IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Tafazzul Islam
Mr. Justice Md. Abdul Aziz
Mr. Justice B. K. Das
Mr. Justice Md. Muzammel Hossain
Mr. Justice S. K. Sinha

CRIMINAL APPEAL NOS. 55 - 59 OF 2007 WITH

JAIL APPEAL No. 02 of 2007 WITH

CRIMINAL MISCELLANEOUS PETITION NO.08 OF 2001 WITH

CRIMINAL REVIEW PETITION No. 03 of 2000.

Major Md. Bazlul Huda (Artillery) ... Appellant (In Crl. Appeal No.55/07, Crl.M.P.08/01 and Crl.R.P. No.03/00).

Lieutenant Colonel Syed Faruque Rahman ... Appellant (In Crl. Appeal No.56/07)

Lieutenant Colonel Sultan Shahrior Rashid Khan (Retd) .... Appellant (In Crl. Appeal No.57/07)

Lieutenant Colonel (Retd). Mohiuddin Ahmed (2nd Artillery) ..... Appellant (In Crl. Appeal No.58/07)

Major (Retd). A.K.M. Mohiuddin Ahmed ... Appellant (In Crl. Appeal No.59/07 and Jail Appeal No.02/07)

-Versus-

The State .... Respondent (In all the cases)

For the Appellant (In Crl.A.No.55/07) : Mr.Abdullah-Al-Mamun, Advocate, instructed by Mr. Md. Nurul Islam Bhuiyan, Advocate-on-Record.

For the Appellant In Crl.A.No.56/07 : Mr.Khan Saifur Rahman, Senior Advocate, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.

For the Appellant (In Crl.A. No.57/07) : Mr. Abdur Razzaque Khan, Senior Advocate, instructed by Mr. Md. Nawab Ali, Advocate-on-Record.

For the Appellant (In Crl. A.No.58/07)	:	Mr. Khan Saifur Rahman, Senior Advocate instructed by Mr. Md. Nawab Ali, Advocate-on-Record.
For the Appellant (In Crl.A. 59/07)	:	Mr. Abdullah-Al-Mamun, Advocate, instructed by Mr. Md. Nawab Ali, Advocate-on-Record.
For the Appellant (In Jail A.No.02/07)	:	Mr. Khan Saifur Rahman, Senior Advocate (with Mr. Abdullah- Al-Mamun, Advocate) instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
For the Petitioner (In Crl. M.P.No.08/01)	:	Mr. Abdullah-Al-Mamun, Advocate, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
For the Petitioner (In Crll. Rev.P.No.03/00)	:	Mr. Abdullah-Al-Mamun, Advocate, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
For the Respondent (In all the cases)	:	Mr. Mahbubey Alam, Attorney General, Mr. A.K.M. Zahirul Hoque, Addl.A.G. Mr. A.S.M. Abdul Mobin, D.A.G. Mr. Md. Motaher Hossain Sazu, D.A.G. Ms. Mahfuza Begum, A.A.G. Mr. Sarder Md. Rashed Jahangir, A.A.G. Mr. Md. Ekramul Hoque, A.A.G. Mr. A.B.M. Altaf Hossain, A.A.G. Mr. Khandaker Diliruzzaman, A.A.G. Ms. Fazilatunnassa Bappy, A.A.G.(Above Addl. A.G, D.A.G. and A.A.Generals with him) instructed by Mrs. Sufia Khatun, Advocate-on-Record. Mr. Anisul Huq, Advocate, (Govt.Chief Prosecutor) Mr. Mosharrap Hossain Kajol, Mr. Abdul Matin Khasru, Advocate, Mr. Nurul Islam Sujon, Advocate, Mr. Sheikh Fazle Noor Taposh, Mrs. Toufiqa Karim, Mr. Momtaj Uddin Mehedi, Mr. Anamul Kabir Emon, Mr. Imtiaz uddin Asif, (Govt. Prosecutors with him). Mr. Ajmalul Hossain Q.C. Senior Advocate (Govt. Prosecutor). Mr. Tawfique Nawaz, Senior Advocate, (Govt. Prosecutor). Mr. Mohammad mohsen Rashid, Advocate (Govt. Prosecutor with him). Mr. A.F.M. Mesbahuddin, Senior Advocate (Govt. Prosecutor). Mr. Yousuf Hossain Humayun (Govt. Prosecutor). Mr. Md. Abu Zafor Siddique, (Govt. Prosecutor).

Mr. Zahangir Hossain Selim, (Govt.Prosecutor).
Mr. S.M.Rezul Karim, (Govt. Prosecutor).
Mr. Rabiul Alam Badu, (Govt.Prosecutor).

Date of hearing: : 05.10.2009, 06.10.2009, 07.10.2009, 08.10.2009, 11.10.2009, 12.10.2009, 13.10.2009, 14.10.2009, 15.10.2009, 18.10.2009, 19.10.2009, 20.10.2009, 21.10.2009, 22.10.2009, 25.10.2009, 26.10.2009, 27.10.2009, 28.10.2009, 29.10.2009, 01.11.2009, 02.11.2009, 03.11.2009, 04.11.2009, 05.11.2009, 08.11.2009, 09.11.2009, 10.11.2009, 11.11.2009, 12.11.2009.

Date of Judgment : 19th November, 2009.

SHORT ORDER

For reasons to be recorded later on in details, we hereby make the following orders:

The appellants Major Md. Bazlul Huda, Lt. Col. Syed Farooque Rahman, Lt. Col. Sultan Shahriar Rashid khan, Lt. Col. Mohiuddin (Artillery) and Major A.K.M. Mohiuddin Ahmed (Lncer) filed 5(five) leave petitions against the judgment and order dated 30th April, 2001 passed by the High Court Division in Death Reference No.30 of 1998 and Criminal Appeal Nos. 30 of 1998, 2604 of 1998, 2613 of 1998 and 2616 of 1998 and also the order dated 14th Deember, 2000 of the first and second learned Judges of the Division Bench of the High Court Division in the above matters.

Leave was granted to consider thefollowing points:

a) Because the learned Judges of the Divisin Bench have delivered and signed two separate dissenting opinions, the third learned Judge has committed a fundamental error of law in not considering the reference in its entirety i.e, in respect of all the convicts and considering the cases of six convicts only.

b) Because there is inordinate delay of 21 years in lodging the F.I.R.; this unreasonable delay speaks of ill intention and design on the part of the prosecution to falsely implicate the appellants by introducing a concocted story-

the High Court Division, in the premises, erred in law in maintaining the capital sentence without properly cosidering this aspect of the matter.

c) Because the evidence on record disclose a case of mutiny leading to the murder of the then President and his family members and thus the said killing not being a case of murder simplicitor, the trial of the appellants by a normal criminal court has vitiated the trial.

d) Because the evidence on record do not disclose a case of a criminal conspiracy to commit murder but disclose a case of conspiracy to commit mutiny to change the then Mujib Government, hence the conviction and sentence are illegal.

e) Because the prosecution having failed to prove the charge under section 302/34 of the Penal Code against the appellants on proper evaluation and sifting of evidence on record, there has been a serious miscarriage of justice.

On opinion on the above points is as under:

a) Sections 378 and 429 of the Code of Criminal Procedure contemplate that it is for the thired learned Judge to decide on what points he shall hear arguments, if any, and, that postulates that he is completely free in resolving the difference as he thinks fit, and therefore, the third learned Judge was competent to decide the case of six convicts of whom the learned judges were equally divided in their opinion and thus the third learned Judge was in agreement with the decision of the learned Judges of the Division Bench in respect of 9(nine) convicts of whom there was no difference of opinion.

b) The learned Sessions Judge as well as the learned Judges of the High Court Division have believed the explanation given by the prosecution regarding the delay in lodging the First Information Report on assessment of the evidence on record; this finding being a concurrent finding of fact, in our view, does not call for any interference.

c) An offence of murder has been included in section 59(2) of the Army Acat, 1952 triable under the Army Act subject to the condition that if the offender commits the said offence while in ‘active service’, but as the appellants were not in ‘active service’ within the meaning of section 8(1) of the Army Act, their trial by an ordinary criminal Court is not barred by the provisions of the Army Act, and secondly, even if it is assumed that it is

a 'civil offence' within the meaning of Section 8(2) of the Army Act, there is no legal bar for trial of such offence in view of section 94 of the said Act.

d) There is no legal evience norecord to come to the conclusion that the murder of Bangabandhu Sheikh Mujibur Rahman and other members of his family including the three security personnel was committed as a consequence of mutiny, we are of the view that it is not a case of criminal conspiracy to commit mutiny, rather it is a criminal conspiracy to commit the murder of Bangabandhu Sheikh Mujibur Rahman and other members of his family.

e) The learned Judges of the High Court Division having believed that the prosecution has been able to porve beyond reasonable doubt the charge of murder against the appellants and other convicts by adducing reliable evidence, and the appellants having failed to make out a case that the High Court Division has caused a grave substantial injustice or a miscarriage of justice in accepting the death reference so far as it relates to the appellants without proper evaluation and sifting of evidence, we find no cogent ground to interfere with the impugned judgment and order of the High Court Division.

f) The appellants having failed to make out a case of extenuating circumstance to commute their sentence of death, we are not inclined to interfere with the sentence of death awarded to the appellants by the learned Sessions Judge and maintained by the High Court Division.

In the premises, Criminal Appeal Nos. 55-59 of 2007 with Jail Appeal No. 2 of 2007 with Criminal Misc. Petition No.8 of 2001 with Criminal Review Petition No.3 of 2000 are hereby dismissed.

The order of stay passed by this Court is hereby vacated.

This short order shall form part of the judgment.

MD. TAFAZZUL ISLAM, J: The above appeals, by leave, have been preferred by the appellants (1) Major (Retd) Md. Bazlul Huda (2) Lt. Col. (Dismissed) Syed Faruque Rahman (3) Lt. Col. (Retd) Sultan Shaharior Rahid Khan (4) Lt. Col.

(Retd) Mohiuddin Ahmed (Artillery) (5) Major (Retd.) A.K.M. Mohiuddin Ahmed (Lancer), hereinafter referred to as Bazlul Huda, Farooque Rahman, Sultan Shahriar, Mohiuddin (Artillery) and Mohiuddin (Lancer), against the judgment and order of conviction and sentence dated 30.04.2001 passed by the High Court Division in Death Reference No.30 of 1998 along with Criminal Appeal Nos. 2604, 2613, 2616 and 2617 of 1998 confirming the sentence of death awarded to the above appellants by the learned Session Judge on 08.11.1998 in Sessions Case No. 319 of 1997 under sections 302/34 and 120B of the Penal Code.

The prosecution case, as stated by the informant, P.W.1, in his deposition is that he was the Personal Assistant of the then President of Bangladesh Sheikh Mujibur Rahman, hereinafter referred to as the President, and was on duty from 8 P.M. on 14th August, 1975 at the residence of the President at Road No.32, Dhanmondi. He spent his night there. At about 4-30- 5 A.M, in the early hours of 15th, he was awakened by one Abdul Matin, telephone mechanic, who informed him that the President is on the telephone line and after he took the receiver the President told him to get in touch with the police control room immediately as some armed men attacked the house of Serniabat, his brother-in-law; while he was trying to connect the police control room, the President came down to his room and by that time although he could connect Ganabhaban but there was response from there; suddenly a barrage of gun shots showered on their office; since there were intermittent firing of gunshots the President himself lied down on the floor and also pushed the informant down; when the firing stopped, the President on his way to upstairs enquired about the firing from the army and police sentries present nearby; in the meantime, Sheikh Kamal came down; at that time 3/4 Khaki and black dressed army personnel entered the house and appellant Bazlul Huda shot at Sheikh Kamal who then fell down and the informant then told the assailants that he is Sheikh Kamal, son of Sheikh Mujib, and upon hearing this Bazlul Huda again brush fired at Sheikh Kamal and he died; the bullets also wounded the informant and also the P.W.50, the DSP in charge of Police House Guard; while P.W.50 and he were trying to escape Major Bazlul Huda got hold of him by grabbing his hairs and then they were put in line in front of the main

gate; one Special Branch Officer who was standing on the line with them was shot down; thereafter some of the assailants went upstairs shooting through the way; the informant heard intermittent gun shot sounds and the cries of the women from upstairs; Sheikh Naser, the brother of the President, was brought down from upatair and was shot dead in the bathroom attached to their office; Rama alias Abdur Rahman, P.W.2, and Sheikh Russel, the youngest son of the President were also brought down and Sheikh Russel, who was with the informant, wanted to return to his mothers whereupon one of the army personlel snatched Sheikh Russel from the informant and took him upstairs on the pretext of taking him to his mother; thereafter the informant again heard gun shot sounds. After that Bazlul Huda went to the gate and on the query from Faruque Rahman told him that "all are finished". The informant then realized that the President along with his family members and other inmates of the house were brutally murdered. At that time tanks were moving on the road in front of the house containing black dressed army personnel. At about 8 in the morning the dead body of Col. Jamil was brought there. The informant also saw Major Dalim in Khaki dress in the house talking to the army personnel. On the morning of 15th August, 1975, the President, Begum Mujib, Sheikh Kamal, Sheikh Jamal, Sheikh Russel, Sultana Kamal, Rozy Jamal, Sheikh Naser and one police officer of the Special Branch, were brutally murdered in the above house. The informant saw Faruque Rahman, Major Dalim, Major Nur and Bazlul Huda in the house of the President at the time of occurrence and also after the occurrence. The informant tried to lodge an information with the then Lalbag Police Station immediately after the incident but the same was not accepted by the police. Then out of fear for his own life he did not lodge any FIR until now. At long last, 2.10.1996, be lodged the FIR with the Dhanmondi Police Station in respect of the occurrence which happened on 15th August, 1975.

The police then took up the investigation, visited the place of occurrence, prepared sketch map with index thereof, seized alamats, examined the witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure, produced some of the apprehended accuseds who asked for producing them before the competent Magistrate for recording their confessional statement under section 164 of the Code of

Criminal Procedure and finally submitted charge sheet against the 20 accuseds including the present appellants under sections 302/ 120B/ 324/ 307/201/380/149/34/109 of the Penal Code.

Among the 19 accused persons who faced trial, 14 were absonding. The learned Judges of the High Court Division found that the warrents of their arrests were duly issued and when they could not be apprehended by the police inspite of their efforts, their properties both movable and immovable were attached in accordance with the provisions of the Code and thus the requirements of Sections 87 and 88 of the Code of Criminal Procedure were satisfied and since the said accuseds remained fugitives from law, necessary notices were duly published in the newspaper, as required under Section 339B of the Code. Records also show that all possible and practicable steps were taken to bring the fugitives before the Court.

The learned Sessions Judge by his Order No. 15 dated 7.4.1997 framed the following charges against the accused persons.

First charge: The accused persons in collusion with Late Khondker Moshtaq Ahmed. Late Mahbubul Huq Chashi, Risalder Syed Sarowar Hossain and Captain M. Mostafa Hossain, in order to satisfy their personal grievance to fulfil joint interest, to attain personal aggrandisement and ambition with illegal motive, they met and conspired/together on different dates since March, 1975, at different places, namely, at the residence of Lt. Co!. Khondker Abdur Rashid at his residence at the Dhaka Cantonment, BARD at Comilla, Shalna at Gazipur, the village residence of Khondker Moshtaq Ahmed at Daspara within P.S. and Daudkandi and at his residence at 54, Aga Mosi Lane, at Ramna Park, at the residence of Lt. Colonel Sultan Shahriar Rashid Khan at the Cantonment and in other places in order to murder Banga Bandhu Sheikh Mujibur Rahman, the then President of Bangladesh, his relations and his famiily members. In order to achieve their such objective, they assembled at BaIUl'ghat within Cantonmcnt Police Station on the night following 14th August, 1975 and in fulfilment of such conspiracy, the accused persons killed 11 persons on the morning of 15th August

including the then President Sheikh Mujibur Rahman and his family members. As such, they committed an offence under Section 120B of the Penal Code.

Second Charge: In pursuance of the said premeditore conspiracy and in furtherance of their common intention, (to carry out the object of the said criminal conspiracy) the accused persons mentioned in the first charge in collusion with late Khondker Moshtaq Ahmed, late Mahbubul Alam Chashi, Risaldar Syed Sarwar Hossain and Captain M. Moshtaq Ahmed in order to vindicate their own personal vendetta and joint interest and ambitions in fulfilment of their conspiratorial scheme, armed with deadly weapons, such as, tanks, cannons, machine guns, stcn guns, rifles attacked (the residence of Bangabandhu Sheikh Mujibur Rahman, the then President of Bangladesh at 677, Dhanmondi Residential Area. Road No. 32 and murdered Bangabandhu Sheikh Mujibur Rahman. His wife Begum Fazilatunnessa, sons Sheikh Kamal, Sheikh Jamal, Sheikh Rassel. daughters-in-law, Sultana Kamal, Roji Jamal and brother Sheikh Naser. Besidcs, they also killed SiddiquI' Rahman, A.S.l.. Police. Shamsul Haque. Scpoy of the army and Col. Jamil, Military Secretary to the President and thereby committed an offence punishable under Section 302/34 of the Penal Code.

The learned Trial Court Judge also framed another charge under Section 201 of the Penal Code for wilfully causing disappearance of the evidence.

Appellants Farooque Rahman, Sultan Shahriar and Mohiuddin (Artillery), who were present in the trial Court pleaded not guilty to the charges and prayed to be tried. They were defended by the learned Advocates of their own choice while the rest 14 absconding accused persons were defended by the learned Advocates appointed by the State.

Prosecution examined 61 witnesses out of whom some were tendered by the prosecution and not cross-examined by the defence. The defence did not adduce any evidence. Aafter close of the prosecution witnesses the three appellants on dock were examined under Section 342 of the Code of Criminal Procedure to which they repeated their innocence. The defence case as could be gathered from the trend of cross

examination is total denial and that the appellants are innocent and the occurrence did not take place in the manner as alleged inasmuch as the occurrence is the result of successful mutiny by some Army personnel.

The trial Court, thereafter, in consideration of the evidence on record as well as facts and circumstances of the case by judgment and order dated 08.11.1998, acquitted four of the accused persons, namely, 1. Taheruddin Thakur, 2. Hon. Captain A. Wahab Joarder, 3. Dafader Marfat Ali Shah (absconding), 4. L.D. Md. Abul Hashem Mridha (absconding), and convicted the rest I5 (fifteen) accused persons under Section 302/34 of the Penal Code and also under Section 120B of the Penal Code and all 15 convicts including the appellants were sentenced to death under Section 302/34 of the Penal Code and no separate sentence under Section, 120B of the Penal Code was imposed upon them. The aforesaid 15 accuseds including the appellants were not found guilty under Section 201 of the Penal Code and were acquitted on that charge.

Being aggrieved by the impugned order of conviction and sentence, appellant Faruque Rahman preferred Criminal Appeal No. 2616 of 1998, appellant Sultan Shahriar preferrcd Criminal Appeal No. 2604 of 1998 and the appellant Mohiuddin (Artillery) preferred Criminal Appeal No. 1617 of 1998. Appellant Bazlul Huda, who althrough remained absconding during the whole period of trial, was brought back from Bangkok to Dhaka on the date of the pronouncement of judgment of the trial Court i.e 8.11.1998 in persuance of an extradition proceedings against him in Bangkok and he then filed a regular appeal against his conviction and sentence being Criminal Appeal No. 2613 of 1998 before the High Court Division.

Then the Death Reference and all above 4 (four) Appeals were heard together by a bench of the High Court Division consisting of two Judges, out of whom Md. Ruhul Amin J. the presiding Judge found the present appellants along with 4 others guilty for the offence charged and maintained the conviction and sentence under Sections 302/34 and 120B of the Penal Code passed by the trial Court in Sessions Case No.319 of 1997 and accepted the Death Reference so far it related to four of the present appellants and 4

others with a modification of the mode of execution of sentence of death and thereby accepted the Death Reference in part and dismissed the conviction and sentence so far it related to 5 accuseds including appellant Mohiuddin (Artillery) under Sections 302/34 and 120B of the Penal Code and accordingly, the Death Reference so far it relates to them was not accepted.

Mr. Khairul Huq J. the other companion Judge of the Bench however found all the 15 accuseds including the appellants guilty for the offence charged and thereby affirmed the judgment and sentence so passed by the trial Court and accepted the Death Reference.

Since the judgment in the Death Reference No.30 of 1998 and the connected appeals was split one the above referene and the concerned appeals, as per provision of Sections 378 and 429 of the Code of Criminal Procedure, were placed before the learned Chief Justice for necessary order and the learned Chief Justice appointed Mohammad Fazlul Karim, J as third Judge to dispose of the Death Reference and the connected appeals.

The third learned judge then under the provision of sections 378 and 429 of the Code of Criminal Procedure took up the hearing of the above death reference and the appeals in respect of to only 6 accuseds including the appellant Mohiuddin (Artillery) in respect of whom also the learned judges of the Division Bench differed in their opinion.

The third learned Judge, after hearing, on consideration of the facts and circumstances of the case and materials available on record, took the view that the prosecution has failed to prove the case as against accuseds Major Ahmed Shariful Hossain alias Shariful Islam, Captain Md. Kismat Hashem and Captain Nazmul Hossain Ansar and having found them as not guilty for the offence charged acquitted them therefrom. The third learned Judge, however, found appellant Mohiuddin (Artillery), accused Captain Abdul Mazed and Risalder Moslemuddin alias Moslehuddin guilty for the offence charged under Sections 120B/302 and 34 of the Penal Code and maintained their sentence of death under Sections 302/34 of the Penal Code agreeing with A.B.M. Khairul Haque, J and accordingly accepted the Death Reference so for it related to them

and dismissed Criminal Appeal No.2617 of 1998 filed by the accused Lt. Col. (Retd) Mohiuddin Ahmed (Artillery) and the conviction and sentence of accuseds Captain Md. Kismat Hashem, Major Ahmed Shariful Hossain alias Shariful Islam passed by the learned Sessions Judge, Dhaka in Sessions Case No. 319 of 1997 was set aside by the third learned Judge holding them not guilty agreeing with the view taken by Md. Ruhul Amin, J and accordingly the Death Reference so far as it related to Captain Md. Kishmat Hashem, Captain Nazmul Hossain Ansar and Major Ahmed Shariful Hossain alias Shariful Islam was rejected.

Mohiuddin (Lancer) was tried and convicted in absentia due to his absconsion outside the country and subsequently he was arrested from U.S.A. and brought back in the country in July 2007 and was sent to jail and he then filed Jail Petition No.9 of 2007 and subsequently filed an application for condonation of delay stating that he had no knowledge of the case and the judgment of conviction and sentence. This was opposed by the State by filing an affidavit. On hearing both the sides the delay being condoned he filed Criminal Petition for Leave to Appeal No.343 of 2007 which was heard analogously with Criminal Petition for Leave to Appeal Nos. 95, 96, 97 and 98 of 2001.

All the above mentioned petitions for leave to appeal having raised the same question of law and fact were disposed of by one leave granting order granting leave as follows:

> "(a) the learned Judges of the Division Bench of the High Court Division dealing with the Death Reference and the connected criminal appeals delivered two separate and parallel judgments and signed their invididual judgment. These two separate judgments signed separately cannot be taken to be the judgment of the High Court Division. This shows that the learned Judges gave dissenting judgments and this became palpable from the order dated 14.12.2000 passed by the learned Judges stating that the judgment given by them in the Death Reference No.30 of 1998 was a split one. Accordingly the matter was referred by the learned Judges to the learned Chief Justice for necessary order. Thereafter the

learned Chief Justice by order dated 15.1.2001 appointed Mr. Justice Mohammad Fazlul Karim as the third judge to dispose of the Death Reference as a whole meaning the case of 15 convicts. In this background of the matter, it is strongly contended by the learned counsels that the Death Reference case in its entirety was referred to the third judge for disposal. Hence the learned third judge having considered the case of only 6(six) convicts committed an error of law occasioning failure of justice.

(b) the occurrence took place in the early morning on 15.8.1975. But the informant P.W.1 A.F.M. Mohitul Islam was all along in Dhaka after the occurrence and he joined as a receptionist in the Bangabhaban on 3rd September, 1975 after the occurrence and continued in service till he filed the F.I.R. on 2.10.1996 after a long lapse of more than 21 years. This unreasonable delay in lodging the F.I.R. speaks of ill intention and a design on the part of the prosecution to falsely implicate the convict petitioners in the occurrence on the basis of concocted and manipulated evidence to the prejudice of the convict petitioners. The courts below including the High Court Division erred in failing to consider this aspect while adjudging the involvement of the convict petitioners in the occurrence and also in convicting and awarding capital sentence to them.

(c) although the evidence and materials on record go to show that it was a case of mutiny leading to the murder of the then President Sheikh Mujibur Rahman and his family members and not a case of murder simplicitor but the convicts including the convict petitions were tried and conv icted by a normal criminal court as a case of murder simplicitor. Hence the trial was vitiated.

(d) the evidence and materials on record will only show that there was no case of criminal conspiracy for murder but a case of criminal conspiracy to commit mutiny to change the then Mujib Government.

Hence the conviction and sentence of the convict petitioners are liable to be set aside.

(e) charge of murder against the convict petitioners under section 302 read with section 34 of the Penal Code has not been proved on the basis of proper evaluation and sifting of evidence on record and thus there has been a miscarriage of justice."

As it appears at the trial, the prosecution tried to establish its case against the appellants and other accuseds on the basis of the evidence of the P.Ws, confessional statement of appellants Faruque Rahman, Sultan Shahriar and Mohiuddin (Artillery), extra judicial confesson proved by P.Ws. 15 and 8, electronic evidence, and also circumstantial evidence relating to conspiracy and on the other hand the appellants and other accuseds tried to show that they were innocent, the confessional statements of the above three appellants were not voluntary and the President and his family members were killed as a consequence of a successful revolt of the army against the then Government.

Regarding the ground that the third learned judge should have heard the entire reference, i.e the cases of all the fifteen convicts instead of six convicts only, the common submissions of the learned counsels for the appellants are that since the learned judges of the High Court Division delivered dissenting openions, the third learned judge aught to have heard the entire death reference but he heard the reference only in respect of six accuseds and so the present reference as well as the appeals should be sent back on remand to the third learned judge for hearing of the death reference and the appeals afresh.

Mr. Khan Saifur Rahman, the learned counsel for appellants Faruque Rahman and Mohiuddin (Artillery), further submitted that the learned Chief Justice referred to the third learned judge the entire death reference not the peacemeal reference for his disposal and so the third learned judge should have heard the entire reference; the judgment impugned is not a judgment in the eye of law as the learned judges expressed their opinion seperately and signed their opinion in violation of the provisions of section 377 of the Code of Criminal Procedure; since the learned judges of the High Court Division

heard death reference as well as the appeals both sections 378 and 429 of the Code of Criminal Procedure are applicable and so opinion of third learned judge shall be the conclusive opinion and judgment and the order shall follow on that basis which was not done in the present appeals; the opinion of the third judge is also in no way a concurrent openion in respect of the the appellants Faruque Rahman, Sultan Shahriar and Mohiuddin(Artillery) specially when the first learned judge disbelieved their confessional statements while the second learned judge believed those.

Mr. Razzaq Khan, the learned counsel for the appellant Sultan Shahriar further submitted that in the present appeals there is no confirmation of sentence in the eye of law since there is no consencious confirmation of the sentence by the High Court Division; the opinion of the learned judges of the High Court Division in the present case can not also be regarded as "judgment" and as held in the case of Md. Shafi vs. The Crown 6 DLR (WP) 104 (FB) and the case of Abdur Razik v. The State 16 DLR (WP) 73 in case of difference of opinion while confirming the sentence, the opinion of the third judge will prevail; the learned judges of the High Court Division also did not consider the principles as laid down in the case of Hethubha v. State of Gujrat AIR 1970 SC 1266, Union of India v Ananti Padmanabiah (1971) SCC (Crl) 533, Sajjan Singh v. State of U-P (1999 SCC 315 (Cri) 44 and Mahim Mandal v. State (1963) 15 DLR 615 and committed error in upholding the conviction and sentence.

Mr. Abdullah-Al-Mamun, the learned counsel representing Major Md. Bazlul Huda and Major A.K.M. Mohiuddin Ahmed (Lancer) adopted the submissions made by Khan Saifur Rahman and Abdur Razzak Khan.

Mr. Anisul Huq, the learned counsel (chief prosecutor) appearing for State, submitted that the third learned judge is perfectly justified in hearing the case of six convicts only in respect of whom the learned judges of the High Court Division were equally divided in their opeinion; section 377 of the Code of the Criminal Procedure merely reletes to the procedure for confirmation in respect of reference made under section 374 of the Code; the words "as he thinks fit" and the words "the judgment an order shall follow such opinion" used in sections 378 and 429 of the Code are significant

and a close reading of the above expressions show that a wide discretion has been given to the third judge by the legislature to decide the case either in respect of whom there is no difference of opinion or in respect of whom there is difference of opinion, and the judgment and order shall follow such openion; in the present appeals the third learned judge, exercising his discretion, passed order dated 6.2.2001 holding that "the case of above 9 condemned prisoners over whom the learned Judges not being divided in opinion are not contemplated to be heard both under the provisions of sections 378 and 429 of the Code of Criminal Procedure. But only the case of accused Abdul Mazed over whom there is difference as regard the conviction under the two separate sections of the Penal Code and the cases of those five other condemned prisoners over which the learned judges are equally divided in opinion .....". and accordingly the third learned judge duly disposed of the reference and the appeals by confirming the sentence of nine convicts including the appellants which is in confirmity with the requirements as provided in sections 378 and 429 of the Code of Criminal Procedure.

In support of the above submissions Mr. Huq referred to the cases of Babu v. State of U.P. (AIR 1965 SC 467), Union of India v. Ananti Padmanabiah AIR 1971 SC 1836 Tanviven Pankajkumar Divctia v. State of Gujrat Case (1997) 1 SCC 156=AIR 1997 S.C. 2193, Sharat Chandra Mirta v. Emperor ILR 38 Cal 202, Ahmed Sher V. Emperor, AIR 1931 Lah 513, Subedor Singh v Emperor AIR 1943 Allahabad 272, Nemai Mandal v State of West Bengal AIR 1966 Cal 194, State of UP v. Dan Singh (1997) 3 SCC 747, Granda Venkata v The Corporation of Calcutta (22 CWN 745), State v Abul Khair 44 DLR 284.

While endorsing the said submissions, the learned Attorney General and Mr. Ajmalul Hossain Q.C added some points and cited some decisions. Mr. Ajmalul Hossain contends that there is fundamental difference in sections 378 and 429 of the Code of Criminal Procedure inasmuch as, while in section 378 the expression "a bench of Judges" has been used in Section 429 the expression "the Judges composing the court of Appeal" has been used and again in section 429 the expressions "of the same Court" have not been used as used the other section. The learned counsel further added that a reference is

required to be heard by at least two Judges and the expression “bench of Judges” used in section 378 means the sentence should have to be confirmed and signed by at least two Judges for the execution and a close reading of sections 374-378 would infer that the question of opinion of the third Judge arise when there is difference of opinion of a bench of Judges and in a case where there was no difference of opinion in respect of a particular accused or accuseds the third Judge was left with no business to deal with his case and his opinion.

The provisions of sections 374, 376,377, 378 and 429 ofthe Code of Criminal Procedure are reproduced below:

> “374. Sentence of death to be submitted by Court- When the Court of Session passes sentence of death, the proceeding shall be submitted to the [High Court Division] and the sentence shall not be executed unless it is confirmed by the [High Court Division].
>
> 376. Power of High Court Division to confirm sentence or annul conviction. In any case submitted under section 374, the High Court Division –
>
> (a) may confirm the sentence, or pass any other sentence warranted by law, or
>
> (b) may annul conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or
>
> (c) may acquit the accused person:
>
> Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.
>
> “377. In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court Division shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.”

> "378. When any such case is heard before a bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit shall deliver his opinion, and the judgment or other shall follow such opinion."
>
> "429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon shall be laid before another Judge of the same Court, and such Judge after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

The above provisions show that whenever a sentence of death is passed by a Court of Sessions the proceedings of the case shall be submitted to the High Court Division for the confirmation of sentence under section 374 of the Code. In dealing with a proceeding under section 374 the High Court Division itself acts on its appellate side power irrespective of whether the accused sentenced to death preferred an appeal or not and accordingly the High Court Division is bound to consider the evidence and then arrive at an independent conclusion as to the guilt or innocence of the accused. The power of the High Court Division to confirm the sentence is provided in Section 376 of the Code. A duty is imposed upon the High Court Division to satisfy itself that the conviction of the accused is justified on the evidence and that the sentence of death in the circumstances of the case is appropriate one.

It also appears that though Section 378 is included in chapter XXVII of the Code of Criminal Procedure under the heading "OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION" and section 429 is included in chapter XXXI under the heading "OF APPEALS" but the language used in both the sections is almost identical. The expressions "as he thinks fit" used in both the sections postulates that the third Judge is completely free in resolving the difference as he thinks fit and accordingly if he decides that there is no need to hear the arguments in respect of any accused of whom the Judges are not divided in their opinion, he may decline to do so. It also appears that the use of

the words “equally divided” in both the sections means the judges differ in their opinions, in respect of complicity of an accused or on the charge framed against him or on any particular point but in a case where the judges concur with each other in respect of a particular accused and in respect of the offence charged, it can not be said that Judges are equally divided in respect of the accused charged with.

On construction of Sections 378 and 429 views taken by different High Courts are that what is laid before another Judge is the “case” and secondly, the judgment or order shall follow the opinion given by such Judge and the opinion of the third judge will be regarded as the final judgement.

In the case of Sarat Chandra Mitra V. Emperor ILR 38 Cal 202, it was observed:-

> “I am not now concerned with the question of the trial of two petitioners with regards to one of whom the Judges composing the Court of Appeal may be agreed in their opinion, while as regards the others the Judges may be equally divided in opinion. In such a contingency it is quite possible to maintain the view that, upon a reasonable interpretation of the term “case” , what has to be laid before another Judge is the case of the prisoner as to whom the Judges are equally divided in opinion. I am now concerned only with the contingency in which the Judges of the Court of Appeal are already divided in opinion upon the question of the guilt of one accused person, though upon certain aspects of the case they may be agreed in their view. In such a contingency, what is laid before another Judge, is, not the point or points upon which the Judges are equally divided in opinion, but the “case”. These obviously mean that, so far as the particular accused is concerned, the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case.”

As it appears in the case of Ahmed Sher V. Emperor AIR 1931(Lah) 513, Subeder Singh V. Emperor, AIR 1943 All 272, Nemai Mandal and others v. State of West Bengal, AIR 1966 Cal 194 the above views have been followed.

In the case of Mohim Mandal v. State, 15 DLR 615 it was however observed that the expression “difference of opinion” as used in the Sections 378 and 429 of the Code

may be either as regards the guilt or innocence of the accused or as to the proper sentence to be passed. In either of these cases the sections require the reference to be made to another Judge. The Judge before whom the case is laid for his opinion is entitled to pass any order he thinks proper including an order directing retrial of the accused. While confirming the sentence one Judge may not accept a piece of evidence but accept the conviction and sentence in respect of an accused person but that does not mean that there is difference of opinion as regards conviction and sentence.

In the case of Babu V State of (Supra), the true purport and power of the third judge came up for consideration before a five member Constitutional Bench of the Supreme Court of India. In that case the Division Bench differed in their opinions in respect of the conviction of three accused persons and delivered two separate judgments. Before the Supreme Court the competency of the appeal was raised. It was observed as follows:

> "The Section (S.429) contemplates that it is for the third judge to decide on what points he shall hear the arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit. In our judgment, it was sufficient for Takru, J, to have said on the question of the First Information Report that he did not consider it necessary to decide the point but it was necessary, he was in agreement with all that Mathur, J. had said. There was, therefore, a proper decision by Takru, J, and the certificate could not be based upon the omission to discuss the First Information Report and the doubts about it."

In the case of Hethubha (Supra) the Supreme Court of India observed as follows:

> "This Court in Babu V. State of Uttar Pradesh, (1965) 2 SCR 771= (AIR 1965 SC 1467) held that it was for the third learned Judge to decide on what points the arguments would be heard and therefore he was free to resolve the differences as he thought fit. Mehta,J., here dealt with the whole case. Section 429 of the Criminal Procedure Code states "that when the Judges comprising the Court of Appeal are equally divided in opinion,

> the case with their opinion thereon, shall be laid before another Judge of the same Court and such Judge, after such hearing, if any, as he thinks fit, shall deliver his opinion, and the Judgment and order shall follow such opinion". Two things are noticeable; first, that the case shall be laid before another Judge, and, secondly, the Judgment and order will follow the opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case."

In the case of Ananti Padmanabiah (supra) as it appears the Division Bench of the High Court of Assam and Nagaland unanimously rejected the first two contentions but were divided in their opinions on the points as to whether the Magistrate applied his mind to allow the investigating agency to investigate the cases and whether sanction under section 196A was necessary. The matter was then laid before a third Judge. The third Judge held that the Magistrate acted without jurisdiction in allowing the investigating agency to investigate into the matter and accordingly he quashed the proceedings. The question in dispute was whether a new point as to the competency of the Magistrate at Delhi to sanction investigation could have been raised before the third Judge since the said point had not been raised before the Division Bench. A.N.Ray,J of the Supreme Court approved the views taken in Hethubha Case (supra) wherein it was observed that "the third learned Judge could deal with the whole case" and that there is no dispute in the statement of law and it is in the discretion of the third judged to deal with the case and in deciding the case if any point is found necessary, he can decide the said point as well.

However in India, after amendment in the 1973 section 429 was substituted by section 392 which reads as follows:

> "392. Procedure where Judges of court of appeal are equally divided- When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion;

> Provided that if one of the Judges constituting the Bench, or where the appeal is laid before another Judge under this section, that Judge, so requires , the appeal shall be reheard and decided by a larger Bench of Judges."

It appears that the addition of a proviso as above authorises one of the Judges constituting the Division Bench or the third Judge of a High Court of India, if so desires, can refer the appeal to a larger Bench for rehearing and decision by such Bench of Judges. The legislature has resolved the controversy by addition of the proviso which in my view in order to remove the doubt about the conflicting views of the Supreme Court of India. Under the present position, if the Division Bench requires, it may refer the appeal for rehearing by a larger Bench of Judges if there is difference of opinion on any point or points. Similarly the third Judge has been given the similar discretionary power to refer the appeal to a larger Bench if he does not agree with the opinion of the Division Bench on any of the points involved in the appeal decided by them.

In Tanviben Pankaj Kumar Divetia V. State of Gujrat (supra) it was observed:

> "The plain reading of Section 392(our S.429) clearly indicates that it is for the third Judge to decide on what points he shall hear arguments, if any, and it necessarily postulates that the third Judge is free to decide the appeal by resolving the difference in the manner, he thinks proper."

In State of U.P.V Dan Singh, (1997) 3 S.C.C.747 however two member Bench of the Supreme Court without considering the previous decisions observed as follows:

> "When the appeal as a whole is heard by the third Judge, he not only has an option of delivering his opinion but, under the proviso to Section 392 of the Code of Criminal Procedure he may require the appeal to be reheard and decided by a large Bench of Judges. This was an option which, under the provision, was also open for any one of the two Judges, namely, B.N.Katju and Rajeshwar Singh, J.J. to exercise, but they chose not to do so. What is clearly evident is that the appeal is finally disposed of by the judgment and order which follows the opinion of the third Judge. This

being so special leave petition could only have been filed after the appeal was disposed of by the High Court vide its final order dated 19.5.1988. Even though the said order purports to be related only to ten out of thirty-two accused the said order has to be read along with the earlier order of 15.4.1987 and, in law, the effect would be that the order dated 19.5.1988 will be regarded as the final order whereby the appeal of the State was partly allowed, with only two of the thirty-two accused being convicted under Section 325 read with Section 34 IPC, while all the other accused were acquitted."

In Sajjan Singh (1999) S.C.C. (Cri) 44), also a Division Bench of the Supreme Court ignoring the views taken in Babu's Case, AIR 1965 SC 1467, and Hetubha Case, AIR 1970 SC 1266 did not approve the opinion taken by the third Judge and observed as follows:

"Statement of law is now quite explicit. It is the third Judge whose opinion matters; against the judgment that follows there from that an appeal lies to this Court by way of special leave petition under Article 136 of the Constitution or under Article 134 of the Constitution or under Section 379 of the Code. The third Judge is, therefore, required to examine whole of the case independently and it cannot be said that he is bound by that part of the two opinions of the two Judges comprising the Division Bench where there is no difference. As a matter of fact the third Judge is not bound by any such opinion of the Division Bench. He is not hearing the matter as if he is sitting in a three Judge Bench where the opinion of majority would prevail. We are thus of the opinion that Prasad,J was not right in his approach and his hands were not tied as far as the three appellants, namely, Gajraj Singh, Meharban Singh and Baboo Singh before him were concerned in respect of whom both Judges of the Division Bench opined that they were guilty and their conviction and sentences were to be upheld."

However in Sajjan Singh's case despite the above observations, the Court did not interfere with the opinion of the third Judge on the reasonings that "Since we have heard the matter in respect of all the three appellants at length we do not think it is desirable now at this stage to remand the matter when only some of the appellants could be said to have been prejudiced because of the approach adopted by Prasad,J" .The Supreme Court thereupon heard the appeal on merit and dismissed the appeal.

In the case of the State Vs. Abdul Khair and others (supra) out of 3 accuseds, one committed the murder and two others were standing with the motorbikes and convicted under section 302/34 P.C. But in a split judgment on appeal, one learned judge acquitted two others. The third judge on an appeal under section 429 of the Code only heard the case of two others leaving the case of the condemned accused who committed the murder.

Similar view find support in the case of Nemai Mondal and others Vs. State of West Bengal AIR 1966 Call 194 where it was held that "The case with the differing opinion is placed before the third judge. It is the duty of the third judge to decide the case and not merely the points on which two judges have differed.

In the case Bhagat Ram Vs. State of Rajstan AIR 1972 (SC) 1502 the appeal filed by the State against the acquittal of two accuseds B and R of offences under sections 120B, 218, 347, 389 Penal Code is dismissed but there being difference of opinion between the judges of the Division Bench as regards the correctness of the order of acquittal of B in respect of offence under section 161 Penal Code and section 5(1)(a) Prevention of Corruption Act and then the matter was referred to a third Judge under section 429 Cr.P.C. and the Supreme Court of India, in view of above position observed that it is not open to the third judge to reopen the matter of acquittal of B in respect of offences under section 120B, 218, 347 for which an express order had been made by the Division Bench upholding the order of acquittal of the trial judge and that since the whole case had not been referred under section 429 Cr. P.C. the third judge could go only into the point of difference and arrive at his conclusion.

As it appears in the case of Muhammad Shafi Vs. Crown, 6 DLR(WP)104(FB) as referred by the appellants, the learned Judges agreed with the contention that "the third Judge was exercising the authority of a Bench of Judges and that, therefore, he should consider for the purposes of Section 12 of the Sind Courts Act not as a single Judge, but as a Bench". I am of the view that the above case has no manner of application in this case.

In the case of Abdur Raziq Vs. The State 16 DLR (WP) 73 it was observed that "there is nowhere laid down in Sections 378 and 429 of the Criminal Procedure Code, that the third Judge should follow or may follow the opinion of the Judge who has given his opinion favouring the accused." But however if this proposition is accepted, then there would have been no necessity in using the expressions "such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion" in Section 378 of the Code.

As it appears the views taken taken by five member constitution bench of the Indian Supreme Court in Babu's case (AIR 1965 S.C.1467), holds the field on the point and the said decision has been followed in later cases as well and this is no cogent ground to depart from those views as they are based on correct construction of the provisions of law.

Further even if it is assumed that the third learned Judge ought to have heard the reference in respect of all the convicts, as we have heard the appeals of the appellants at length on merit as was done in Sajjan Singh's case (supra), the appellants could not be said to have been prejudiced.

Regarding the submission made in respect of "judgment" it appears that in view of the difference of opinion as regards conviction of 6 accused persons the Division Bench by order dated 14th December, 2000 passed the following order:

> "Death Reference accepted in part, Crl.A. 2604 of 1998, 2613 of 1998, and 2616 of 1998 are dismissed. Crl.A. 2617 of 1998 is allowed by Mr. Justice Md. Ruhul Amin by judgment in separate sheets.
>
> B.O.

Death Reference accepted in part, Crl.A. 2604 of 1998, 2613 of 1998, 2616 of 1998 and 2617 of 1998 are dismissed by Mr. Justice A.B.M.Khairul Haque vide judgment in separate sheets."

B.O.

"14.12.2000. As the judgment in Death Reference No. 30 of 1998 is split one, let the matter, as per provision of Section 378 of the Code of Criminal Procedure be placed before the learned Chief Justice for necessary orders.

Md. Ruhul Amin

A.B.M.Khairul Haque,J.J.

Thereafter the appellants filed applications before the third learned judge praying for hearing the death reference in respect of all the condemned prisoners for ends of justice and the third learned Judge, after hearing heard the learned counsel at length, by order dated 6th February, 2001 rejected the application on the following reasons:

"In view of the discussion above and equally divided opinion of the learned Judges of the Division Bench, I am of the opinion that the cases of above 9 condemned prisoners over whom the learned Judges not being divided in opinion are not contemplated to be heard both under the provisions of Sections 378 and 429 Cr.P.C. But only the case of accused Abdul Majed over whom there is difference as regards the conviction under the two separate sections of Penal Code and the cases of those 5 other condemned prisoners over which the learned Judges are equally divided in opinion i.e. convicted by one learned Judge and acquitted by another learned Judge are before this Court for an opinion. Upon delivery of the opinion by this Court, the judgment and order shall follow such opinion in order to dispose of the entire death reference."

As it appears the appellants did not take any exception to the aforesaid order of the third learned Judge and the learned counsels on their behalf then argued the appeals and the death reference. Then the third learned Judge, after hearing, gave openion as follows:

"In view of the discussions, reasons and findings above in the body of this judgment, in my opinion, accused Lt. Col. Mohiuddin Ahmed (Artillery), Captain Abdul Mazed and Risalder Noslemuddin @ Muslehuddin were rightly convicted under section 120B and 302/34 P.C. and sentenced to death under section 302/34 Penal Code by the learned Sessions Judge, Dhaka and agreeing with my learned brother A.B.M. Khairul Hoque, J the Death Reference so far as it relates to Lt.Co. Mohiuddin Ahmed (Artillery), Cap. Abdul Mazed and Risalder Moslemuddin @ Moslehuddin is accepted and the Criminal Appeal No.2617 of 1998 filed by accused Lt. Col. Mohiuddin Ahmed (Artillery) is dismissed but the conviction and sentence of accused Cap. Md. Kismat hashem, Capt. Nazmul Hossain Ansar and Major Ahmed Shariful Hossain @ Shariful Islam passed by the learned Session Judge, Dhaka in Sessions case No.319/97 are liable to be set aside and the same are accordingly set aside and accordingly, agreeing with my brother Md. Ruhul Amin J, the Death Reference so far as it relates to Capt. Md. Kismat Hashem, Cap. Nazmul Hossain Ansar and Major Ahmed Shariful Hossain @ Shariful Islam is rejected."

Then followed the judgment and order dated 30th April, 2001 of the High Court Division maintaining the conviction and sentence in respect of three condemned prisoners including the appellant Mohiuddin Ahmed (Artillary) and accepting their death reference and disposing the death reference which is as follows:

"In the result, Death Reference No.30 of 1998 so far as it relates to Lt. Col. Syed Farook Rahman, Lt. Col. Sultan Shariar Rashid Khan, Lt. Col. Khandker Abdur Rashid, Major Md. Bazlul Huda, Lt. Col. Shariful Hoque Dalim, B.U. Lt. Col. A.M. Rashed Chowdhury, Lt. Col. A.K.M. Mohiuddin (Lancer), Lt. Col. S.H.B.M. Nur Chowdhury, Lt.Col. Md. Aziz Pasha, Lt.Col. Mohiuddin Ahmed (Artillery), Risalder Moslemuddin @ Moslehuddin and Capt. Abdul Mazed is accepted confirming the Death sentence and assordingly, Criminal Appeal No.2616 of 1998 filed by accused Lt. Col. Syed Farook Rahman, Criminal Appeal No.2604 of 1998 filed by accused Lt. Col. Sultan Shariar Rashid Khan, Criminal

Appeal No. 2613 of 1998 filed by accused Major Md. Bazlul Huda and Criminal Appeal No.2617 of 1998 filed by Lt. Col. Mohiuddin Ahmed (Artillery) are dismissed but Death Reference No.30 of 1998 so far it relates to accused Capt. Md. Kismat hashem, Major Ahmed Shariful Hossain @ Shariful Islam and Capt. Nazmul Hossain Ansar is rejected and the conviction and the sentence of these accused are accordingly set aside and thereby acquitting them of the charges levelled against them in this case."

I am of the view that the above judgment and order of the third learned Judge is absolutely in accordance with the provision of sections 378 and 429 of the Code.

Regarding the second ground i.e delay, the learned counsels for the appellants submitted that there is inordinate delay in lodging the FIR and this unreasonable delay of 21 years enabled the prosecution to introduce concocted story for implicating the appellants and other accuseds falsely by collecting manipulated evidence which caused prejudice to the appellants and further even if it is assumed that this delay has been caused due to the promulgation of the Indemnity Ordinance, 1975 but there is no explanation for about three months from 26.6.1996, i.e the date after Awami League came to power.

Mr.Anisul Huq, and the learned Attorney General on the other hand, submitted that the prosecution not only had explained the reasons but also demonstrated cogent evidence to substantiate the cause for delay in lodging the FIR and the inability of the informant to lodge the FIR after the occurrence due to the fact that the successive Governments expressly as well as impliedly prevented the institution of the case against the appellants and other accused persons by promulgating Indemnity Ordinance 1975 and protected the appellants and other accuseds persons as would be evident from the fact that after the incidents the appellants and other accuseds not only remained under the shelter of the then governments but also held influential and powerful positions and Major Rashid contested the general election in 1996 who along with Farooque Rahman floated a political party under the name "Freedom Party" and Farooque Rahman also contested the election in 1980, and Bazlul Huda was the Secretary of the "Freedom Party" and further

after General Ziaur Rahman came to power he rewarded most of the accused persons involved in the killing of the President and his family by appointing them in foreign missions even they openly declared themselves as killers of the then President and his family and that this being an exceptional case in which then successive Governments sheltered and protected the accused persons including the appellants, the informant was apprehensive of his life by taking risk of filing any case till the Bangladesh Awami League came into power in the year 1996. In support of the above submissions the learned counsels for the state referred the cases of State V. Fazal, 39 DLR(AD) 166, Md. Shamsuddin @ Lalu and others Vs. State , 40 DLR(AD)69, Tara Singh and others V. State of Punjab 1991 Supp(1) SCC 536, Jamna and others V. State of U.P. 1994 Supp(1) SCC 185 and State of H.P. V. Shreekanthia Shekari (2004) 8 SCC 153.

As it appears the learned Judges of the High Court Division believed the explanation for delay and observed that the prosecution has been able to explain the delay by assigning cogent reason.

The first learned Judge observed:

> "In the present case delay in lodging the FIR has sufficiently been explained and in view of the matter the contention that FIR has been lodged after lapse of several years change of manipulation and false implication can all together to be not ruled out merits no consideration."

The second learned Judge observed:

> "In this case from the evidence of P.W.44 and other witnesses, the most accused persons used to stay in Banga Bhaban since 15th August, 1975 and in the name of an unwritten command council used to govern the country till they were made to leave on the 4th November, 1975. Still though they were not without influence. The accused Major Syed Farooque Rahman tried to force a mutiny at Savar and Bogra Cantonments and the accused Major Khondker Abdur Rashid tried unsuccessfully to take over the command of 2nd Field Artillery Regiment in 1976. Again in 1980 they made another attempt to over through the Government but still no

> Government took any punitive action against any of them; rather they were all given their arrear salaries. The accused Major Syed Faruque Rahman even contested the Presidential election in 1986 (P.W.44). So the apprehension of the informant about his life and limb can not be said to be unreasonable. Under such circumstances, the delay in lodging the FIR can not vitiate the trial, after all it is always for the prosecution to prove its case on evidence, as such, and the contention of the learned counsel on behalf of the appellants about the delay in lodging the FIR has got no substance."

The thire learned judge also believed the explanation of delay.

The learned judges also cited many decisions of this sub-cotinent in support of their reasonings.

It is true delay in lodging the FIR some times result to embellishment by creature of afterthoughts. But the consistent views of the Superior Courts are that mere delay in lodging a case is not a ground for disbelieving a prosecution case, for there are various circumstances in which lodging any case as to the commission of offence may be delayed.

However as observed in the case of Shreekantthia (supra) the delay in lodging the first information report puts the Court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case the prosecution fails to explain the delay satisfactorily and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay then this possibility becomes a relevant factor. On the other hand, satisfactory explanation of the delay is enough to reject the plea of false implication or vulnerability of the prosecution case.

In the present case the informant in the FIR has implicated only 14 accused persons in the F.I.R and out of them he made specific allegation of overt act only against Bazlul Huda and identified three other accused persons and implicated rest of the accused persons from the informations collected from other sources. If the informant had ill

motive to implicate and/or embellish facts against the appellants and other accused persons, he could have vividly mentioned in the FIR the role played by each accused persons, but he did not resort to that path and this shows that this FIR is the true version what the informant has seen at the place of occurrence and whatever evidence that have been collected against the appellants and other accused persons about their complicity by the investigating agency were in the course of the investigation of the case.

Further, as it appears, after the incident Khondker Mostaque Ahmed userped the power and proclaimed Martial Law on 20th August, 1975 and assumed the office of the President of Bangladesh with retrospective effect from 15th August, 1975 and then he promulgated the Indemnity Ordinance, 1975 on 26th September, 1975 putting restriction on taking of any legal or other proceedings against persons in respect of certain acts, things, committed by those persons in connection with, or in preparation or execution of any plan for, or necessary steps towards the change of the Government of Bangladesh.

As it appears whether or not an F.I.R could have been lodged even after the promulgation of the said Ordinance was a matter of interpretation of law and further the above Ordinance has also made psychological impact.

Further, as Lt. Col. Shafayat Jamil (P.W.44) stated in his deposition, the appellant Farooque Rahman and condemned convict Major Rashid always stayed in the Bangabhaban and their accomplice officers stayed in the Radio Station and used to maintain contact among them by constituting an unwritten Revolutionary Command Council and ruled the country under the leadership of Khondker Mostaque Ahmed and that it was not possible for taking legal action against the killers of 15th August as the killers were being given protection by the Governments in power after the incident till 1996.

Admittedly, the then President and all other members of his family found in the house were brutally killed. Had the Government in power had not supported the above killing, it was the bounden duty of the Governments in power to institute a case for ascertaining the cause for the death and bring the killers to justice but in this particular case the process of law has not been allowed to take its own course, rather by

promulgating Indemnity Ordinance 1975 the Government in power wanted to protect the accuseds including the appellants and further though some of them were initially removed army officers, they were also absorved in the Foreign Ministry and were appointed in the Foreign Missions.

Further as the law stands, if no case was instituted against the killers of the elected President of the country by anyone on behalf of the victims, the Governments "according to law" was under obligations to institute a case specially when an elected President was brutally killed along with his family and further the appellants along with other accuseds not only committed an offence of murder, they also committed atrocities against humanity by killing a child and three innocent women. Further the above offence of murder being a cognizable offence, if no FIR was lodged on behalf of the victims for such an offence, the officer-in-charge of the Dhanmondi Police Station was under an obligation to hold investigation into the offence without an order of a Magistrate and to submit his report under section 173 of the Code.

The learned Attorney General and Mr. Azmalul Hossain expressing their concern about the mode of dispensation of justice by the then Governments in power submitted that the justice delivery system has failed in all respects during the relevant time which can not be exonerated and this failure of the justice delivery system has colossal and catastrophic affect in the country which should not be allowed to recur for the interest of the country. This, according Mr. Hossain, is a part of the history that can not be erased- the entire administration from the top to the bottom failed to perform their responsibilities which will be termed as a scandalous chapter in our history and this sort of practice should be stopped forever and it should not be allowed to repeat again.

The above submissions have substance as justice is related to law and justice differs from benevolence, generosity, gratitude, friendship, and compassion and justice consists of maintaining the societal status quo and further the concept of impartiality is at the core of the system of criminal justice. Further a Government is not of men but of laws. When law ends tyranny beings. Law is the very antithesis of arbitrary power. Further among different types of felonies, an offence of murder or an order to commit

murder is obviously illegal and immoral and that is why the Nazis never tried to legalise genocide and the orders to kill the concentration camp inmates were always couched in veiled terms and even the Nazis recognised that such conduct could never be justified in terms of any system of law.

The criminal justice system in a country is designed to protect the citizens of the country from the onslaught of criminal activities of a section of people who indulges in such acts. The State as a guardian of fundamental rights of its citizens is duty bound to ensure the administration of justice and the rule of law. It is in the interest of the people that the guilt of the offender who has indulged in criminal activity is determined as quickly as possible. But, unfortunately this concept has been ignored after killing of the then President of the country and other members of his family. In order to have a strong socio-economic system, it is important that each and every offender involved in crime should be put to justice and his trial should move at reasonably fast pace. The challenges before the criminal justice system are to balance the rights of the citizen as well as of the accused while dispensing speedy and effective justice in order to ensure a welfare state for its citizens. Rule of law is meaningless unless there is access to justice for the common people.

It seems to me the learned Judges have given ccogent reasons in believing the explanation of delay given by the prosecution. Further this being a finding of fact based on evidence on record, the scope of this Division to interfere under Article 103(3) of the constitution is very limited.

So I am of the view that the delay being reasonably explained, no interfere is called from this Division.

Regarding the third ground, i.e Mutiny, the learned counsels for the appellants made common submission that the evidence on record revealed that the killing of the President and the members of his family and the change of power on 15th August, 1975 was a result of mutiny by some army officers and therefore the trial ought to have been held by Court Martial under the provisions of Army Act, 1952 and accordingly the trial of the appellants under the provision of the Code of Criminal Procedure was without

jurisdiction and in support of this submission Sections 31(a), 59(3), 92(2), 94 and 95 of the Army Act, Sections 5 and 139 of the Penal Code and Section 594(2) of the Code of Criminal Procedure were referred.

Mr. Khan Saifur Rahman further submitted that the instant incident originated from Dhaka Cantonment on the night of 14th August from which it is apparent that it was a mutiny simplicitor and futher there was also no agreement or criminal conspiracy or premeditated plan or pre-arranged plan, within the meaning of Section 34 or Section 120A of the Penal Code. The learned counsel further argued even if when any retired army officer or any other person not subject to Army Act joined in the occurrence on the night following 14th August, 1975 would also constitute a mutiny within the ambit of Section 31 of the Army Act and accordingly they also ought to have been tried by a Court Martial under the Army Act and moreover there is similarity in the killings of the President as in the present appeals and General Ziaur Rahman as in both the cases they were Presidents of the Republic and they were killed by the army personnel and in the present appeals the officers and jawans army from artillery and lancer units came out from Dhaka Cantonment and killed the President at dawn on 15th August, 1975 at his official residence, whereas, in case of General Ziaur Rahman the army came out from Chittagong Cantonment and killed him at Circuit House where he was staying on the night following 29th May, 1981 and since both the occurrences were committed in similar manner, the appellants, if they were at all involved in the incident of 15th August, ought to have been tried by a Court-Martial as was done in case of General Ziaur Rahman. Further the President, being the commander-in-chief of the armd forces, for his killing, trial aught to have been held before Court Martial. In support of this contention the learned counsel has referred the case of Jamil Huq Vs. Bangladesh, 34 DLR (SC) 125.

Mr.Anisul Huq on the other hand, contended that the incident is not a mutiny, rather it is a preplanned murder and therefore, there is no legal bar for the trial of the appellants under the provisions of the Code of Criminal Procedure as would appear from the provisions of sections 59, 92, 94 and 95 of the Army Act 1952, Section 35 of the

Navy Ordinance 1961 and Section 549 of the Code of Criminal Procedure. Learned Attorney General endorsing the above submissions of Mr. Huq added that the appellants did not raise this point in the trial Court and raised for the first time it in the High Court Division with malafide motive in order to confuse the Court and further the evidence on record do not support a case of mutiny and rather disclosed a case of murder and accordingly the charges against the appellants were duly framed and even if it is assumed that the incident is a 'civil offence' with the meaning of Section 8(2) read with Section 59(2) of the Army Act, in view of Section 94 of the Army Act the criminal Court has concurrent jurisdiction to try such offence.

Mr. Tawfique Nawaz, the learned counsel for the State, submitted that the entire scheme of the constitutional and legal personality of the President as was provided in some 59 Articles of the Constitution which were in force at the time of the killing of the then President are very explicit and accordingly the legal personality and the status, functions and immunities as enjoyed by the then President under the Constitution is to be considered on the basis of constitutional provisoions instead of merely considering his position merely on the basis of one single Act i.e Army Act 1952 or a provision therein for treating him as "army personnel" for being the "commander in chief" and accordingly the trial of the appellants by criminal Court instead of Court martial was lawful.

As it appears the defence did not take any plea of "mutiny" while cross-examining or giving suggestions to the prosecution witnesses. Since the prosecution witnesses did not say anything in support of the defence plea of mutiny, the defence ought to have suggested to the prosecution witnesses that the involved officers and jawans in the mutiny submitted their charter of demands and as their demands were not acceded to, they killed the President but on the contrary it was suggested to P.W.24 on behalf of Lt. Col. Syed Farooque Rahman that at that time when Major Dalim was broadcasting the news of the killing, P.W.24, had knowledge about declaration of Martial Law and that Khonkder Mostaque Ahmed became the Chief Martial Law

Administrator. Form this suggestion the defence wanted to make out a case that after the killing of the President, Martial Law was declared and Khonkder Mostaque Ahmed became the President and the Chief Martial Law Administrator of the country and by this suggestion the defence wanted to make out a case that since the killing was the consequence of a successful army insurrection, such killing would not constitute an offence of murder.

However as it appears as per provisions of the Constitution, after the killing of the President, the then Vice-President ought to have assumed the office as President but this time this constitutional provisions were ignored. Further if there was a mutiny, the officers and jawans involved in the incident should have been put on trial for mutiny under the Army Act by the Government in power but no such action was taken, rather the killers were rewarded by the Government. Md. Reajul Haque (P.W.37) a employee of Radio Station, stated in chief that at about 9 A.M. the chiefs of three services as well as the B.D.R. chief and the I.G.P. of Police were brought by Major Dalim at Studio No.2 and their statements of allegiance in favour of the change were recorded and broadcast. On behalf of Lt. Col. Shahriar Rashid it was suggested to Major General Shafiullah (P.W.45) that there was a successful military insurrection in the morning of 15th August,1975 and in the said insurrection Khonkder Mostaque Ahmed assumed the power of President , that all the chiefs of the defence services expressed their allegiance and that he did not take any action against the persons involved in the incident and that Khandaker Mostaque declared the killers as " p§kÑÉ p¿¹¡e". In reply to a question on behalf Farooque Rahmann Col. Shafayet Jamil (P.W.44) stated that it was not possible to take any action against the killers of 15th August as the persons involved in the killing of 15th August were given protection by the subsequent Governments and favoured them and that the conspirators and killers of 15th August used to stay at Bangabhaban and that they run the Mostaque Government by constituting a Revolutionary Council.

By the above suggestions as given to the witnesses the appellants termed the incident as a successful military coup d'etat and that the Governments protected and rewarded them by declaring them as 'Surya Santan' and the appellants did not try to

make out a case of mutiny and further they, in their statements under section 342, were conspicuously silent on this point and they changed their stand at the appellate stage in the High Court Division although there is no material in support of the plea.

Though in the Army Act, 1952, the definition of mutiny has not been given but the punishment for the mutiny has been provided in Section 31 of the Army Act 1952.

Mutiny has been defined in Section 35 of the Navy Ordinance, 1961, which reads thus:-

> "35. In this Ordinance, mutiny means a combination between two or more persons subject to service law, or between persons two at least of whom are subject to service law-
>
> (a) to overthrow or resist lawful authority in the armed forces of Bangladesh or any forces co-operating therewith or in any part of any of the said forces;
>
> (b) to disobey such authority in such circumstances as to make the disobedience subversive of discipline, or with the object of avoiding any duty or service, or in connection with operations against the enemy; or
>
> (c) to impede the performance of any duty or service in the armed forces of Bangladesh or in any forces co-operating therewith, or in any part of any of the said forces."

There is no dispute that this definition of mutiny is applicable in the Army Act 1952 in view of the definition of 'service law' given in section 4(xxxiv), of the Navy Ordinance 1961 which provides that "service law" means this Ordinance, the Army Act, 1952 , the Air Force Act, 1953,and the rules and regulations made thereunder."

The expression 'active service' used in Section 59 of the Army Act 1952, Khan Saifur Rahman submits, as is not applicable in this case but the above submission is contradictory because the appellants are trying to oust the jurisdcition of the criminal Court relying upon some provisions of the Army Act 1952.

According to Mr. Huq this definition of mutiny as given in section 35 of Navy Ordinance 1961 should be read along with Section 31 of the Army Act 1952 for coming to the conclusion that the acts of the appellants do not come within the mischief of mutiny. Clause (a) of Section 31 speaks of overthrowing or resisting lawful authority the armed forces of Bangladesh but there is nothing on record to show that the appellants and other accused have collectively insubordinated or collectively defied or disregarded the authority or refused to obey authority in order to bring their act within the ambit of mutiny and further the evidence on record proved that the authority rather accepted the action of the appellants and other accuseds, some disgrunted army personnel and retired army officer, and some of them were rewarded by the Government.

As it appears section 59(1) of the Army Act 1952 provides that subject to the provisions of sub-section (2), any person subject to the Army Act who at any place commits a civil offence shall be deemed to be guilty of an offence under the Army Act and "Civil offence' defined in section 8(2) Army Act means an offence which, if committed in Bangladesh, would be triable by a criminal Court. Therefore, there is no dispute that if the acts of the appellants come within the mischief of 'civil offence' there is no legal bar for the trial of the appellants by a criminal Court constituted under the Code however section 59(2) of the Army Act stipulates that person who is a subject to Army Act commits murder against any person not subject to the Army Act shall not be liable to prosecution under the Army Act unless he commits the offence while on active service.

The term 'active service' has been defined in Section 8(1) as under:

> " active service", as applied to a person subject to this Act, means the time during which such person is attached to, or forms part of a force which is engaged in operations against an enemy, or is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or is attached to or forms part of a force which is in military occupation of a foreign country;

There is no allegation against the appellants and other accused persons to the effect that while they were in “active service” committed the offence of murder and the appellants also did not claim that the incident was committed while they were on “active service”. There is also no material on record to show that the incident was committed while the appellants were engaged in operation against an enemy or that they were engaged in military operation or is on the line of march to a country or place wholly or partly occupied by enemy.

In terms of the relevant provisions of law as above, if the appellants being not in ‘active service’ commit a ‘civil offence’, the provisions of Army Act does not stand on the way for their trial by a criminal Court. Further Sections 94 and 95 have also been included in chapter IX of the Army Act 1952 for trial of ‘civil offence’ by an ordinary criminal Court. Section 94 presupposes that both a criminal Court and Court-Martial have jurisdiction concurrently in respect of an act or omission punishable both under the Army Act or in case of an offence deemed to be an offence under the Army Act as well as under any law in force and the same will also under the scheme of those two provisions, in the first instance, it is left to the discretion of the prescribed officer to decide before which court the proceedings shall be instituted and, if the prescribed officer decides that the case should be instituted before a Court Martial, the offender is to be detained in military custody. However at the same if a criminal Court is of opinion that the said offence shall be tried before the said Court, he may issue notice under Section 95 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Government and upon receipt of the requisition the prescribed officer may either deliver over the offender to the said court or refer the question to the Government for determination as to whose order shall be final.

I am also in agreement with the submission of Mr. Tawfique Nawaz that in view of the position of the then President as provided in the constitution, merely because of one single Act i.e Army Act 1952 and for being “commander in chief” the late President cannot be regarded as army personnel.

The learned counsels for the appellants also contended that in view of Section 139 of the Penal Code and Section 549 of the Code of Criminal Procedure the trial of the appellants by a criminal Court is barred.

Section 139 of the Penal Code is included in chapter VII which contains sections 131-140. As it appears section 131 provides for abetting mutiny or attempting to seduce a soulder, sailor or airman from his duty, Section 132 provides for abetment of mutiny, if mutiny is committed in consequence thereof and other sections are relating to abetment of other offences and section 139 prohibits punishment of any person under the provisions of Penal Code who is subject to the Army Act, 1952, the Navy Ordinance, 1961, the Air Force Act 1953 for any of the offence for the abetment of those offences mentioned in section 131 to 138. Thus section 139 of the Penal Code has no application in the present appeals in view of the fact that the appellants have been tried and convicted not for committing an offence of abetment of mutiny but for a substantive offences of criminal conspiracy and murder. Regarding section 549 of the Code it appears that it is of a special nature and has the result of taking away the jurisdiction of criminal Court with respect to persons subject to military, naval and air force law. The expressions "is liable to be tried either by a court to which this Code applies or by a Court-Martial" used in this section implies that the offence for which the offender is to be tried should be an offence of which cognizance can be taken by a Criminal Court as well as a Court-Martial. The phrase is intended to refer to the initial jurisdiction of the two Courts to take cognizance of the offence and not to their jurisdiction to decide it on merits. In respect of offences which could be tried by both the Criminal Court as well as a Court-Martial, Section 94 and 95 of the Army Act have made suitable provisions to avoid a conflict of jurisdiction between those two Courts as discussed above.

It may be mentioned here that Sections 125 and 126 of the Army Act 1950 as applicable to India and Sections 94 and 95 of the Army Act 1952 are in verbatim language.

In Balbir Singh and another V. State of Punjab (1995) 1 SCC 90 the Supreme Court of India observed:

> "When a criminal court and court-martial each have jurisdiction in respect of the trial of the offence, it shall be in the discretion of the officer commanding the group, wing or station in which the accused is serving or such other officer as may be prescribed, in the first instance, to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a "court-martial", to direct that the accused persons shall be detained in Air Force custody. Thus, the option to try a person subject to the Air Force Act who commits an offence while on "active service" is in the first instance with the Air Force Authorities. The criminal court, when such an accused is brought before it shall not proceed to try such a person or to inquire with a view to his commitment for trial and shall give a notice to the Commanding Officer of the accused, to decide whether they would like to try the accused by a court-martial or allow the criminal court to proceed with the trial. In case, the Air Force Authorities decide either not to try such a person by a court-martial or fail to exercise the option when intimated by a criminal court within the period prescribed by Rule 4 of the 1952 Rules, the accused can be tried by the ordinary criminal court in accordance with the Code of Criminal Procedure."

In Joginder Singh V. The State of Himachal Pradesh , AIR 1971 SC 500, the Supreme Court observed:

> "It is further clear that in respect of an offence which could be tried both by a criminal Court as well as a Court-martial, Sections 125, 126 and the Rules have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal courts and the Court-martial. But it is to be noted that in the first instance, discretion is left to the officer mentioned in Section 125 to decide before which court the proceedings should be instituted. Hence the officer commanding the army , army corps, division or independent brigade in which the accused person is serving or such

> other officer as may be prescribed will have to exercise his discretion and decide under Section 125 in which court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceeding should be instituted before a court martial, that the provisions of Section 126(1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in the way of a criminal Court exercising its ordinary jurisdiction in the manner provided by law."

In the case of Major E.G.Barsay V. State of Bombay, AIR 1961 S.C. 1762 it was observed by Subha Rao, J as follows:

> "The scheme of the Act therefore is self-evident. It applies to offences committed by army personnel described in S.2 of the Act; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by a fiction to be treated as offence under the Act; it provides satisfactory machinery for resolving the conflict of jurisdiction. Further it enables, subject to certain conditions an accused to be tried successively both by court-martial and by a criminal court. It does not expressly bar the jurisdiction of criminal courts in respect of acts or omissions punishable under the Act, if they are also punishable under any other law in force in India; nor is it possible to infer any prohibition by necessary implication. Sections 125, 126 and 127 exclude any such inference, for they in express terms provide not only for resolving conflict of jurisdiction between a criminal court and a court-martial in respect of a same offence, but also provide for successive trials of an accused in respect of the same offence."

In the case of Jamil Huq relied on by the appellants, the writ petitioners were tried and convicted by the Court Martial under the Army Act, 1952 for the offence of mutiny that took place in the night following 29th March,1981 which resulted in the death of

Ziaur Rahman, the then President of Bangladesh. They filed writ petitions challenging the decision of the Court Martial constituted under the Army Act. The High Court summarily rejected the writ petitions. The Appellate Division in the facts of the given case observed "if the Court-Martial is constituted properly and the offence committed is cognizable by it then the rest is a question of fact based on evidence which is held by all the authorities that the writ jurisdiction is not available to interfere. This Court is only concerned to examine the question whether the jurisdiction under Article 102 has been conferred and once it comes to the conclusion that the jurisdiction has not been conferred there is the end of the matter."

As it appears, this case has no manner of application in the facts and circumstances of the instant case.

Mr. Abdullah-Al-Mamun, the learned counsels for the appellant Bazlul Huda, however referred the case of R.V. Grant, Davis Riley and Topley, (1957) 2 All E.R. 694.

As it appears, in the above case the appellants were convicted by a General Court-Martial held at Nicosia in Cyprus of the offences of mutiny. On the night of the incident a noisy outbreak took place in the barracks- the appellants held a meeting on the roof of the hotel at which they were stationed and then came down and acted riotous conduct and demolished the bar's shop as their grievances made to the authority were not redressed. They received an order from a Warrant Officer to disperse but they did not disperse. The House of Lords refused to interfere with their the conviction on the reasonings as under:

> "I have not thought it necessary to take up time by going through the evidence in detail. The court is quite satisfied that there was evidence on which the court martial could find on a proper direction that there was a mutiny, and it is not for us to criticize the finding provided there was evidence on which they could come to the decision they did. For the reasons which I have endeavored to state as shortly as I can, the court is of opinion that there was no misdirection; that, although perhaps criticism could be made of the words the Judge-Advocate used when he made his interlocutory observation, there was a perfectly fair direction and nothing

was said by the Judge-Advocate which could have misled the court martial. Therefore, on all these grounds the appeals should, we think, be dismissed."

As it appears in the instant appeals there is nothing on record to show that the army authority have initiated any proceeding against the appellants and other accused persons under the Army Act for violating the direction of the authority. There is also no evidence that there was collective insubordination and committed the killing. The accused persons were not in 'active service' and they have not committed a civil offence within the meaning of section 8(2) of the Army Act. Therefore, the criminal Court has not acted in excess of jurisdiction in convicting the appellants.

It also appears that in order to avoid controversy, the learned Sessions Judge was accorded sanction from the prescribed authority for trial of the appellants and other accused persons although they have committed no offence under the Army Act. Therefore, I find no substance in the objection raised by the learned counsels for the appellants regarding the forum of trial.

Before discussing the fourth and fifth grounds i.e conspiracy and murder, the question as to whether the confessions made by the appellants Furuque Rahman, Sultan Shahriar and Mohiuddin (Artillery) are legally admissible in evidence are to be addressed because if those confessional statements are legally admissible in evidence, the statement made therein will be relevant for disposing both the grounds of conspiracy as well as murder and if those are found to be not legally admissible, the prosecution will have to prove both the grounds on the basis of other evidence on record.

Regarding the confessional statements of the appellants Faruque Rahman, Sultan Shahriar and Mohiuddin (Art) the learned counsel for the appellants submitted those were procured by torture and coercion by the police by keeping them on police remand for a long time and therefore, those were not voluntary as would be evident from the reasonings and findings given by first learned Judge and the second learned Judges erred in law in accepting these confessions as voluntary and the third leanred Judge also erred in accepting the confesion of Mohiuddin (Artillery). It was further urged that since the

learned Judges of the Division Bench were equally divided in their opinion as regards the confessional statements of Sultan Shahriar, Farooque Rahman, the third learned Judge aught to have considered their confessional statements also.

Mr. Anisul Huq and the learned Attorney General, on the other hand, submitted that the first learned Judge not only misread the materials on record, but on misconception of law disbelieved the above confessional statements on the grounds that before recording the statements the confessing accuseds were kept in police remand beyond period as provided in section 167(2) of the Code of Criminal Procedure by a "device". The learned Attorney General drew our attention to the statement of P.W.61 and submitted that the appellant Farooque Rahman was taken on police remand for 13 days on two occasions in Lalbagh P.S. Case No.11(11)75 before the institution of the instant case on 2nd October 1996, and Sultan Shahrior was also taken on 15 days remand on three occasions in the said case before he was shown arrested in the instant case on 3rd October 1996 and accordingly findings of the first learned Judge that the the confessional statement of Farooque Rahman was in fact recorded after keeping him on police remand for 32 days and lekewise the confessional statement of Shahriar was recorded after keeping him on police remand for 34 days are not correct.

Records show that Sultan Shahriar was shown arrested in the instant case on 3rd October, 1996 and he was taken on police remand for 7 days on 30th November, 1996 and then on his confissional statement was recorded and that Farooque Rahman was shown arrested on 3rd October, 1996 in the instant case and thereafter he was taken on police remand for 7 days on 12th December, 1996 and then his confessional statement was recorded on 19th December, 1996 and that Mohiuddin (artillery) was taken on police remand for 7 days on 19th November, 1996 and thereafter he made his confessional statement on 27th November, 1996.

P.W. 51 stated that he recorded the confession of Sultan Shahrier after compliance of formalities required under section 364 of the Code of Criminal Procedure and explained to the accused about the contents of his statement and that after recording statement he issued a certificate about the correctness of the statement. As it appears

appellant Sultan Shahriar did not challenge this statement of this witnesst hat he did record his statement in accordance with Section 364 of the Code. P.W.51 however admitted that there was no comment in column no.8 of the Form and he gave an explanation that as the accused did not complain to him of any ill treatment he did not fill up the above column and this witness denied the defence suggestion that he recorded the statement of the accused under duress and torture and that the accused was kept in wrongful confinement in police custody or that the statement recorded was not read over to the accused and that it was not voluntary. P.W. 51 also stated that he recorded the statement of Farooque Rahman after compliance of the formalities required under section 364 of the Code and that after recording his confession the accused was sent to the Court of Chief Metropolitan Magistrate and the C.M.M. acknowledged the receipt of the accused on the same day and that he issued a certificate to the above effect. Farooque Rahman the confessing accused, did not challenge this claim made by this witness regarding the recording of his confessinal statement in accordance with the provisions required by law. P.W. 51 denied the defence suggestion that at the time of recording his statement an A.S.P. of C.I.D., the investigating officer and other police officers were present in his room. P.W. 51 however admitted that he did not fill up columns 3,4,8 and 10 of the Form but denied the defence suggestion that Faruque Rahman reported to him about police torture .

P.W.52 stated that at the time of recording confession of Mohiuddin (artillery)he followed the procedures provided in section 364 of the Code and thereafter he issued a certificate and that after recording his confession, the accused was sent to jail custody.Mohiuddin (Artillery) also did not challenge the claim of this witness about recording his statement in accordance with the procedure laid down by law. P.W.52 however admitted that the Column No.1 of the Form was blank P.W.52, however denied the defence suggestion that Mohiuddin (Artillery)did not make any confession to him or that he signed a statement being prepared by the investigating officer or that the signature of this accused was obtained by force in presence of the police and that the confessional statements were not true or voluntary. As it appears in column No.1 of the Form it was

mentioned by P.W.52 that the Mohiuddin was produced at 11 A.M. on 27th November, 1996 and his statement was recorded at 2 P.M. So the time as well as date of producing the accused and the time of recording his statement were duly mentioned. Column Nos. 3 and 4 of the Form are the instructions and guidelines given to the Magistrates to follow while recording confessional statement of an accused. Column No.3 relates to explaining the confessing accused on each of the matters mentioned in column 5 and to caution him to reflect carefully before making the statement. However as it appears the queries required to confront the accused in column 5 had duly been confronted in Column No. 6. The above columns were duly filled up and so the accused should not have any grievance in this regard. The defence suggestion that at the time of recording statement any police officer was present in his room was denied Column 8 relates to brief statement of Magistrate's reasoning about his satisfaction that the statement was voluntary. The concerned Magistrate in their statement stated that the confessional statement were recorded in accordance with law and that the accused being satisfied of the correctness of the statement put his signature. Column 10 contains the time of forwarding the accused after recording confession. The concerned Magistrate stated that after recording statement he forwarded the accused to the Chief Metropolitan Magistrate on the same day with the record.

As it appears the object of putting questions to an accused who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having reference to the charge against him.

Chapter XLV of the Code of Criminal Procedure deals generally with irregular proceedings. There are certain irregularities which do not vitiate the proceedings and these are set out in Section 529. No question of prejudice arises in this class of cases because the section states categorically that they shall not vitiate the proceedings. Certain other irregularities are treated as vital and there the proceedings are void irrespective of prejudice. These are set out in section 530. A third class is dealt with in sections 531,532,533,535,536(2) and 537. There broadly speaking the question is whether the error has caused prejudice to the accused or has occasioned a failure of justice. The

Code` has carefully classified certain kinds of error and expressly indicates how they have to be dealt with. In every such case the court is bound to give effect to the express commands of the legislature; there is no scope for further speculation. The only class of case in which the courts are free to reach a decision is that for which no express provision is made.

In the instant particular case only section 533 of the Code is to be considered. The first learned Judge has mentioned section 537 of the Code in this regard which has no manner of application in respect of any error or omission or irregularities that occurred while recording confessional statement by Magistrate.

Section 533 reads as follows:

> "533. Non-compliance with provisions of section 164 or 364.(1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.
>
> (2) The provisions of this section apply to Courts of Appeal, Reference and Revision."

This section provides a mode for the rectification of an error arising from noncompliance with any of the provisions of section 164 or section 364. The object is to prevent justice being frustrated by reason of such non-compliance. If any of the provisions of this section have not been complied with by a Magistrate, the confessional statement may be admitted under this section upon taking evidence that the statement recorded was duly made, if non-compliance has not injured the accused to his defence on the merit. If the record of the confession or the statement is inadmissible owing to the failure to comply with any of the provisions of Section 164 or Section 364, intrinsic

evidence, notwithstanding anything in Section 91 of the Evidence Act, may be given to show that the accused person duly made the statement and the statement, when so proved may be admitted and used as evidence of the case, if non-compliance has not injured the accused. The non-compliance with the provisions is cured only when there is no injury caused to the accused as to his defence on merit.

This view has been expressed in Mohammad Ali and others V. Emperor, 35 Cr.L.J. 385(F.B.) as follows:

> "In view of the provisions of the sections of the Code of Criminal Procedure, particularly those contained in s. 533, Criminal Procedure Code, it is difficult to say that the omission to record questions and answers is a fatal defect, and that it is only by recording such questions and answers that a confession can furnish data which enable the court to arrive at the conclusion as to the voluntary nature of the confession. It is equally difficult to hold that when supplying these data or materials it would always be "impossible" for the trial Court to form an estimate as to the voluntary nature of such confession. The defect no doubt is a gross irregularity and it may in certain special cases injure the accused in his defence on the merits, but barring such cases such a defect is completely cured by the provisions of s. 533 of the Code of Criminal Procedure. It is open to a court to come to a conclusion from the internal evidence furnished by the statement itself or from other evidence that the statement had been voluntarily made, and the mere fact that there was an omission to record questions and answers would not debar the court from coming to that conclusion. Nor can it be said that without these data or materials it is "impossible" for a court to arrive at the conclusion that the confession had been made voluntarily. Where, of course, the defect is not merely one of recording it in due form and in accordance with law but there is a defect that the statement was not duly made at all, the position would be different."

However in Kehar Singh's case (AIR 1988 SC 1883) a question arose about the defect in the procedure in recording the confession of Kehar Singh wherein it was observed as follows:

> "On a consideration of the above decisions it is manifest that if the provisions of S. 164(2) which require that the Magistrate before recording confession shall explain to the person making confession that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the Magistrate has reasons to believe that it is being made voluntarily then the confession will be recorded by the Magistrate. The compliance of the sub-sec.(2) of S. 164 is therefore, mandatory and imperative and non-compliance of it renders the confession inadmissible in evidence. Section 463 (old Section 533) of the Code of Criminal Procedure provides that where the questions and answers regarding the confession have not been recorded evidence can be adduced to prove that in fact the requirements of sub- sec. (2) of S. 164 read with S. 281(old Section 364) have been complied with. If the Court comes to a finding that such a compliance had in fact been made the mere omission to record the same in the proper form will not render it inadmissible evidence and the defect is cured under S. 463 but when there is no-compliance of the mandatory requirement of S. 164(2) Criminal Procedure Code and it comes out in evidence that no such explanation as envisaged in the aforesaid sub-section has been given to the accused by the Magistrate, this substantial defect cannot be cured under S. 463 Criminal Procedure Code."

However as it appears the first learned judge taking into consideration the successive remands of the appellants and the alleged non compliance of provisions of law, did not accept the confessional statements holding that taking the appellants on remand in connection with other cases without following proper procedure was a "device" adopted by the prosecution for obtaining the above confessional statements.

From the record, it further appears that Sultan Shahrier retracted his confession on 5th February, 1997 after 52 days of his confession, Farooque Rahman retracted his

confession on 1st March, 1993 after 43 days of his confession and Mohiuddin (artillery) retracted his confession after a long time more than 30 days of his confession. There being no explanation on the side of defence about the delay in filing the applications for retractions, it can be inferred that the retracting of these appellnats are afterthought devices for nullifying the admissions made in the statements.

Regarding the effect of retraction of a cofessional statement, in the case of Joygan Bibi 12 DLR SC 157, the Supreme Court of Pakistan observed :

> "We are unable to support the proposition of law laid down by the learned Judges in this regard. The retraction of a confession is a circumstance which has no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and on the further question whether it is true. The fact that the maker of the confession later does not adhere to it cannot by itself had any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true, for to withdraw from a self-accusing statement in direct face of the consequence of the accusation, is explicable fully by the proximity of those consequences, and need have no connection whatsoever with either its voluntary nature, or the truth of the facts stated. The learned Judges were perfectly right in first deciding these two questions, and the answers being in the affirmative, in declaring that the confession by itself was sufficient, taken with the other facts and circumstances, to support Abdul Majid's conviction. The retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true. That being the case, no reason whatsoever can be found for the inability felt by the learned Judges in taking the confession into consideration against the co-accused. It is true that if there were no other evidence against Joygun Bibi except the confession of Abdul Majid, then, the confession by itself being merely a matter to be taken into consideration, and not having the quality of evidence against

> Joygun Bibi, it could rightly be held in law that her conviction could not be sustained on the confession alone. The grounds for this conclusion would undoubtedly gain weight if the confession were also retracted. But in the present case, Abdul Majid's confession is by no means the only material in the case to be taken into consideration against Joygun Bibi. As will be seen presently, the evidence of the maid-servant Zohura furnished a very complete and detailed account of the movements and behaviour of Joygun Bibi on the night in question, and particularly at and after the time of the murder. Joygun Bibi has not offered any explanation in answer to the questions put to her on the basis of Zohura's evidence and Abdul Majid's confession as to her behaviour that night. She has been content to repeat that she is innocent and to suggest that the case has been fabricated against her by her husband's younger brother, Sattar."

In State Vs. Minhun alias Gul Hassan, 16 DLR (SC) 598 similar views have been expressed as follows:

> "As for the confessions the High Court, it appears, was duly conscious of the fact that retracted confessions, whether judicial or extra judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. It is now well settled that as against the maker himself his confession, judicial or extrajudicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement. The question, however, as to whether in the facts and circumstances of a given case the Court should act upon such a confession alone is an entirely different question, which relates to the weight and evidentiary value of the confession and not to its admissibility in law."

Similar views have been expressed in Mohd. Hussain Umar V. K.S. Dalipsinghhi, AIR 1970 S.C. 45, Ram Prakash V. State of Punjab AIR 1959 S.C.1, and State Vs. Fazu Kazi alias Kazi Fazlur jRahman and others 29 DLR (SC) 271.

As to the weignt of confessional statement, the view of the superior Courts is that a confession can be made foundation of a conviction if it is recorded in accordance with law, found true and voluntary, inculpatory in nature and if on examination of the statement as a whole if it is found inconformity on comparison with the rest of the prosecution case. What amount of corroboration could be necessary in a case would always be a question of fact to be determined in the light of the circumstances of each case. Sometimes no corroborative evidence are available and the court can act upon the confession whether retracted or not, against the maker, if the confession is found to be true and voluntary and if it was not obtained by torture, coercion or inducement. The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could be based on it. If it is capable of belief independently, then of course, it is not necessary to call the confession in aid. Where the court is not prepared to act on the other evidence, in such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence.

As it appears the confessional statement of Sultan Shahriar is about his presence in front of Sherniabat's house and then at the Radio Station is corroborated by other two confessional statements of Syed Farooque Rahman and Mohiuddin (artillery). His statement as regards his subsequent conduct has been corroborated by P.Ws. 15,42 and 46. The confessional statement of Farooque Rahman has been corroborated by the other two confessional statements of Sultan Shahrier and Mohiuddin (artillery). P.Ws. 1, 4, 11, 12, 15, 21, 42 and 46 corroborated his statement in material particulars. The confession of Mohiuddin (artillery) is corroborated by other confessing accuseds in material particulars. His statement has also been corroborated by P.Ws. 17,18, 27 and 34. His statement as regards his presence at the night parade has been corroborated by P.Ws. 11,21,22, 24, 25 , 29 and 35.

Next question is whether under section 10 of the Evidence Act the above confessional statements even if found to be true and voluntary are admissible in evidence against the makers and also each of the appellants as co conspirators to prove the charge of criminal conspiracy after the cessation of the conspiracy?

As it appears section 10 of the Evidence Act will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a primafacie evidence that a person was a party to be conspiracy before his act can be used against his conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said act is limited by two circumstances, namely, that the act shall be in reference to their common intention and in respect of a period after such period was entertained by any one of them.

Conspiracy means something more than the joint action of two or more persons to commit an offence; if it were otherwise, section 10 would be applicable to any of the offence committed by two or more persons jointly and would thus import into a trial of hearsay evidence which the accused person would find it impossible to meet. The section is intended to admit evidence of communications between different conspirators while the conspiracy was going on, with reference to the carrying out of the conspiracy. Now the question is whether Section 10 is capable of being widely construed so as to include a confession made by a conspirator with reference to past acts done in the actual course of carrying out the conspiracy after it has been completed.

In the case of Emperor of India V. Abani Bhusan Chakrabutty, 15 CWN 25, question arose whether confessions of co-accuseds is a relavent fact under section 10 of the Evience Act. In the above decision the Full Bench observed as follows:

> " The first piece of evidence we refered a short time ago. It is argued, on behalf of the Crown, that statement comes within the provisions of sec to the Indian

Evidence Act, and is therefore to be treated as evidence aainst Abani's fellow-prisoners. It is said that, if it does not fall within sec. to, at any rate, under the provisions of sec. 30, it is a confession of one of the co-accused and may be referred to in the course of the trial. It is argued by Mr. Roy with very considerable force, that, in any case, its value can be no higher than that of the evience of an cacomplice, and that, indeed, it is of less value than the evidence of an accomplice, because an accomplice can be cross-examiined for the purpose of testing his accuracy, while this confession of Abani made when he was a prisoner cannot be subject to that test. There is, of course, very great force in that argument we have come to the conclusion that the statement of Abani cannot properly be treated as evidence under sec. to of the Evidence Act that section, in our view, is intended to make evidence communications between different conspirators while the conspiracy is going on, with reference to the carrying out of the conspiracy. No doubt section 10 is wider than the law of England as to evidence in case of conspiracy. But we do not think that that section is intended to make evidence the confession of a co-accused and put it on the same foting as a communication passing between conspirators, or between conspirators and other persons, with reference to the conpiracy. But, withregard to section 30, in our opinion the statement, being the confessin of a co-accused, can be looked at under that section. But its value is discounted by the fact that it cannot be tested by cross-examinatin. We do not think, for a moment, of putting it any higher than the statement of an accomplice, nor can we in any way allow ourselves to be influenced by the statements in it, except where those statements are corroborated by independent testimony implicating the accused persons in the design with which they are charge."

This point was then considered with in Mirja Akbor V. King Emperor, AIR 1940 (P.C) 176. Their Lordships of the Privy Council on consideration of different authorities and Section 10 of the Evidence Act observed as follows:

> "This being the principle, their Lordships think the words of S.10 must be construed in accordance with it and are not capable of being widely construed so as to capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships judgment, the words "common intention" signifies a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships judgment S.10 embodies this principle. That is the construction which has been rightly applied to S.10 in decisions in India, for instance, in 55 Bom 839 and 38 Cal 169. In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past."

As it appears the expression 'in reference to their common intention' is very comprehensive and, it appears to have been designedly used to give a wider scope than the words 'in furtherence of the common intention' used in Section 34 of the Penal Code with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it.

On analysing section 10, it has been observed in Bhagwan Swarup v. State of Maharashtra, AIR 1965 SC. 682 as under:

> "Anything so said, done or written is a relevant fact only "as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it". It can only be used for the purpose of proving the existence of the conspiracy or that the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short, the section case be analysed as follows: (I) there shall be a prima facie evidence affording a reasonable ground for the Court to believe that two or more persons are members of the conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour."

Similar views have been expressed in the case of Zulfikar Ali Bhutto V. The State PLD 1979 SC 53 and also in the case of State. V. Nalini(1999) 5 S.C.C. 283.

In the case of Moqbool Hossain Vs. The State, 12 DLR SC 217 the case against Moqbool Hussain rested entirely on what the other two accused were alleged to have stated to Tahsilder at the time of offering the bribe money to the Tahsilder for the purpose of mutating his name in the register. At the trial those two accused repudiated their alleged statements. The question that arose was whether the statements of two co-accused were available to the prosecution against him by virtue of Sections 10 and 30 of the Evidence Act. It was held as follows:

> Section 10 of the Evidence Act declares that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. A plain reading of this section makes it clear that apart from the act or statement of the co-conspirator, some prima facie evidence must exist of the antecedent conspiracy in order to attract section 10 Such evidence of a pre-existing conspiracy between the appellant and the two Revenue Officer is conspicuous by its absence in this case."

Accordingly once a reasonable ground exists to believe that two or more persons have conspired together to commit an offence, anything said, done or written by one of the conspirators in reference to the common intention after the common intention was enetertained, is relevant against other, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. There can be two objections to the admissibility of evidence under Section 10 of the Evidence Act. Firstly that the conspirator whose evidence is sought to be admitted against the co-conspirator is not confronted in court by the co-conspirator, and secondly the prosecution merely proves the existence of reasonable ground to believe that two or more persons have conspired to commit an offence and tht brings into operation the existence of agency relationship to implicate co-conspirator.

But however statement made after the conspiracy has been terminated on achieving its object or it is adandoned or it is fraustrated or the conspirator leaves the conspiracy in between, is not admissible against the co-conspirator. Fixing the period of conspiracy is important as the provisions of Section 10 of the Evidence Act would apply only during the existence of the conspiracy.

In view of the legal position as stated above it appears that the above confessional statemens of Farooque Rahman, Sultan Shahriar and Mohiuddin (Artillery) are not relevant fact to prove the charge of conspiracy framed against the appellnats.

As stated earlier, the first learned judge taking into consideration the successive remand of the appellants by passing the provisions of law and non compliance of provisions of the Code of Criminal Procedure, did not accept the confessional statements holding that taking the appellants on remand in connection with other case and "showing the appellants arrested" without following proper procedure which according to him was a "device" adopted by the prosecution.

Now the question is if the said confessional statements are kept out of consideration whether the evidence on record merely discloses a case of conspiracy to commit mutiny to change the then Government of Sheikh Mujibur Rahman on a conspiracy to commit murder of the President and his family.

Before considering the above question and also the fifth grounds i.e charge of murder, the scope of Article 103(3) of the constitution is also to be considered because to decide the above the question of facts will invariably come in.

Article 103(3) is couched in the verbatim language of Article 136 of the Constitution of India.

Besides various decisions of this Division on this point, in the case of Hargun Sundar Das V. State of Maharastra, AIR 1970 SC 1514 the Supreme Court of India, while considering the scope of its jurisdiction to assess the evidence in an appeal on conviction also observed as follows:

> "We may appropriately repeat what often been pointed out by this Court under Article 136 of the Constitution, this Court does not normally proceed to review the evidence in criminal cases unless the trial vitiated by some illegality or material irregularity of procedure or the trial is held in violation of rules of natural justice resulting in unfairness to the accused or the judgment or order under appeal has resulted in grave miscarriage of justice. This article reserves to this Court a special discretionary power to

interfere in suitable cases when for special reasons it considers that interference is called for in the larger interest of justice."

Similar views have been expressed in the cases of Metro. V. State of U.P. AIR 1971 SC 1050, Subeder V. State of U.P. AIR 1971 SC 125, and Ram Sanjiwan Singh V. State of Bihar, AIR 1996 SC 3265.

Regarding conspiracy, the learned counsels for the appellants argued, the evidence of Lt. Col. Abul Basher B.A, P.W 7, Lt. Col. (Rtd) Abdul Hamid, P.W.9, A.L.D. Sirajul Haq, P.W.12, Habilder Md.Aminur Rahman (Rtd), P.W.24, Naik Md. Yeasin P.W.25, Md. Reajul Haque, P.W.37, Honourary Lieutenant Syed Ahmed, P.W.40, Col. Shafayet Jamil P.W.44, Major General Shafiullah, P.W.45, Major General Khalilur Rahman, P.W.47, Air Vice-Martial A.K.Khandaker P.W.48, and Rear Admiral M.H.Khan P.W.49, clearly relates to conspiracy to commit mutiny and existence of criminal conspiracy to murder the President and his family members is absent in the present appeals but the learned Judges illegally maintained the conviction of the appellants under section 120B of the Penal Code.

On the other hand, Mr. Anisul Huq submitted that there are sufficient evidence on record in support of the charge of criminal conspiracy to commit the murder of the President and his family members and further the defence having admitted that there was criminal conspiracy to commit mutiny and they failing to substantiate its plea, the appellants could not escape from the charge of criminal conspiracy to commit murder specially in view of the admission of the appellants that they have conspired to commit an offence, and the evidence of L.D.Bashir Ahmed P.W.11, A.L.D. Sirajul Haq P.W.12, Dafadar Shafiuddin Sarder P.W.13, Dafader Abdul Jabbar Mridha P.W.14, Resalder Abdul Alim Mollah P.W.23, Habilder Md. Aminur Rahman P.W.24 Naik Md. Yeasin P.W.25, Subader Major Anisul Haque Chowdhury P.W.35, Resalder Munsur Ahmed P.W.39, Honourary Lieutenant Syed Ahmed, P.W.40, Col. Shafayet Jamil P.W.44 and Syed Siddiqur Rahman, Curator of Dhaka Musium P.W.53 proved the charge of criminal conspiracy to commit murder of the President and his family members and the learned judges of the High Court Division committed no miscarriage of justice in maintaining the

charge of criminal conspiracy to commit murder of the President and other members of his family.

The elements of criminal conspiracy are (a) an agreement between two or more persons, (b) to do an illegal act, or (c) to do a legal act by illegal means, and (d) an overt act done in pursuance of the conspiracy. Further in order to prove a charge of criminal conspiracy for an offence under section 120B of the Penal Code, the prosecution need not prove that the perpetrators expressly agreed to do or caused to be done the illegal act; the agreement may be proved even by necessary implication. In a conspiracy, persons are often required to do various acts at various stages and even if for the first time they come into conspiracy at a latter stage they are members of the conspiracy provided their act is calculated to promote the object of the conspiracy. It is no doubt true that the offence is complete as soon as an agreement is made between the conspirators and in that case they would be punishable under section 120B. The essence of the offence is the combination of agreement express or implied, the actus reus in a conspiracy is the agreement to commit an offence, not execution of it. It is enough if it is shown a meeting of minds, a consensus to affect an unlawful purpose. It can be established by direct or circumstantial evidence. Privacy and secrecy are main characteristics of a conspiracy than of a loud discussion in an elevated place open to public view. It is not always possible to give direct evidence about the date, place and time of the formation of the conspiracy, about the persons that took part in its formation, about the objects which they set before themselves as the object of conspiracy and about the manner in which the object of conspiracy is to be carried out- all these are matters of inference that can be drawn from the facts of the case.

Under the common law, conspiracy consists in an agreement between two or more persons to achieve an unlawful object- unlawful being used in a special sense here. The offence consists in the combining. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself. The offence is, therefore, complete though no further act is done in pursuance of the

agreement and, provided that if the stage of negotiations has been passed, it will be a conspiracy even “where the parties had not settled the means to be employed.”

It is not necessary that a person charged with conspiracy should also be an accomplice.

The English Law on this matter is welsettled. The following passage from Ruussell on Crime (12 Ed. Vol. 1, 202) may be usefully noted:

“The gist of the offence of conspiracy thenlies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough.”

Glanville Williams in the “Criminal law” (Second Ed.382) explains the proposition with an illustration:

“The question arose in an Lowa case, but it was discussed in terms of conspiracy rather than of accessory ship. D. Who had a rrievance against P. told E that if he would whip P someone would pay his fine. Ereplied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that hewould whip him at the first opportunity. E whipped P.D was acquitted of conspiracy because there was no agreement for “ concert of action”, no agrement to “co-operate”.

He explained “Mere knowledge of and mental consent to a crime about to be committed by another does not make a man a conspirator, but quite a slight participation in the plan will be sufficient.”

Coleridge, J. while summing up the case to Jury in Regina v. Murphy, (1837) 173 ER 502 (508) pertinently states:

“ I am bound to tell you, that althoughthe common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law

nor common sense requires that it should be porved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, "Had they this common design, and did they pursue it by these common means- the design being unlawful ?"

It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may nor be done in pursuance of agreement, but the very agreement is an offence and is punishable.

Reference to section 120-A and 120-B of the Penal Code which have brought the "Law of Conspiracy" in the then India, will show that those are in line with the English law by making the over-act unsessential when the conspiracy is to commit any punishable offence and the provisions of section 120A would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

Section 10 also has a reference to Section 120A of the Penal Code which provides: "when two or more persons agree to do, or cause to be done, (a) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy." A proviso has been added which provides that no agreement except an agreement to commit offence shall amount to conspiracy. Therefore, it is apparent that a primafacie case of conspiracy has to be established for the application of Section 10 of the Evidence Act. There must be reasonable ground to believe that two or more persons have conspired together in the light of the language of Section 120A of the Penal Code.

In Kehar Singh V. State, AIR 1988 SC.1883 explained section 120A in the following manner:

> "This section mainly could be divided into two: the first part talks of where there is reasonable ground to believe that two or more persons have

conspired to commit an offence or an actionable wrong, and it is only when this condition precedent is satisfied that the subsequent part of the section comes into operation and it is material to note that this part of the Section talks of reasonable grounds to believe that two or more persons have conspired together and this evidently has reference to S. 120-A where it is provided "When two or more persons agree to do, or cause to be done". This further has been safeguarded by providing a proviso that no agreement except an agreement to commit an offence shall amount to criminal conspiracy. It will be therefore necessary that a prima facie case of conspiracy has to be established for application of S.10. The second part of Section talks of anything said, done or written by any one of such persons in reference to the common intention after the time when such intention was first entertained by any one of them is relevant fact against each of the persons believed to be so conspiring as well for the purpose for proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. It is clear that this second part permits the use of evidence which otherwise could not be used against the accused person. It is well settled that act or action of one of the accused could not be used as evidence against the other. But an exception has been carved out in S.10 in cases of conspiracy. The second part operates only when the first part of the Section is clearly established i.e. there must be reasonable ground to believe that two or more persons have conspired together in the light of the language of S.120-A. It is only then the evidence of action or statements made by one of the accused, could be used as evidence against the other."

In a later case in Suresh Chandra Bahri V. Gurbachan Singh AIR 1994 S.C. 2420, The supreme Court of India held as observed:-

"In the above context we may refer to the provisions of S. 120-A of the Indian Penal Code which defines criminal conspiracy. It provides that

when two or more persons agree to do, or cause to be done. (1) an illegal act, or (2) an act which is not illegal by illegal means, such agreement is designated a criminal conspiracy; provided that no agreement except an agreement to commit an offence shall amount to criminal conspiracy un less some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Thus a cursory look to the provisions contained in S. 120-A reveal that a criminal conspiracy envisages an agreement between two or more persons to commit an illegal act or an act which by itself may not be illegal but the same is done or executed by illegal means. Thus the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a fact situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in S. 120-B read with the provision to sub-sec (2) of S. 120-A of the I.P.C., then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under S. 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions in such a situation do not require that each and every person who is a party to the conspiracy must do some overt act to wards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trapping of the provisions contained in S. 120B since from its very nature a conspiracy must be conceived and hatched in complete secrecy, because otherwise the whole purpose may frustrate and it is common experience

> and goes without saying that only in very rare cases one may come across direct evidence of a criminal conspiracy to commit any crime and in most of the cases it is only the circumstantial evidence which is available from which an inference giving rise to the conclusion of an agreement between two or more persons to commit an offence may be legitimately drawn."

If thus appears that, in order to constitute the offence of conspiracy, there must first be a combining together of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy in order to the doing of that thing. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. Chapter V-A, introduced a new offence defined by Section 120A. That offence is called the offence of criminal conspiracy and consists in a mere agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means; there is a proviso to the section which says that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

So in terms of the principle as laid down above, each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. There may be a general plan to accomplice the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. The common intention of the conspirators then is to work for the furtherance of the common design. Conspirators do not discuss the plans in the presence of the stranger or outsider. Since privacy and secrecy are the elements of criminal conspiracy it is difficult to obtain direct evidence in its proof. It can, therefore,

be proved by evidence of surrounding circumstances and conduct of the accused both before and after the commission of the crime.

According to the prosecution, the appellants along with other accused persons hatched up a conspiracy for the killing of Present and his kith and kin with a view to mitigate their personal vengeance and also to fulfill their persons ambition and with that end in view, they arranged a night parade on 14th August, 1975, and in the night parade the appellant Farooque Rahman and other co-accuseds incited the jawans attended it, took arms from the kote, deployed officers and Jawans at key points and then some of them came to the official residence of the President and brutally killed him and his family members and that such yearly night parade starts in the evening and ends at 11 P.M. but the night parade of 14th August continued till the early hours of 15th August and moreover there is no provision for amalgation of two units of army in the parade but the appellants and other accuseds for the fulfillment of their criminal object in violation of the Rules amulgated Lancer unit and Artillery unit and that further though there is prohibition for carrying ammunition at such exercise but the appellants and the co-accuseds carried ammunition from the kote for the implementation of the object it will be necessary to keep in view the limited scope in this appeal under Article 103(3) of the Constitution against the judgments and orders of conviction and sentence by which the High Court Division confirmed the conviction and sentence passed by the trial Court.

The appellants have not raised any point as to whether the trial of the appellants has been vitiated by reason of misreading, non reading or non consideration of the evidence on record. Despite that we have afforded the learned counsels to argue the appeals at length on merit of the evidence on record for ends of justice since the appellants have been sentenced is death.

As stated earlier the prosecution to prove criminal conspiracy relied on the depositions of P.Ws. 11, 12, 13, 14, 18, 21, 22, 23,24, 25, 26, 27,32, 34, 39, 40, 53.

P.W.11, stated that he was a member of unit he on reaching at the parade ground he noticed that the parade was disorderly, that in the parade Farooque Rahman came there along with Major Ahmed Hossain and then Farooque Rahman and other officers

went to the office of Mohiuddin (Lancer) and he also noticed some persons in white dress present in the office of Mohiuddin (Lancer) and he guessed them as officers and that at about 12 at mid-night, he came out of his room and noticed that while the white dressed persons were coming out of his office Mohiuddin (Lancer) came out from his room after them and called Huda to come nearer to him and at that time Huda told Major Dalim to wait for some time and then both of them followed Mohiuddin (Lancer) who then arranged uniforms for them.

P.W.12, stated that in the parade ground he found Farooque Rahman, Mohiuddin (Lancer) and some other accused persons and the parade continued till 3.30 A.M and thereafter, they were asked to fall- in and in the parade ground he noticed that Farooque Rahman, Mohiuddin, Major Shariful Ahmed Hossain , Lt. Nazmul Hossain Ansar were talking something with J.C.O's by the side of the parade ground and thereafter they came in front of them and that he noticed three unknown officers with uniform and Farooque Rahman introduced them as Major Dalim, Bazlul Huda and the name of other person, he could not recollect that Farooque Rahman briefed them that on 15th August a meeting would be held at University wherein the President would declare monarchy, that they did not support monarchy and that they would have to follow the directions to be given by him and other officers and thereafter Frooque Rahman directed them to take arms from kote and as per such direction, they took arms from the kote and thereafter Mohiuddin thereupon directed them to board into the vehicles and as per his direction, they boarded in four trucks and noticed that two other trucks with jawans were also present there and subsequently he came to know that they were jawans of artillery unit, who would participate with them and thereafter they jointly marched and reached at the meeting point of road No.32 via Balurghat, Mohakhali Road-Farm Gate and that Mohiuddin directed them not to allow any persons to move through Road No.32 and further informed that if they heard any sounds of firing they would not be frightened as the others were their own people.

P.W.13, stated that he was a member of lancer and attended the night parade, stated that in the night parade Farooque Rahman and Mohiuddin (lancer) were present

and the parade continued till 3.30 A.M. and at that time Major Abdur Rashid came to their unit and then Moslemuddin and other army officers came there and boarded on a truck and then they directed him and others to follow them and that their vehicle stopped at Mohakhali where he noticed the jawans of artillery unit were standing there and at that time one officer from artillery unit boarded in their vehicle and thereafter going Indria Road- Mirpur Road and Satmosjit Road their vehicle stopped at the meeting point of Road No.32 on the Mirpur Road.

P.W.14, stated that he was a member of lancer unit stated that he attended the night parade which continued till the late hours of 14th August and he found Farooque Rahman Mohiuddin, Major Ahmed Shariful Hossain, Lt. Kismot and Lt. Nazmul Hossain Ansar and some other persons in civil dress and also noticed some officers of artillery unit with Major Rashid and the that Major Farooque directed them to fall-in and told them that for an emergency task they were directed to fall-in and then he introduced the persons in civil dress as Major Dalim and Sultan Shahriar and told him and others that these two officers would work with them and that they were required to follow their directions and reminded them that in case of any negligence, they would be dealt with severely and that at about 4 A.M., Farooque Rahman directed for moving of the tanks and that Major Farooque commanded one tank and the tanks started marching at the same time and some tanks came at Radio Station-via Balurghat-cantonment–Mahakhali and after reaching there, Sultan Shahrier, Major Dalim, Major Shariful Hossain talked for some time and then they entered into the Radio Station and some times thereafter, Farooque Rahman and Abdur Rashid entered into the Radio Station.

P.W.17, stated that he was a member of artillery unit during the relevant time and that Mohiuddin (Artillery) was commander of Papa Battery and he attended the night parade and it continued till 12 at night and thereafter, as per direction of Habilder of Cannon of Unit No.1, they took cannon-ball and he noticed that the regiment officers were talking behind the cannons at the time of night parade amongst them he recognised Abdur Rashid, Mohiuddin (Artillery), Captain Mostafa and Captain Jahangir and two others and approached them and gave some instructions to Subedar Hashem and

thereafter Hashem directed the force to board into the trucks and hooked six cannons in six trucks. Thereafter at about 3.30/4-00 A.M. the trucks loaded with cannon started moving and that he was in the vehicle with Major Mohiuddin (Artillery); their truck stopped beside the Dhanmondi Lake at around 4 A.M. and then Mohiuddin directed them to install the cannons aiming the Road No.32 and Rakshibahani Head Quarter and as per his direction, the cannons were fixed aiming Road No.32 and then Mohiuddin directed them to fire cannon-ball whenever he would direct them to do so and some times thereafter, they heard sounds of firing from the house of the President and at that time, as per direction of Mohiuddin they fired 4 rounds of cannon-ball. As it appears the defence did not challenge the testimony of this witness and therefore, his testimony about the direction of Mohiuddin for installation of cannon and firing of cannon-ball remain uncontroverted.

P.W.18 stated that he was a gunner of the Artillery Unit of which Khondker Abdur Rashid was the Commanding Officer and Mohiuddin (Artillery), was the battery Commander and he attended the night parade and that in their Papa Battery they had six cannons and as per direction of Mohiuddin, they moved towards Balurghat via New Air Port with cannons and they continued their night training till 12.30/1-00 A.M and that in the course of training Khondker Abdur Rashid and Mohiuddin (Artillery) inspected the training and that at about 3.30/4-00 A.M, they were directed to amalgamate their gun and to hook them with the vehicle and after that they were made fell in and then Captain Jahangir, in presence of Mohiuddin, told them that they had to perform an emergency work and it was to check Rakshibahini and directed them to follow their vehicle and then their unit marched towards Rakshibahini Head Quarter.

P.W.21 stated that he was a jawan of the asme Artillery Unit as above and that he attended the night parade and that at about 2 A.M. Major Abdur Rashid, Mohiuddin, Captain Bazlul Huda and some other officers came at the Air Port Runway where they were sitting and at that time Major Rashid told them to get ready with arms and ammunition as they would have to move for an emergency duty and then as per his direction they took ammunition and thereafter Bazlul Huda directed them to board into

the trucks and then the trucks started towards Dhanmondi and that at about 4/4.30 A.M some of them were directed to get down from the truck at about at Road No. 32 and those who got down were directed not to allow any person to move through the Road No.32.

P.W.22 stated that he was a jawan of Artillery Unit and he attended the night parade on the fateful night and that the parade continued till 12 at night and after taking of some rest, at about 2/2.30 Major Abdur Rashid came there with Major Mohiuddin, Mostafa, Captain Bazlul Huda and some other unknown officers and at that time Major Abdur Rashid enquired about their arms and they showed their arms and then he told them that they would be taken at an emergency task and that in case of necessity, they would use their arms, and that they took ammunition in their truck and then the B.H.M. divided them in groups and directed them to board into the trucks and then their truck moved towards the Road No. 32 and at the time of Fazar Ajan, some of them were directed to get down from the truck at Road No. 32 and they were directed not to allow anybody to enter into Road No. 32. The defence did not challenge the incriminating portion of his testimony.

P.W.23 stated that he was a jawan of Lancer unit and he attended the night parade on the fateful night and he saw that Farooque Rahman came in front of the tank and talked for tome time with Lt. Kismot and thereafter Lt. Kismot directed Resalder Shamsul Hoque to make the squadron fell-in and thereafter Farooque Rahman, Lt. Kismot and Resalder Shamsul Huq came there and as per direction of Faruque Rahman six drivers of the tanks and some other jawans were picked up from amongst them and then he distributed the jawans in six tanks and also divided the duties of the officers and that at about 3/3-30 A.M, Major Farooque Rahman again came and as per his direction the officers and the jawans boarded into the tanks and then the tanks were removed from the garage and were kept in queue position at the signal gate. Thereafter Farooque Rahman boarded in a tank and directed the other officers to board on the other tanks and as per his direction and then the tanks moved towards south.

P.W.24 stated that he was a jawan of artillery unit during the relevant time and he attended the night parade as per direction of Major Abdur Rashid, and that they marched

to Air Port as per his direction and before their marching they were directed to take arms with them, Major Rashid told them that they would move at different places for emergency works and thereafter their battery commander took them to lancer unit. He found the jawans of lancer unit in fall-in condition. The commanding officer of lancer unit Farooque Rahman amalgamated both the units together and briefed them and at that time he noticed some officers of artillery unit present there. He also noticed some removed army officers there and Major Rashid and Farooque Rahman introduced those officers as Major Dalim, Major Rashed Chowdhury, Major Sultan Shahrier and Captain Majed. Thereafter Major Abdur Rashid and Major Dalim told them that they liberated the country at the cost of blood – the present Government failed to protect the modesty of the women folk – the people are dying for starvation- and so the Government should be toppled. Thereafter Farooque Rahman and Major Abdur Rashid directed them to take ammunition and as per their direction they took ammunition from the armory. Thereafter they marched towards the town.

The defence did not challenge the testimony of this witness so far as it related to amalgamation of two units of lancer and artillery by Farooque Rahman, the briefing of Faruque Rahman to the units and the presence of Major Abdur Rashid there. In course of cross-examination, this witness stated that there was no provision for joint parade of different units in the yearly parade. He reaffirmed his statement in chief that as per direction of Farooque Rahman their unit was amalgamated with lancer unit. There is also no denial that as per direction of Major Farooque and Major Rashid they took ammunition with them.

P.W.25, a jawan of artillery unit during the relevant time stated that he attended the night parade and stated that at about 3/3.30 A.M. they were made to fall-in as per direction of Captain Mostafa and then they marched at an open space of the Tank Unit and noticed the presence of jawans of tank unit and that they were divided into six groups. Major Rashid, their commanding officer of Artillery and Farooque Rahman, the commending officer of the tank briefed them. Major Rashid, Captain Mostafa, Major Dalim, Captain Majed and other officers were present there, Major Dalim gave a speech

there and then Farooque Rahman and Major Rashid joined him and they stated that they liberated the country in exchange of many lives–the Government failed to protect the modesty of mothers and sisters people were dying for starvation- the Government should be toppled. Thereafter they directed them to take ammunition and then as per their order they took ammunition and marched towards the house of Minister Abdur Rob Serniabat and thereafter he also narrated the incident of killing of the family members of Serniabat. In course of cross-examination by Mohiuddin, this witness stated that the ammunition were piled up in front of Lancer Ammunition Store and as per order of Farooque Rahman they took ammunition. The testimony of this witness was not challenged by the defence in any manner.

P.W.26 stated that he was a jawan of artillery unit during the relevant time and Mohiuddin (Artillery) was commander of Papa Battery of the said unit and Major Rashid directed him to keep the key of ammunition store with him and at about 11/11.30 A.M. Major Rashid and Captain Jahangir came in front of the ammunition store with 10/12 jawans of artillery and lancer units and as per direction of Major Rashid he unlocked the ammunition store and then as per direction of Major Rashid, the jawans took cannons rifles, stenguns , S.M.G and pistols etc. The testimony of this witness has not been challenged by the defence and therefore, his testimony remain uncontroverted.

P.W.27 stated that he was a jawan of the field artillery during the relevant time and he attended the night parade and then from the parade ground they marched towards New Airport Road, at about 3/3.30 a.m. Mohiuddin (Artillery) came there and made them to fall-in and directed some jawans to board into the vehicle with Mohiuddin (Artillery) and then Major Mohiuddin told them that the Rakshibahani would attack army and they should prepare for such eventuality. He saw that one cannon was hooked with the vehicle, four other cannons were also hooked in other vehicles, thereafter they marched and came to Khalabagan area near the Lake after, coming through Mohakhali- Farm Gate-Green Road- Elephant Road and Mirpur Road and then they were directed to get down from the vehicle. The Major Mohiuddin (artillery) told them that no body would be

allowed to move through this road. The testimony of this witness has not been challenged by the defence.

P.W.32 stated that he was a jawan of artillery unit, in which, Major Mohiuddin (Artillery) was their commander and that he attended the night parade and at the parade he recognized Major Rashid, Mohiuddin (Artillery), Major Zubair Siddique, Captain Mostafa and Lt. Hasan and that the parade continued till 3/3.30 A.M. when also Habilder Mozaffar made them to fall-in and at that time those officers and Major Dalim were present. As per direction of Rashid, Habilder Mostafa directed them to board in 3 / 4 trucks and thereafter Kote N.C.O. Shamsul Islam gave them ammunition and that thereafter they marched and then they were directed to get down on the road beside Tejgaon Airport and alsl not to permit any body to move through the road. The testimony of this witness has not been challenged by the defence and the same remain uncontroverted.

P.W.34 stated that he was a jawan of artillery unit, in which, Major Mohiuddin (artillery) was the Battery Commander and that he attended the parade and after the parade they marched to New Airport with six tanks and that and that at about 2.30 a.m. they were made to fall-in and then they were directed to board in a vehicle and then they marched towards Mirpur Road Via- Farm Gate towards the eastern side of the Lake and they took their position there andthen the guns were set in there. At that time Mohiuddin (artillery) stood behind the gun and directed them not to allow any person to move through the road. The defence also did not challenge his statement.

P.W.39 stated that he was a driver of lancer unit during the relevant time and in his unit Farooque Rahman was the commanding officer-in-charge. He also attended the night parade and found Mohiuddin (lancer), Major Shariful Islam and other accused persons present at the parade; Farooque Rahman told them that for an emergency purpose the tanks would be moved outside and directed them to get ready, thereafter he told the jawans and officers to attend to their works, at that time Major Dalim and another officer came in their unit and Major Dalim wanted uniform and he was supplied the uniform and that the tank unit marched via- Airport towards Bangabhaban.

P.W.40 stated that during the relevant time, he was a lieutenant of Lancer Unit of which Farooue Rahman was the commander and he attended the night parade and he handedover the parade to Mohiuddin (Lancer) who then handed over the parade to Farooque Rahman and that the parade continued till 2/3.00 a.m. although it was supposed to close up at 12 at night and that Farooque Rahman told him to take care about the regiment and to close down the gate and he further stated that in reply to his query, Farooque Rahman told him that they were going to remove autocratic Government. The defence did not challenge the testimony of this witness although this witness specifically stated that Major Farooque and other persons were moving to topple the Government.

P.W.53 stated that he was a Subedar Major of artillery unit and Mohiuddin (Artillery) was Papa Battery Commander of that unit and that Farooque Rahman used to visit the office of their commanding officer Major Rashid and talked with him many times in the month of August, 1975. He further stated that Major Rashid arranged the night training programme in August and as per programme, he fixed the 14th August night for the purpose and that Mohiuddin took over parade from Captain Jahangir and then he handed over the parade to Major Rashid. He further stated that at about 10 P.M. Major Rashid and Farooque Rahman came to the varendha of his office and some times thereafter they jointly left the place with a jeep.

The above evidence shows that Major Rashid and Farooque Rahman, who as the records show are close relation, arranged the night parade on 14th night with a view to fulfill their premeditated plan of conspiracy. Major Rashid as the records show is also a close relation of Khondaker Mostaqe Ahmed. Records also show that Lt. Col. Momen, the Commanding officer of 1st Lancer Unit was on leave upto 15th August and Farooque Rahman, as 2.I.C of the said unit by utilizing the absence of Col. Momen took control of 1st Lancer Unit and he in collusion with near relation Major Rashid, Commanding Officer of 2nd Field Artillery, as well as other accuseds as a part of conspiracy arranged the night parade on 14th night and dragged it till the early hours of 15th August, and removed army officers also attended the said parade and then the officers talked secretly in the office of Mohiuddin (lancer) and that Faruque Rahman, Bazlul Huda and Mohiuddin (Lancer)

incited the jawans by their speeches to the effect that Rakhibahini would attack them or that monarchy will be established and as per their direction the jawans took heavy arms and ammunition which could be used during the war time only.

It thus appears that P.Ws. 11,12,13,14,23,24,25,35,39 and 40 have recognized Farooque Rahman, P.Ws. 11, 12, 14 and 39 have recognised Mohiuddin (Lancer), P.Ws. 17,18,21,22,26,27,32,34 and 53 have recognised Mohiuddin (artillery), P.W. 14. recognised Sultan Shahrior and P.Ws. 11,12,21 and 22 recognised Bazlul Huda in the said conspiracy. Further the defence did not challenge the incriminating part of the evidence of these witnesses about their complicity, such as, night parade continued beyond the scheduled timetable till 3.30/4.00 a.m., that though there was no provision for amalgation of two different units of army at the night parade but even then amulgamation was made and that they took ammunition from the kote which was strictly prohibited and that by violating army rule they took the tanks and cannons outside the cantonment during peace period and deployed those at key points just before the incident and that some removed army officers attended the night parade and that there were confidential talks among the accused officers keeping the jawans in fall-in position by inciting them and that in terms of the conspiracy some officers and jawans of the two units including appellants came out of the cantonment and went to the house of the President and killed him and his family members while other officers and jawans including some appellants remained deployed in other key points.

Further regarding previous conduct of the appellants depositions show that P.W.11 recognized Lt. Col. Syed Farooque Rahman, Mohiuddin (Lancer), and Bazlul Huda at the night parade. P.W.12 recognized Mohiuddin (lancer), Farooque Rahman and Bazlul Huda at the night parade on 14th August. P.W.13 recognized Major Mohiuddin (lancer) and Farooque Rahman. P.W.14 recognized Mohiuddin (lancer) and Shahriar. P.Ws. 17 and 18 recognized Lt. Col. Mohiuddin (artillery) at the parade ground on 14th night. P.Ws. 21 and 22 recognized Lt. Col. Mohiuddin (artillery) and Bazlul Huda at the parade ground. P.W.23 recognized Lt. Col. Farooque Rahman at the parade ground. P.W. 24 recognized. Farooque Rahman, A.K.M.Mohiuddin Ahmed (artillery) and Lt. Col.

Shahriar at the parade ground. P.W.25 recognized Mohiuddin (artillery) and Farooque Rahman at the night parade. P.W.27 recognized Mohiuddin Ahmed (Artillery) at Kalabagan. P.W.32 recognized Mohiuddin (artillery) at the night parade. P.W.34 recognized Lt. Col. Mohiuddin Ahmed (artillery) at Kalabagan. P.W.35 recognized Col. Mohiuddin (artillery) and Farooque Rahman at the night parade ground. P.W.39 recognized Farooque Rahman and Mohiuddin (lancer) at the night parade ground. P.W.40 stated that Farooque Rahman told him that they were moving to topple the autocratic Government, but instead of toppling the Government, they killed the President and the members of his family. The evidence of the above P.Ws, which have been discussed in details while considering the charge of criminal conspiracy, shows that the appellants along with co-accuseds and their troops marched from the parade ground towards the key points, took control or those key points by deploying troops with artillery and then their object was materialised. All these acts of the accused are done in one series in the course of carrying through the design in question – there is community and continuity of purpose. These conducts of the appellants are relevant which has no reasonable explanation other than their guilt.

The first learned Judge however disbelieved P.W.24 on the reasoning that in course of cross-examination on behalf of Farooque Rahman in answer to a suggestion he stated that as per version of the police he deposed against the accuseds on the apprehension that otherwise he would be made an accused in the case as he was found present at the house of Sherniabat. The second learned Judge, however, believed P.W.24 on the reasonings that a perusal of his statement in its entirety in cross would suggest that he denied the above suggestion but the learned Sessions Judge recorded his statement in the positive form inadvertently and as it appears P.W. 24 denied the almost similar suggestion made to him on behalf of Col. Mohiuddin (artillery). Further this witness deposed in Court on 19th October,1997, after more than 22 years of the occurrence and at this belated stage there was no occasion for him to harbour any apprehension of being implicated in Sherniabat's murder case since the cases were filed long ago and moreover the abvoe statement was made while deposing before the Court and not before the police.

Accordingly I am in complete agreement with the views of the second learned second Judge that the learned Sessions Judge inadvertantly recorded the suggestion in question in affirmative although P.W. 24 replied in negative.

The first learned Judge also disbelieved P.W.46 about his identification of the appellants Farooque Rahman, Sultan Shahriar Bazlur Huda and other accuseds at Bangabhaban on the reasoning that there was nothing on record to show that he knew them earlier. This finding of the learned Judge is inconsistent, inasmuch as, the learned Judge himself believed the presence of these appellants at Bangabhaban and made adverse inference regarding their presence only in the oath taking ceremony on the ground that they, being junior army officers, were not supposed to remain present at Bangabhaban in the President's oath taking ceremony . P.Ws. 15 and 47 also deposed that they saw them at Bangabhaban. Therefore, the learned second Judge has rightly believed witness P.W. 46

As it appears according to the prosecution story the appellants along with other accuseds arranged the parade on the night on 14th August, and in the army rule though there was no provision for taking arms at such exercise they took arms from the armory and marched towards Road No. 32, Dhanmondi where the President was residing, Minto Road where the Cabinet Ministers were staying, the Rdio Station and in front of Rakhibahini Head Quarter and setting up cannons aiming Rakhibahini Head Quarter and Road No. 32 to use those if there was any resistance from the Rakhibahini or other forces and they also took cannon with ammunition and tanks which could not be taken out of cantonment during normal time. These arms, ammunition and heavy artillery like cannons and tanks they carried just before the occurrence and set up those mainly with the motive to resist and prevent the counter attack of Government and other security forces. These preparations of the appellnts and other accuseds have relevancy with the occurrence in that they took those measures in a calculated way to bring about the premeditated action of killing. After taking all these precautions, they attacked the house of the President situated at Road No.32 Dhanmondi R/A and killed the President and all the members of his family.

In support of the subsequent conduct, of the appellants ad other accuseds the prosecution has examined P.Ws. 8,9,12,15,16,20,23,37,42,44,45,46,47,49 and 60. P.W. 9 stated that on 15th August at about 3 P.M. he went to the house of the President as per direction of P.w.45 for ascertaining the condition of that house where Bazlul Huda received him at the gate of that house and under the supervision of Mohiuddin(Lancer) the dead body of President was sent to Tongipara through a helicopter. P.W.12 stated that he saw Farooque Rahman while he was coming towards Mirpur Road from Road No.32 with a tank at 7.15 A.M. on 15th August. P.W.15 saw Farooque Rahman, Sultan Shahriar, Bazlul Huda and Mohiuddin (lancer) at Bangabhaban on the day of occurrence at about 4 P.M. P.W.16 saw Farooque Rahman on a jeep in front of Shanghai Restaurant, Kalabagan, Mirpur Road, on 15th August in the morning while he was approaching towards south of the house of the President. P.W. 16 after going to Bangabhaban also saw Mohiuddin (artillery) with his troops. P.W.20 stated that he saw Shahriar and Farooque Rahman and other officers inside Bangabhaban after the occurrence. P.W.23 stated that after the incident he did not see Farooque Rahman and Mohiuddin (Lancer) in the Lancer Unit and heard that they were then staying at Bangabhaban. P.W.37 stated that after the incident he at the Studio No.2 of the Radio Station, saw Shahriar, along with other co-accuseds were preparing speech of Khondker Mostaque Ahmed of Bangladesh Radio on 15th August 1975 at 7 a.m.. P.W.42 stated that he found Shahriar , Mohiuddin (lancer) and Farooque Rahman in the Radio Station on 15th August when the Chief of Army, Navy and Air Force came there to broadcast their allegiance by radio and that he also found Bazlul Huda and Nur when he went to road no.32 on 15th August at 11 a.m. for taking pictures of the victims as per direction of the authority and that he also saw Shahriar Rashid, Farooque Rahman, Mohiuddin (lancer) and other accused persons in the President's room at Bangabhaban in the afternoon. P.W.44 stated that while the officers involved in the killing of 15th August and 3rd November, were staying in Bangkok, the so called "sepahi biplob" (armed revolution) occurred on 7th November, 1975, and Major General Ziaur Rahman became the exclusive powerful leader and that after taking over power, he repatriated the officers involved in the killing of 15th August and 3rd November

by arranging their service at foreign embassies of Bangladesh. He further stated that those officers made abortive attempt of revolt against General Ziaur Rahman and thereafter they were removed from the service and thereafter they led their lives abroad as fugitive. The appellants did not challenge the statements of this witness. P.W.45 stated that at the oath taking ceremony of Khondker Mostaque Ahmed as President, Bazlul Huda, Farooque Ahmed and other co-accuseds were present. P.Ws 46 noticed Farooque Rahman, Shahriar, Bazlul Huda and other accused persons were sitting beside Khondker Mostaque Ahmed, who was sitting on the chair of the President at about 3.30 P.M. at Banga Bhaban on the day of occurrence. P.W.47 also saw Farooque Rahman, Shahriar Mohiuddin (lancer) and Bazlul Huda at the oath taking ceremony of Khandakar Mustaque Ahmed and this Cabinet and He that after the incident of 3rd November, Major Abdur Rashid and other accused persons left for Bangkok. P.W.49 stated that on 15th August Major Dalim introduced him with Farooque Rahman after broadcasting the allegiance by the Chiefs of Army, Navy and Air Force in the Radio Station. P.W.60 stated that a file was opened for absorbing some army officers in the Ministry of Foreign Affairs on 8th June, 1976 and thereafter, as per letter of Army Head Quarter under Memo. dated 15th August, 1976, Mohiuddin (lancer), Bazlul Huda, Sultan Shahrier and other co-accused have been deputed to the Ministry of Foreign Affairs.

The third learned Judge however was of the view that the deployment of some of the appellants and other accused persons in the foreign embassies could not be taken as reward for their involvement in the carnage of 15th August and so no adverse inference could be drawn against them by reason of such employment.

But as it appears most of them were removed army officer and P.Ws. 44 and 47 proved that they were absorped in service by General Ziaur Rahman after he came to power on 7th March 1975 and earlier when Khondker Mostaque Ahmed, their selected person, was dethrowned by Khaled Mosharref they left the country on the evening of 3rd March . If the evidence of P.Ws. 44, 45 and 47 are read along with those of P.W.60 it will appears that the appellants and other co-accuseds, as part of their premeditated plan arranged night parade and then came out from the cantonment with tanks and other arms

without authorization and some then went to the house of the President situated at Road No. 32, and also other key points such as Radio station, Minto Road, BDR Head Quarter, Rakhibahini Head Quarter with a view to prevent the Government and the security forces from interfering their object of killing the President and his family members and that after killing of the President and his family members they compelled the Chief of Army , Navy and Air Force to express their allegiance of the killing and accepting Khondker Mostaque Ahmed as the President of the Republic and that thereafter they stayed at Bangabhaban and guarded Khondker Mostaque Ahmed and the Radio Station so that any other could not topple Khandakar Mushtaque Ahammed and they attended in the oath taking ceremonies of the President his Cabinet although they were not supposed to be present at such national ceremonies being petty officers in the army and some of them including the appellant Sultan Shahriar were removed officers and some of them arranged for burying the dead bodies and the act of fleeing away from the country after the incident of 3rd November and taking shelter to Bangkok and thereafter their absorption at the different Bangladeshi Missions by late General Ziaur Rahman and then they are removal for the service after their abortive attempt to revolt against Ziaur Rahman and their staying abroad are the the circumstances which prove that they were involved in the killing of the President and other members of his family. These conducts of appellants other the accused persons are relevant under section 8 of the Evidence Act and may be taken as corroborative evidence for furnishing further prove of the guilt of the appellants and other appears and other accused persons.

The above evidence prove that the appellants and other accuseds made criminal conspiracy to murder the President and the members of his family.

Regarding the fifth ground i.e. the murder of the President and the members of his family, the learned conunsels for the appellants made common submissions that the learned Judges of the High Court Division upon superficial consideration of the evidence on record and on mere conjacture and surmise confirmed the death sentence of the appellants and failed to consider that there is no legal evidence on record in support of the charges under section 302/34 of the Penal Code and that the appellants along with other

accuseds attended the night parade merely as a routine work and further their presence at the parade could not be connected with the murder of the President and his family members and the killing of the President and his family members was a revolt to overthrow the then Government of Sheikh Mujibur Rahman and in consequentce of such revolt only, the President and his family members were killed by the army in which the appellants were not involved.

Mr. Abdullah-Al-Mamun, learned counsel appearing for the appellant Bazlul Huda and Mohiuddin(Lancer) further submitted that there is no reliable evidence in support of the prosecution story that these appellants have been recognized by the informant at the place of occurrence, the allegation that Bazlul Huda shot to death Sheikh Kamal and Bangabandhu is also based on contradictory evidence on record; the prosecution has withheld vital witnesses such as, Sheikh Yunus Ali, Col. Moshiud Doula and Col. Mahmudul Hasan purposely as their evidence would have been unfavourable to the prosecution and therefore an adverse inference may be drawn against the prosecution for withholding those vital witnesses; the allegation that Mohiuddin (Lancer) was taking the President down from the first floor is based on no reliable evidence on record and further the recognition of Mohiuddin (Lancer) by the witnesses at the place of occurrence is totally absurd and unbelievable story and further the evidence on record about the presence of Bazlul Huda and Mohiuddin (Lancer) at the place of occurrence is also contradictory.

Mr.Khan Saifur Rahman, learned counsel appearing for the appellants Syed Farooque Rahman and Mohiuddin (artillery) further submitted that there is no evidence in support of the charge for causing the murder of the President and the members of his family by the appellants and P.W.1 is not an eye witness of the occurrence and Mohiuddin (artillery) is not an FIR named accused and his inclusion in the case is a product of concoction; the story of hoisting of flag and playing bugle in the house of the President just immediate before the occurrence as stated by the P.Ws are not believable since P.Ws. 1-3 stated that at that time the assailants were already in the house of the President; there is at all no evidence on record to show the presene of Farooque Rahman

in the house of the President at the relevant time ; the presence of Mohiuddin (artillery) with cannon at Kalabagan playground has not been substantiated by adducing reliable evidence; in view of withholding of tank crews an adverse presumption may be drawn against the prosecution as if they were produced they would not have supported the prosecution case; in view of the evidence as revealed from the lips of the prosecution witnesses the real planner of the incident was Jobaida Rashid; from the evidence of the P.Ws. it will also be evident that the appellants had no common intention or preconcert mind of their being involved in the murder of the President and his family members and therefore, the conviction of the appellants under section 302/34 was illegal.

Mr. Abdur Rezzaque Khan, learned counsel appearing for Sultan Shahriar further submitted that there is no reliable evidence regarding Sultan Shahriar complicity in the murder of the President and members of his family; he did not go to House No.677 at Dhanmondi; the High Court Division erred in law in relying upon the testimony of P.W. 14 to prove his presence at the night parade at Balurghat even though there is no corroborating evidence at all and if the evidence of P.W.14 is disbelieved there remains only evidence against Sultan Shahriar regarding his presence at the Radio Station at about 6 A.M. on 15th August and this fact has no nexus with the murder of the President and his family members as being reemployed with effect from 15th August, 1975, his presence in the Radio Station was a part of his official duty which he had carried out as per direction of his Commanding Officer.

The learned counsels, in support of their contentions, referred the cases of Nurul Islam and others Vs. The State , 43 DLR (AD)6, Hazrat Khan @ Hazrat Ali Vs. the State, 54 DLR 636, Moslemuddin and others Vs. The State, 38 DLR (AD)311, Safdor Ali Vs. The Crown, 5 DLR(FC)107 and Moyezuddin and another Vs. The state, 31 DLR(AD) 37.

Mr. Anisul Huq and learned Attorney General submitted that the evidence that came forth from the deposition of the witnesses proved the charge of murder and further Ext. X, the copy of the “Sunday Times” and also the electronic evidence, Material Exts.12 and 32 also proved charge of murder. The learned Attorney General and Mr.

Azmalul Hossain to prove the charge of murder also relied upon the extra judicial confessions of the appellants as disclosed by P.Ws. 8 and 15.

At first the submission made by the counsels for the State in respect of the publication as made in Sunday Times, Ext. X, and also Electronic evidence Material Ext Nos. 32 and 12 are taken up for consideration.

P.W. 58, exhibited the issue of the "Sunday Times" dated 38.05.1976, which was marked as Ext X with a note of objection by the defence, stating that he while acting as Director Ministry of Foreign Affairs, at the request of Criminal Investigation Department, C.I.D, collected a copy of the "Sunday Times" through the than Councilor of Bangladesh High Commission at London, in which the appellant Farooque Rahman, admitted his complicity by saying "I helped to kill Sheikh Mujibur Rahman, dare to put me on trial". P.W. 58, also proved the forwarding letter with the signature of the Councilor by which the above journal was sent to him. P.W.58 also exhibited with objection Exhibited 32, a video cassette broadcasted by Granada Independent Television in the U.K on 2nd August 1976, along with notarized certificate issued by Keith Robert Hopkings, Notary Public, certifying that to the best of his knowledge, information and belief, the said video cassette is an authentic copy of a television programmee. Further Mr. Boktiar Hossain, P.W. 59, a local video recorder, also proved the video cassette, Exhibit-12, in which Major Rashid and Farooque Rahman, on an interview by Anthony Mascaranthus stated that they killed Sheikh Mujib along with his family. According to the Learned Attorney the issue of "Sunday Times", Ext-X, is a document within the meaning of section 3 of Evidence Act in which Farooque Rahman admitted his participation in the killing of the President while giving his interview and further the incident of 15th August 1975 being a sad historic fact in Bangladesh, any book or document in reference to the above incident may be taken as judicial notice under the provisions of section 57 of the Evidence Act on such a fact and further since Faruque Rahman during cross examination did not deny his said interview with Aunthony Mascaranthus, the video cassettes, Material Exhibits- 32 and Ext 12, may also be admitted as evidence.

However, as it appears in terms of section 57 of Evidence Act, the Court itself may take cognizance of certain matter which are so notorious or so clearly established that the evidence of their existence is deemed unnecessary. But as it appears the alleged statement made by appellant Farooque Rahman to a reporter of the issue of the "Sunday Times" is in the nature of hearsay evidence as the prosecution did not examine the reporter who interviewed the above appellant.

Regarding the admission of digital or electronic evidence, as it appears the party seeking to admit any statement or admission of any person recorded in a compact disk or video cassettee or any interview conducted by any television channel relating to a relevant a fact or facts in issue, must also produce the original compact disk or video cassette or the programmee published in the television channel with the certificate of the producer of the programmee certifying the the date and place of the record of the programmee and further the signature of the producer in the certificate has also to be proved. In the present appeals, these requirements have not been met.

However as regards admissibility of a statement recorded in a compact disk or video cassette or in a television channel, if the accused does not deny his statement or admission, there is no difficulty in admitting such digital or electronic evidence as documentary evidence. However if the accused denies the statement or admission, the question of its admissibility has to be looked into under the prevailing law of evidence.

As it appears the expression ‘evidence’ has been defined in section 3 of the Evidence Act which is as follows:

‘Evidence’ means and includes-

(1) all statements which the Court permits or requires to be made before it by a witness, in relation to matters of fact under enquiry; such statement are called oral evidence;

(2) All documents produced for the inspection of the Court, sucht documents are called documentary evidence.

However in India sub section 2 of section 3 of the Evidence Act as above has been substituted in the year is as follows:-

(2) all documents incluidng electorinic record produced for the inspection of the Court; such documents aere called documentary evidence.

So in terms of the above amendement, in India, in criminal matters, evidence can also be by way electornic record such as video cassette, compact disk and video conferencing.

In the case of State of Maharashtra V. Dr Praful B. Desai, (2003)4 SCC 601 the Supreme Court of India ruled that the evidence taken from a witness through vedio-conferencing is compatible with the requirements of the Code.

The modes for recording evidence has been expressly laid down in section 353 of the Code of Criminal Procedure which provides that except as otherwise provided, all evidence taken under chapter XX, XXII, and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his advocate. This shows that though the actual physical presence of the accused is necessary while taking evidence, it may be dispensed with in certain circumstances.

However the Evidence Act is 1872 a procedural law and at the same time is an ongoing statute. According to Francis Benion, the principle of interpretation of an ongoing statute should be that Parliament intentds the Court to apply to an ongoing Act a contruction that continuously updates its wordings to allow for changes in an Act which was initiatly framed. While it remains law it has to be treated as always speaking. Further Bhagabati J in the case of National Textile Workers' Union V.P.R Ramakrishnan, AIR 1983 S.C. 75 Bhagwati, J. speaking for the majority observed as follows:

> "We can not allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the

way of its growth. Law must therefore constantly be on the move adapting itself to the fast-changing society and not lag behind."

Accordingly it is high time to evaluate how technological developments are transforming the functioning of the legal system. With the emergence of newer technologies, uncertainties arise with regard to the application of existing laws and occasionally there is a need to create new laws to regulate their use. However at the sametime it is to be kept in mind that the need for regulating new technologies is usually prompted by social and cultural perceptions about the advantage of a particular technology or alternatively the scope of its misuse.

The challenges before the criminal justice system are to balance the rights of the accused while dispensing speedy and effective justice. The criminal justice system machinery must also meet the challenge of effectively dealing with the emerging forms of crime and behaviour of criminals. It is thus hoped that the obsolete laws or obsolete portions of laws prevailing in the country will be amended and new suitable laws will also be enacted to respond to the needs of changing society as was done in India in respect of electronic evidence.

However because of the express provisions in the existing law as referred earlier as to how evidence are to be taken, I am of the view that the electronic evidence produced by the prosecution in this case can not be used.

Regarding the extra judicial confession as disclosed by P.Ws.8 and 15 in support of charge against the appellants for murder, as it appears, as those statements have not been challenged by the defence during cross-examination.

As it appears P.W.8, who was working in the army in the rank of Captain during the relevant time, in his deposition stated that being deputed by Chief of Army Staff to report after ascertaining the real position in the house of the President, he visited the said house on 15th August at about 8.45 A.M. P.W. 8 being stated that Major Nur Chowdhury and Bazlul Huda received him and thereupon Bazlul Huda took him inside the house. He narrated the actual position as noticed their as follows:

“LÉ¡-ÃVe ýc¡ Bj¡¢cN-L h¡s£l ¢ial ¢eu¡ ®N-m h‰hå¥l h¡s£l ¢l¢pfne l²-j ®V¢m-g¡e ®V¢h-ml f¡-n ®nM L¡j¡-ml m¡n …¢m¢hÜ lJ²¡J² AhØq¡u ®j-T-a ®c¢Mz B¢j aMe hSm¤m ýc¡-L ¢S‘¡p¡ L¢l ®nM L¡j¡m-L ®Le ®j-l-Re- EJ-l hSm¤m ýc¡ S¡e¡u, ®nM L¡j¡m ®g¡-e h¡¢q-l Mhl¢c-a¢Rm- ®pC SeÉ a¡q¡-L ®j-l¢Rz

I l²-jl ®V¢h-ml p¡j-e m¤w¢N fl¡ AhØq¡u …¢m¢hÜ lJ²¡J² AhØq¡uB-l¡ HLS-elm¡n ®c¢M-a f¡Cz LÉ¡-ÃVe ýc¡-L ¢S‘¡p¡ L¢l “®Le a¡-L ®j-l-Re- Sh¡-h ýc¡ S¡e¡u ®p f¤¢m-nl ®m¡L a¡-L Q-m ®k-a hm-m ®p aLÑ öl² L-l ®cu- ®pC SeÉ a¡-L Bjl¡ ®j-l¢Rz” avfl hSm¤m ýc¡ Bj¡¢cN-L ¢p¢sl ¢c-L ¢e-u k¡uz ¢p¢sl c¢re ¢c-L h¡b ®cM¡Cu¡ h-m “HM¡-e ®nM e¡-p-ll m¡n B-Rz” Bjl¡ h¡b l²-j …¢m¢hÜ lJ²¡J²AhØq¡u e¡-p-ll m¡n ®c¢Mz ýc¡-L ¢S‘¡p¡ L¢l “a¡-L ®Le ®j-l-Rez” LÉ¡-ÃVe ýc¡ ®L¡e EJl ®cu e¡z

Hlfl LÉ¡-ÃVe hSm¤mýc¡ Bj¡-cl-L ¢eu¡ ¢p¢sl ¢c-L E-Wz ¢p¢sl L-uL d¡f E¢Wu¡ h‰hå¥ ®nM j¤¢Sh¤l lqj¡-el m¡n ®c¢Mu¡ Bjl¡ qaiÇj qCu¡ k¡Cz p¡c¡ dfd-f f¡ÇS¡h£ f¢l¢qa h¤-Ll h¡j f¡-n, ®f-Vl X¡e ¢c-L X¡e q¡-a AbÑ¡v n¡l£-ll ¢h¢iæ S¡uN¡u …¢m¢hÜ lJ²¡J² AhØq¡u f¡ i¡S L-l ¢Qv qCu¡ ¢p¢sl j-dÉ h‰hå¥ ®nM j¤¢Sh¤l lqj¡e f¢su¡ B-Rz f¡-n a¡q¡l Qnj¡J ®c¢M-a f¡Cz B¢j LÉ¡-ÃVe ýc¡-L ¢S‘¡p¡ L¢lm¡j “Bfe¡l¡ ®Le ®c-nl ®fË¢p-X¾V-L HC i¡-h j¡l-mez” EJ-l LÉ¡-ÃVe ýc¡ h¢m-me B¢j kMe cmhmpq h‰hå¥ ®nM j¤¢Sh¤l lqj¡-el L¡-R k¡C ®p aMe h-m “ ®a¡jl¡ ®Le Bj¡l h¡p¡u B¢pu¡R- ®L ®a¡j¡-cl-L f¡W¡Cu¡-R- n¢gEcCõ¡q ®L¡bh¡u- HC h¢mu¡ Bj¡-L TVL¡ j¡-l- aMe B¢j f-s k¡Cz Cq¡l fl Bjl¡ h‰hå¥-L …¢m L¢lz a¡lflBj¡-cl-L ¢eu¡ LÉ¡-ÃVe ýc¡ M¡h¡l O-ll f¡-n ®N-m Bjl¡ ®pM¡-e (h‰hå¥l ®hX l²-jl clS¡l) ®hNj j¤¢S-hl …¢m¢hÜ lJ²¡J² m¡n ®c¢M-a f¡Cz HR¡s¡ h‰hå¥l ®hXl²-jl ®XÊ¢pw ®V¢h-ml p¡j-e …¢m¢hÜ lJ²¡J² AhØq¡u B-l¡ Q¡¢l¢V m¡n f-s b¡¢L-a ®c¢Mz

aMe B¢j LÉ¡-ÃVe ýc¡-L ¢S‘¡p¡ L¢l “ ®Le H-cl-L eªnwpi¡-h qaÉ¡ L-l-Rez” Sh¡-h LÉ¡-ÃVe ýc¡ hm-me pnØH ®~p¢eLl¡ out control qCu¡ H-cl-L qaÉ¡ L¢lu¡ m¤V f¡V L¢lu¡-R Hhw ®pC SeÉ ®p ®~p¢eL-cl-L h¡¢q-l

l¡¢Mu¡-Rz" LÉ¡-ÃVe B-l¡ S¡e¡u "L-ZÑm S¡¢jm-L h¡¢q-l ®j-l a¡l m¡npq N¡s£ h¡s£l ¢ia-l¢-f-e l¡M¡ qCu¡-Rz"

It thus appears that appellnat Bazlul Huda admitted to this witness that he killed Sheikh Kamal because he was giving information about the incident out side. He also admitted that they killed one security personnel as he was altercating with them and thereafter on query about the cause of death of Sheikh Naser , Captain Huda ramained silent and on further query about the killing of the President he replied that as the the president queried why they came there and asked about the Shafiullah that prompted him to shot him and on further query about the killing of womenfolk Bazlul Huda replied that the situation went beyond their control and the sepoys killed them There is no denied either directly or indirectly about those admissions of Bazlul Huda to P.W.8. these evidence remain uncontroverted whther these statements may be taken as extra judicial confession in which Bazlul Huda has admitted about his active role and killing of Sheikh Kamal by gun shot whether the other appellants Farooque Rahman, Sultan Shahriar. Mohiuddin (lancer) and Mohiuddin can be convicted relying upon this statement. It thus shows that while in Bangabhahan P.W. 15, found Farooque Rahman, Major Abdur Rahsid, Sultan Shahriar, Major Shariful Hoque Dalim, major Aziz Pasha, Mohiuddin(lancer), Bazlul Huda and others were gossiping during which they disclosed how they killed the President and his family members.

On behalf of the appellants it was argued the prosecution did not raise this point in the Courts below and therefore, this point can not be taken into consideration at this stage and was further the alleged statement not being communicated to P.W.5 by this witness in no circumstances the same can be treated as extra judicial confession. P.W. 15 in his statement stated that

> "-k-qa¥ Bjl¡ h‰ ih-e L¡S Ll¡l p¤h¡-c A¢i' ¢Rm¡j ®pC L¡l-e jÇœ£ f¢lo-cl nfb Ae¤ù¡-el hÉhØq¡ Ll¡l SeÉ Bj¡-cl Efl c¡¢ua¥-cuz ®pC Ae¤k¡u£ Bjl¡ EJ² c¡¢uaÄ f¡me L¢lz Hlfl ®jSl ®~puc g¡l²L lqj¡e, ®jSl M¾cL¡l Bx l¢nc, ®jSl p¤ma¡e n¡q¢lu¡l, ®jSl n¢lg¥m qL X¡¢mj, ®jSl B¢SS f¡n¡, ®jSl j¢qE¢Ÿe (mÉ¡Çp¡l), ®jSl hSm¤m ýc¡, LÉ¡-ÃVe

j¡-Sc, ¢lp¡mc¡l ®j¡p-mjE¢Ÿe Hl Lb¡h¡aÑ¡u S¡e-a f¡¢l ®k, a¡q¡l¡ h‰hå¥ ®nM j¤¢Shl lqj¡e-L ü-f¢lh¡-l AbÑÉ¡v a¡q¡l ØH£, a¡q¡l ¢ae ®R-m, 2 c¤C ®R-ml hE J i¡C ®nM e¡-pl Hhw L-eÑm S¡¢jm ®L h‰hå¥l 32 ew ®l¡XØq h¡s£-a qaÉ¡ L-lz" ..... " a¡q¡l¡ c¡f-Vl p¡-b h¢ma ®cn-L h¡Q¡Ch¡l SeÉ Bjl¡ HC qaÉ¡ L¡ä OV¡Cu¡¢Rz"

The appellants have not denied those statements by way of cross-examining this witness or by way of giving him any suggestion. On behalf of Sultan Shahriar suggestion was given to this witness in evasive manner and the above statement as made by this witness was not directly. Now the question is whether the above statement can be taken as extra judicial confession since it has not been communicated by the above accuseds to this witness by stating to him that they killed the President and his family members. It also appears that this point has not been canvassed in the Courts below. But this being a question of law as to whether any such statement made by an accused relating to the incident to which he has faced trial and directly relevant to the point involved in this case, its implication should be considered.

From the statements quoted above it appears that admittedly Farooque Rahman, Sultan Shahriar and Mohiuddin (artillery) have in course of their conversation that they have killed and other members of his family including Col. Jamil. It is also a fact that this statement has not been communicated to P.W.15 but this witness has overheard the same. As it appears admissions and confessions are dealt with in sections 24-30 of the Evidence Act in respect of admissibility of those. These are exception to the general rule of evidence and they are placed in the category of "relevant fact" since they are declarations against the maker, the probative value of such admissions or confessions do not depend upon its communication to another and they can be admitted into evidence if they are proved by a witness.

A confessional soliloquy is an expression of conflict of emotion, a conscious effort to stifle the pricked conscience; or an argument to find excuse or justification for his act or a pertinent or remouse full act of exaggeration of part in the crime; or a joyous perception for the act is a direct piece of evidence.

In Sahoo V. State of Uttar Pradesh, AIR 1966 (SC) 40 the convict Sahoo developed illicit intimacy with his daughter-in-law Sundar Patti(son's wife). There was quarrel between them on a previous occasion of the occurrence and Sundar Patti ran away to the house of one Md. Abdullah, a neighbour. The convict brought her back and passed the night with her in one room of their house. On the morning of the date of occurrence Sundar Patti was found with injuries in the room and the convict was not found present. Sundar Patti was admitted in the hospital in the afternoon and she died after 12/13 days. The convict was put on trial for the charge of murder. The evidence produced by the prosecution was an extra judicial confession and circumstantial evidence. The extra judicial confession was proved by 4 witnesses stating that on the fateful morning at 6 A.M. they saw the convict was going out of his house murmuring that "he had finished Sundar Patti and thereby finished the daily quarrels." The question was whether the mutterings of the accused proved by four witnesses could be taken as extra-judicial confession.

The Supreme Court of India in the facts of the given case observed as follows:

> "But there is a clear distinction between the admissibility of evidence and the weight to be attached to it. A confessional soliloquy is a direct piece of evidence. It may be an expression of conflict of emotion, a conscious effort to stifle the pricked conscience; and argument to find excuse or justification for his act; or a penitent or remorseful act of exaggeration of his part in the crime. The tone may be soft and low; the words may be confused; they may be capable of conflicting interpretations depending on witnesses, whether they are biased or honest, intelligent or ignorant, imaginative or prosaic, as the case may be. Generally they are mutterings of a confused mind. Before such evidence can be accepted, it must be established by cogent evidence what were the exact words used by the accused. Even if so much was established, prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may be used only as a corroborative piece of evidence."

Mr.Azmalul Hossain, Q.C. in this regard has referred to the case of State of U.P. V. M.K.Anthony, AIR 1985 SC 48 on this point. In that case the accused killed his wife and two children. Witness P.W.9 stated that. the accused was seen sitting in the adjoining room and on seeing him this witness asked him as an what has been found about the murder and in reply the accused reclaimed "to God to excuse him that he had committed mistake as he had murdered his wife and two children." The learned Sessions Judge reproduced the statement of this witness as follows:

> "Oh God Pardon me, I have done blunder, I have murdered my wife and children."

Question arose before the Supreme Court of India as to whether the above is extra judicial confession deposed by P.W.9 can be the sole basis for conviction of the accused. The Supreme Court of India considered this point in the light of the views taken in the case of Sahoo (supra) and other decisions and was of the view that there is neither any rule nor of prudence that evidence furnished by extra judicial confession can not be relied upon unless corroborated by some other credible evidence. The Indian Supreme Court on evaluation of the earlier decisions AIR 1974 SC 1545, (1975) 1 SCR 747, AIR 1975 SC 258, AIR 1966 SC 40 and AIR 1977 SC 2274) concluded as follows:

> "It thus appears that extra-judicial confession appears to have been treated as a weak piece of evidence but there is no rule of law nor rule of prudence that it cannot be acted upon unless corroborated. If the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test, on the touchstone of credibility, if it passes the test, the extra-judicial

> confession can be accepted and can be the basis of a conviction. In such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach the same can be relief upon and a conviction can be founded thereon."

But however in the present appeals there is difference in the disclosure of extra judicial confession by P.Ws. 8 and 15 as whatever admission made by Bazlul Huda and proved by P.W.8 was direct in nature but has the element of hearsay and the other one by P.W.15 is indirect in nature and Further the statements of the appellants have not been depicted in verbatiun as was done in the above cited case.

As it appears to prove the charge to leveled against the appellant Bazlul Huda, the prosecution examined A.F.M.Mohitul Islam (P.W.1), Habilder Md. Quddus Sikder (P.W.4), Nk.Subedar Abdul Gani (P.W.5), Habilder Ganner Sohrab Ali (P.W.6), A.L.D. Sirajul Huq (P.W.12), Lt.Naik Abdul Khalek (P.W.21), Habilder Abdul Aziz (P.W.22). The learned Judges of the High Court Division have exhaustively reproduced their evidence in their judgment.

P.W.1, the informant, was deputed at House No. 677of Road No.32, Dhanmondi as the resident P.A. of the President during the relevant time. He stated that on the day of occurrence at about 4.30 /5-00 A.M., the telephone mechanic Abdul Motin woke him up stating that the President wanted to talk him over telephone and after he took the receiver the President directed him to connect the Police Control Room stating that the miscreants attacked the house of Seniabat, the brother in law of the President. He tried but failed to connect the police control room and then though got convection of Ganabhaban but there was no response. In the mean time the President came down into the office room and wanted to talk himself by taking the receiver from him. At that time showers of bullet hit the wall of the office room breaking the window glass whereupon they laid down beside the table. After a break of firing the President went upstairs and Sheikh Kamal got down and stood on the verandah. At that time 3/4 army personnel in khaki and black dress with arms in their hands stood in front of them and the appellant Bazlul Huda shot on the leg

of Sheikh Kamal who then fell down and told P.W.1 to intimate the assailant that he was the son of Sheikh Mujib and when P.W.1 informed the assailant, about the identity of Sheikh Kamal appellant Bazlul Huda brush fired aiming Sheikh Kamal. One bullet hit his leg and another hit P.W. 50's leg. Sheikh Kamal died on the spot. At one stage P.W.50 wanted to take out P.W.1 out through the back side door and when they came nearer to the door, Bazlul Huda grabbing his hair pulled him back. There were other armed army personnel with him. Bazlul Huda lined up P.W.1 and others in front of the main gate. Some times thereafter he heard shouting noise of Bangabandhu and heard indiscriminate firing and also screaming of women. He also narrated how Sheikh Naser was shot to death and the uttering of Bazlul Huda on query made by Farooque Rahman that "all are finished". On hearing the above uttering of Bazlul Huda, he understood that the President and his family members were brutally killed. The defence in course of the cross-examination did not challenge the statement of this witness regarding killing of the Sheikh Kamal and therefore, the statement of this witness remain uncontroverted.

P.W.4, an army jawan posted in the field artillery regiment and during the relevant time deputed at the house of the President along with other army personnel of his company, stated that Bazlul Huda and 3 other army personnel were from the field artillery units, on 15th August, 1975 at about 5 A.M. he along with other guards noticed that Subedar Major Abdul Wahab Joarder was getting down from the jeep in front of the house situated on Road No.31 where he along with other guards were staying using it as temporary barrack for guarding the house of the President; thereafter he along with other guards started towards the house of the President and after reaching there they hoisted flag upon playing bugle and at that time he noticed indiscriminate firing towards the house of the President from the southern side of the lake and at that time black and khaki dressed army personnel entered into the house by shouting 'hands up' and at that time he saw Bazlul Huda, Mohiuddin (lancer) and another at the gate. On seeing Sheikh Kamal, who was standing on the verandah, Bazlul Huda shot at him with sten gun and Sheikh Kamal fell down inside the reception room. Bazlul Huda again shot at Sheikh Kamal and killed him. Thereafter Mohiuddin (lancer) with his force went to the first floor by firing;

thereafter Bazlul Huda and Noor with their force followed him this witness as per their direction also followed them. He saw that Mohiuddin and his force were taking President down to the ground floor at that time the President asked "-a¡l¡ ¢L Q¡p" and soon thereafter, Bazlul Huda and Major Nur shot at Bangabandhu with their stan guns, who died on the spot. The statement of this witness that he saw Bazlul Huda and Mohiuddin (lancer) at the gate, that Bazlul Huda, Major Noor and his force approached to the first floor and that Bazlul Huda and Major Noor shot at the President on the stair had not been denied by Bazlul Huda in course of cross-examination or by giving suggestion to him and then the incriminating part of the statement of this witness remain uncontroverted. Appellant Mohiuddin (Lancer) also did not challenge the testimony of this witness as regards his recognition by this witness at the gat of the house of the President and also the statement of this witness that he saw Mohiuddin (Lancer) and his force bringing Bangabandhu down to the ground floor.

P.W.5, also a jawan of artillery unit and was deputed at Bangabandhu's house as security guard, should that he was present at the house of the President at the time of occurrence at about 5 A.M and that after hoisting the flag he noticed indiscriminate firing towards the the house of the President whereupon when he went towards the guard room, 5/7 minutes thereafter the firing stopped and at that time he saw Bazlul Huda, Major Noor and other jawans in khaki and black dress got down from a vehicle infront of the house of the President and Bazlul Huda queried to him and then he talked with another over wireless, soon thereafter Mohiuddin(lancer) and his force came from eastern side and by saying " hands up" entered into house of the President by opening fire and that he along with other guards was kept confined into the guard room. The defence did not challenge his statement that he recognised Bazlul Huda and Mohiuddin(lancer) while they were entering into the house of the President by firing.

P.W.6 who was also a member of the Guard Regiment at the house of President stated that on 15th August at about 4.30 a.m. Habilder Gani made all the security staff to fall-in infront of guard room of the house of the President and sometimes thereafter 2 /3 trucks with force in black dress stopped towards the western side of Bangabandhu's

house and there was firing towards house of the President from the lake side and in corroboration with the testimonies of P.Ws. 1 and 4, he stated that Bazlul Huda, another officer of Lancer unit with black dress, and some jawans of artillery unit entered into the house of the President. Soon thereafter Bazlul Huda and another shot at Sheikh Kamal who rolled down inside the reception room on sustaining gun shot injury. Bazlul Huda again shot at him. Thereafter Bazlul Huda and another officer went to the first floor. Some times thereafter he heard sounds of firing and screaming of women. In cross-examination Bazlul Huda did not challenge the incriminating part of the statement of this witness and therefore, the statement that P.W.6 that he saw Bazlul Huda while he shot to death of Sheikh Kamal remain uncontroverted.

P.W.11 stated that he attended the night parade on 14th August which was arranged infront of his store. He identified Bazlul Huda, Mohiuddin(lancer) and Farooque Rahman there. He stated that at about 4 A.M. when he along with other came near the house of the President by vehicle and at about 4.30 A.M. when they were at about 80 yards west of the house of the President were asked to get down from the vehicvle and then Resalder Sarwar told him to follow the order of Mohiuddin and then Mohiuddin directed them not to allow movement of people infront of the house of the President and to disarm the police on duty. He heard sounds of firing inside the house of Bangabandhu and then heard the order saying 'hands up', that Resalder Sarwar directed him not to allow anybody to enter into Bangabandhu's house and at that time Mohiuddin, Major Noor, Bazlur Huda and others entered into the house of the President, that he heard sounds of firing from the house of Bangabandhu and screaming of women, that Mohiuddin, Major Noor, Bazlul Huda came out and at that time Noor directed Subedar Major to go and see whether all were finished, that Buzlul Huda directed him through Sarwar to disperse the persons standing beside the lakes, that thereafter he heard the sound of movement of tank and one tank came in front of the house of the President wherefrom Farooque Rahman got down and then Mohiuddin, Major Noor, Bazlul Huda and others went to him and talked with him for sometimes , and thereafter Farooque Rahman left with tank. This statement of this witness about the complicity of the

appellant Bazlul Huda in the incident has not been challenged directly or indirectly and thus the statement of this witness remain uncontroverted.

P.W.12, who during the relevant time was serving in the First Bengal Lancer Unit of which Farooque Rahman was the commanding officer, stated that in the parade ground he saw the appellant Bazlul Huda and other accuseds including Farooque Rahman and Mohiuddin (lancer) and that in the second phase of parade which started after 3.30 A.M., he found appellant Bazlul Huda along with other officers including Farooque Rahman, Mohiuddin (lancer) and that Farooque Rahman introduced Major Dalim, Bazlul Huda and another to them and Farooque Rahman briefed them that on 15th August, 1975 a meeting would be held in the university and in the said meeting the President would declare monarchy in the country and that they did not support monarchy and directed the army personnel to follow their direction; thereafter Farooque Rahman directed to bring ammunition from the kote and as per the said direction, they brought ammunition and came to the parade ground; then Mohiuddin(lancer) directed them to board into the vehicles; the army personnel boarded on 3 trucks and the others boarded on another truck; at about 4.30 A.M. they via Balurghat cantonment-rail crossing. Firm Gate and Mirpur Road went Road No.32 Dhanmondi and at the meeting point of Road No.32, Mohiuddin(lancer) directed them to get down from the truck and thereafter Mohiuddin (Lancer) briefed them not to be frightened on hearing sounds of firing and that he directed them not to allow anybody to enter into Road No.32 and thereafter he narrated the other incidents that happened after killing of the President and the members of his family. The appellant did not challenge the incriminating part of the evidence in chief of this witness as regards his recognition of Bazlur Huda, Mohiuddin (lancer), Dalim and Farooque Rahman in the parade ground and the marching of their convoy towards the house of then President.

P.W.21 who was deployed in the Two Field Artillery of Papa Battery during the relevant time, stated that he attended the night parade and thereafter he along with other soldiers was kept towards the southern side of Air Port run way and that at about 2 A.M. their commending officer Major Rashid along with Mohiuddin, (lancer), Bazlul Huda and

other officers came there and Major Rashid told them to make themselves prepared with arms and ammunition as they would be taken to an emergency duty and at about 4.30 A.M. their truck came to Road No. 32 and they were directed to get down from the truck at Road No.32 and the commanding officer then directed them not to allow anybody to move through Road No.32 and that after ajan he heard sounds of firing towards the eastern side and thereafter he came to know that the appellant and other accused persons killed Bangabandhu and the members of his family.

P.W.22, a sepoy of Two Field Artillery during the relevant time stated that he was present at the night parade on 14th night till 12 at night and at about 2.30 a.m. the commending officer Khonkder Abdur Rashid, along with the appellant Bazlul Huda and some other officers, came there and Major Rashid told them to get ready for special duty and if necessary they were required to open fire. He corroborated the testimony of P.W.21 about their coming to Road No.32 and his recognition of the appellant. The appellant declined to cross examine him.

To prove the charge of murder levelled against appellant Mohiuddin (lancer), the prosecution has examined P.Ws. 4, 5, 7, 11, 12, 21, 22.

P.W.4 stated that he recognized Mohiuddin (Lancer) along with appellant Bazlul Huda at the gate of Bangabandhu's house and that this appellant along with the force of his unit ascended to the first floor of the President house of the President by firing and thereafter they brought the President down and when they were on the stair Bazlul Huda and Major Noor shot him to death and that after killing of the President this appellant and others got down and left towards south. In course of cross-examination this appellant did not challenge the statements of P.W.4 regarding the incriminating part of his involvement in the incident and therefore, the evidence that the appellant along with his force entered with into the house of the President by firing and brought Bangabandhu down on the point of arms remained uncontroverted.

P.W.5 corroborated the statement of P.W.4 that this appellant along with his force entered into the house by firing. The appellant has not challenged the testimony of this

witness and thus the identification of the appellant at the place of occurrence and his direct participation in the carnage as deposed by this witness, remain uncontroverted.

P.W.11 had identified this appellant at the parade and also saw two persons in the civilian dress who came out of the office of this appellant's at about 12 at night on 14th August and at that time this appellant called "Huda" to come towards him this witness He also stated that this appellant arranged army dress for those two persons who were in civil dress. While discussing the evidence of this witness about the complicity of Bazlul Huda, the complicity of this appellant has been discussed as well.

P.W.12 also identified this appellant at the parade ground on 14th August and stated that this appellant directed the army personnel who were at the parade to board into the vehicle and at at about 4.30 A.M. they came to the meeting point of Dhanmondi Road No.32 by six trucks via Balurghat, Cantonment-rail crossing - Mohakhali road and Firm gate and he was with the appellant in the same truck and that this appellant directed all of them to get down from the truck at the meeting point of Road No.2 and then this appellant briefed them stating that they should not be frightened on hearing the sounds of firing as those firing will be from the force of Major Dalim who were inside the house and thereafter, this appellant along with some force entered into Road No.32. In course of cross-examination, this appellant did not challenge the incriminating part of his complicity that he entered onthe already house of the President at Road No.32 with his force. The evidence of this witness have been narrated while considering the complicity of appellant Bazlul Huda. In cross-examination, this witness reconfirmed his statement made in his chief regarding his presence at the parade ground and his entering into the house of the President situated at Road No.32 with his force just immediate prior to the occurrence.

P.W.22 made statements corroborating the statements of P.W.21, whose evidence have already been discussed while considering the complicity of Bazlur Huda. He further stated that he along with P.W.21 and other army personnel were dropped on Road No.32 by the side of a canal, that the commander directed them to ensure that no outsider enteres Road No.32, that thereafter he heard sounds of firing and that he along with Naik

Nazrul, sepoy Khalek and others proceeded towards east and found army personnel of artillery unit and lancer units standing in front of a house and on query he came to know that the house belonged to the President; thereafter he along with the guards, commander Nazrul, Khalek and others entered into the house of the President and saw the dead bodies and on coming out of the house and their querry the army personnel standing at the gate, informant then that Mohiuddin(lancer) and other officers killed Bangabandhu and his family members. This appellant did not challenge those incriminating part of the evidence of this witness in course of cross-examination and thus his evidence remained uncontroverted.

To prove the charge of murder levelled against.Farooque Rahman, the prosecution examined P.Ws. 1, 4, 11 and 12.

P.W.1 stated that at the time of occurrence he saw Farooque Rahman at the gate of the house of the President and on in query of Faruque Rahman, Bazlul Huda told him that "all are finished." The recognition of the appellant by this witness has not been challenged in course of cross-examination.

P.W.4 stated that at or about the time of occurrence, Major Farooque came in front of the main gate of the house of the President with a tank and at that time Major Noor, Major Aziz Pasha, Mohiuddin (Lancer) Bazlul Huda and others went to him and talked with him for some time. This witness identified Farooque Rahman in the dock and further stated that some times thereafter Farooque Rahman called Bazlul Huda and Subedar Major Abdul Wahab and decorated Bazlul Huda with a badge of Major and Subedor Abdul Wahab Joarder with a badge of Lieutenant and then he addressed them as Major Huda and Lt. Joarder respectively. The presence of this appellant at the gate of the house of the President at or about the time of occurrence as deposed by this witness has not been denied by this appellant.

P.W.11 deposed that in the night parade on 14th August 1975 he saw 2 I.C. Farooque Rahman and at that time Resalder Moslehuddin saluted him. This witness then narrated about the marching of the troops towards the house of the President and then narrated the killing incident vividly. He further stated that Farooque Rahman came with a

tank at the gate of Bangabandhu's house when Mohiuddin (Lancer) Major Noor, Badlul Huda, Resalder Sarwar and other army personnel of artillery unit went nearer to him, that they talked with him for some time and thereafter Farooque Rahman left with the tank. He identified Farooque Rahman in the dock. He did not challenge the statements made by this witness about his identification in the parade ground and at the gate of Bangabandhu's house with tank at or about the time of occurrence.

P.W.12 made statements corroborating P.W.11 and stated that he saw Farooque Rahman and other accused persons at the parade on 14th August night. He further stated that Farooque Rahman inspected the parade and directed to follow R.D.M. night class and thereafter they were made to fall-in at 3.30 a.m, Farooque Rahman, Mohiuddin (lancer) and other accused persons consulted among themselves by the side of parade ground and then they came in front of them. Thereafter this witness narrated about marching of the troops towards the Road No.32 from the parade ground and also narrated the manner of hearing sounds of firing after reaching to the place of occurrence.

To prove the charge of murder levelled against appellant Sultan Shahriar, the prosecution has examined P.W.14 to show his presence at the night parade at Balurght whereon conspiracy was made to kill the President and his family.

P.W.14 stated that he was present at the night parade on 14th August at Balurghat which ended at 2/ 2.30 a.m., that at that time they were directed to fall-in, that after coming to the parade ground he saw Faorrque Rahman, Mohiuddin and other accused persons and two other persons in civil dress; alongwith them, he also saw Major Rashid with some officers of artillery unit, Farooque Rahman directed them to fall-in for an important task and thereafter he introduced two persons in civil dress as Major Dalim and the other as Major Sultan Shahriar, this appellant Faruque Rahman told that P.W. 14 and other jawans would work with them and that the troops were required to obey their directions. Thereafter, he narrated about the movement of the tanks and the other incidents. The defence did not challenge the statement of this witness that he came at the night parade at Balurghat at 2- 2.30 in civil dress or that Farooque Rahman introduced the jowans about the identity of the appellant. The evidence of this witness so far as it

relates to the incriminating portion about his participation in the night parade and his identification remained uncontroverted.

Admittedly this appellant was a dismissed/released officer from the army and he was not supposed to remain present at the army's parade at mid night on 14th August 1975. The learned counsel of the appellant contended that there is no corroborating evidence of P.W. 14 to show that this appellant was present at Balurghat. But as it appears, this appellant did not deny the statements of P.W.14 about his presence at Balurghat, he also did not give any explanation in his explanation under Section 342 of the Code despite the fact that he was confronted with the statement of P.W.14. There is no rule of law that the uncorroborated testimony of one witness can not be accepted.

As a general rule, a Court may act on the testimony of a single witness, though uncorroborated. Unless corroboration is insisted upon by statute, the court should not insist on corroboration, except in cases where the nature of the testimony of the single witness itself requires that corroboration should be insisted upon , and that the question, whether corroboration of the testimony of a single witness was or was not necessary, must depend upon the facts and circumstances of each case.

To prove the charge of murder levelled against Mohiuddin (artilary) the prosecution has examined P.Ws. 17, 18, 21, 22, 24, 25, 27,29,32,34 and 35.

P.W.17, a Nayek of Two Field Artillery regiment at the relevant time of which the appellant was a commander of the Papa Battery, deposed regarding the presence of the appellant at the night parade at Balurghat on 14th August 1975. This witness narrated about the parade in details and stated that after the parade Mohiuddin (Artillery), stood behind the Papa Battery cannon and gave some directions by calling Subedor Hashem and then Hashem called the jawans and reminided them about the direction and then this appellant directed them to board in the truck and called 4/5 gunners including this witness from the Qubek Battery and thereafter Hashem hooked 6 cannons in trucks after examining them and thereafter the trucks loaded with cannons started moving around 3.30/4.00 A.M, this witness was with the appellant in the same vehicle; the trucks reached Kalabagan area at 4 .A.M. and as per direction of the appellant the cannons were

set up aiming at the house of the President at Road No.32 and Rakshibahini Head Quarter. This witness further stated that as per order of the appellant they fired 4 rounds of cannon-ball and some times thereafter, when the morning light was visible they as per order of the appellant closed the cannons and hooked those with the truck and then they returned to their barrack. This appellant during cross examination did not challenge the statement of this witness relating to the incriminating portion.

P.W.18, an other army personnel of two field artillery regiment, stated that the appellant was their Battery Commander and he narrated the details in respect of parade on 14th August night, in which, this appellant and other accused persons were present. He stated that the night training continued till 12.30 to 1.00 A.M. and this appellant inspected the parade. He corroborating P.W.17 stated that at about 3.30/4.00 a.m, Abul Kalam made them to fall-in and at that time Captain Jahangir and the appellant came there and Captain Jahangir told them that they had to perform an important task of checking Rakshibahini and directed them to board into the vehicle. This witness then narrated about the approaching of their vehicle towards Dhanmondi, when he heard 4 rounds of firing and some times thereafter, This appellant told them to assemble the cannons and as per his direction, they proceeded towards Ganabhaban and after reaching there the appellant got down from the vehicle and after one hour he came back and directed them to go to the Radio Station via New Market.

P.W.21, a sepoy of two field artillery Papa Battery, stated that the appellant was commander of Papa Battery. He narrated about the night parade in which appellant Mohiuddin (Artillery) and other accused persons were present. He further stated that at about 4/4.30 A.M. their truck with arms approached towards Road No.32 and after stopping at Road No.32, some of the army personnel were directed to get down from the vehicle and they were also directed not to allow anybody to move through the Road No.32. The defence did not challenge the statements of this witness in any manner.

P.Ws. 22, 24 and 25 narrated the night parade on 14th August of Two Field Artillery Unit of Papa Battery at the airport area in which their commander the appellant

was present. There statements have not been denied by this appellant. P.W.25 further stated that after the parade Farooque Rahman briefed them.

P.W.27, also a sepoy of Two Field Artillery of Padda Battery under Mohiuddin (artillery) during the relevant time narrated the details of the night parade on 14th August and that as per direction of the appellant and as per his order he boarded on a vehicle and that when the vehicle came to Balurghat, the appellant told them that Rakhibahini might attack army and thereafter he saw that a cannon was hooked with a vehicle and the other vehicles were also hooked with cannons and thereafter they approached towards the Kalabagan via Mohakhali-Firmgate-Green road- Elephant Road and that some of them were directed to get down from the vehicle near Kalabagan and the appellants told them not to allow any body to move on the road. He further stated that when the sun rose one army vehicle took them to Ganobhaban and there he heard the voice of Major Dalim over radio that Bangabandhu was killed. This appellant did not challenge the testimony of this witness regarding the incriminating part of his complicity in the incident.

P.W.29, another sepoy of the Papa Battery of Two Field Artillelry Unit, stated that the appellant was the commander of papa battery and he narred the details about the night parade and stated that at about 3.30 A.M. the parade was closed and thereafter they were taken to Balurghat and whereupon they found that the army personnel were loading arms in the vehicles. They were directed to load arms. Thereafter they started towards the town.

P.W.32. a sepoy of Two Field Artillery under the command of the appellant stated that he attended the night parade on 14th night and that their unit was made to fall-in when this appellant and other officers were present and they were made to fall-in for the second time at 3/3.30 a.m. when Major Rashid and other accused were present and that as per order of Major Rashid they boarded into the truck and at that time Naik Shamsul Islam gave him ammunition. He further stated that their truck started before Fazar Ajan and when they reached by the side of Tejgaon Airport, Lt. Hasan directed them not to allow movement of any vehicle on the road. He further stated that thereafter he came to

know that the appellant and other co-accused were involved in the incident. The appellant did not challenge the statement of this witness in any manner.

P.W.34 a Subedor of Papa Battery of Two Field Artillery of which the appellant was the commander stated that in 14th night training he was present and that their unit moved with six guns to new airport via Chairman Bari and at about 10 p.m. he heard sounds of firing of gun under Mohiuddin (Artillery) near the gun area and that at about 2.30 A.M. they were made to fall-in again and thereafter they boarded in a vehicle and proceeded towards the Science Laboratory via Mohakhali and from there their vehicle turned towards northern side and approached through the Mirpur Road and thereafter, the vehicle stopped in front of a lake and at that time the appellant was standing behind the gun. The troops were directed not to allow anybody to move on the road. The appellant did not challenge the statement of this witness.

P.W.35 corroborated P.W.34 and stated that he was Subedor Major of the Papa Battery of Two Field Artillery of which the appellant was the commander and he narrated the night training on 14th August in details and stated that Captain Jahangir handed over the parade to the appellants. He further stated that after the incident he queried to the force about the cause for killing of the President and came to know that this appellant and other accused persons were involved in the killing of the President and his family members. The appellant did not challenge the statement of this witness.

On an analysis of the evidence on record it is seen that there are uncontroverted evidence on record against the appellant Bazlul Huda about his participation in the killing of Sheikh Kamal and Bangabandhu on 15th August. P.Ws. 1, 4 and 6 are the eye witness of the occurrence and they have stated that Bazlul Huda shot to death of Sheik Kamal. P.W.4 further stated that Bazlul Huda along with Major Nur shot to death the President. Besides these 3 witnesses, P.Ws. 5 and 7 recognized Bazlul Huda at the time of occurrence at Bangabandhu's house. This appellant was also seen by P.Ws. 11, 21 and 22, at the night parade, wherefrom he alongwith others came to the house of President and killed Sheikh Kamal and also the President. So there is direct complicity of this

appellant in the incident of 15th August, 1975 and the learned Judges of the High Court are perfectly justified in finding him guilty of the charge of murder.

In respect of the charge of murder levelled against appellant Faruoque Rahman, P.Ws. 11 and 12 recognized him at the night parade wherefrom he along with his force marched towards Dhanmondi and thereafter he was seen at the gate of Bangabandhu's house at or about the time of occurrence with a tank and talked with Bazlul Huda, Mohiuddin (lancer), Major Noor and others, then when he was confirmed about the death of the President and other members of his family left the place of occurrence. The evidence of these witnesses sufficiently proved that this appellant was also involved in the occurrence and the learned Judges of the High Court Division are perfectly justified in finding his complicity in the murder.

As regards Mohiuddin (lancer), it is seen that P.Ws.4 and 5 saw him while he was in entering into the house of the President by firing. P.W.4 further stated that he saw while this appellant was taking Bangabandhu down at the stair Bazlur Huda and Major Noor shot him death. Besides these two witnesses, P.W.11 saw him at the gate of the house of the President at or about the time of occurrence and P.W.12 saw him while he was getting down from the truck at the entry point of Road No.32 just before the occurrence. Besides these witnesses, P.Ws. 21 and 22 saw him while they were dropped at the meeting point of road no.32. Therefore, I find that the learned Judge of the High Court Division have rightly found his complicity in the incident of 15th August, 1975.

In respect of the charge appellant Sultan Shahriar P.W.14 proved his presence at the night parade on 14th August at Balurghat and his complicity in the occurrence have been stated while discussing the evidence of P.W.14.

As regards the appellant Mohiuddin (Artillery) P.Ws. 17, 18, 21, 22, 24, 25,27,29,32, 34 and 35 proved as regards his presence at the night parade wherefrom the troops of his unit marched to Kalabagan Lake Circus play ground, and set up cannon aiming Bangabandhu's house and the Rakshibahini head quarter. The witnesses proved that as per his order, his troops fired 4 rounds of cannon-ball from Kalabagan play ground aiming the house of the President and Rakshibahini Head Quarter. This appellant did not

deny the statement of this witness. In view of this evidence on record it can not be said that there is no sufficient materials on record to implicate this appellant in the occurrence of 15th August, 1975. No exception could be inferred from this act of participation in the night parade and the first learned Judge also did not take any exception even after he was recognised at Kalabagan play ground with cannons and firing cannon-balls aiming at the house of the President and Rakshibahini Head Quarter at the time of occurrence. In the premises there is no doubt that this appellant was involved in the occurrence and helped the other co-accused to commit the carnage. The second and the third learned Judges are perfectly justified in finding his complicity in the occurrence.

It may also be mentioned here that all the above prosecution witnesses are army personnel of lancer and artillery units and the appellants and other co-accused served in those units. The defence failed to show any enmity with them or their motive to depose against them in support of the prosecution case. The defence also failed to shake their testimonies in any manner rather they virtually admitted their participation in the incident of murder by not challenging the testimonies of those witnesses relating to material particulars. All of them are neutral and trust worthy witnesses. There is no cogent ground to discard their testimonies. The second and the third learned Judges of the High Court Division and as well as learned Sessions Judge have believed them as independent and reliable witness. The first learned Judge also believed P.Ws.1, 4, 11, 12, 13, 14, 15, 16, 22, 25, while believing the complicity of Bazlur Huda, Mohiuddin (Lancer), Farooque Rahman and Sultan Shahrior but disbelieved P.Ws.16, 17, 18, 21, 22, 24, 25, 26, 27, 32, and 35 while disbelieving about Mohiuddin (Artillery) complicity in the occurrence. The finding of the first learned Judge that "the presence of the convict with C.O. at parade was part of duty and that parade in the night of 14th August was held as per pre-existing practice as seen from the evidence of P.Ws. 44 and 45 are based upon piecemeal consideration of the evidence of P.Ws 44 and 45. The first learned Judge failed to consider the admitted fact that the appellants along with others hatched up conspiracy at the parade ground, took ammunition from the kote, removed heavy artillery from the

cantonment, deployed the troops with artillery at key points and thereafter they killed the president and other members of his family as discussed earlier.

Now the question is whether a finding as to whether a witness is reliable or independent as arrived at by the trial Court and the High Court Division is a finding of fact and this finding is binding on this Court and must be accepted as final ?

In the case of Nurul Islam (43 DLR (AD) 6) referred by the counsels of the appellant leave was granted to consider the glaring inconsistency and discrepancy in the evidence of four eye witnesses, P.Ws. 1, 3, 7 and 8 which cast a doubt as to the truth of the prosecution case. The Appellate Division on assessing their evidence found it difficult to rely upon them and observed that the learned Judges of the High Court Division did not consider the material discrepancy of these eye witnesses while maintaining the conviction and sentence. Therefore, this decision referred by the learned counsel is not applicable in this case.

In the case of Hazrat Ali (54 DLR 636), also referred by the counsels of the appellant it has been observed that when the evidence of witnesses is disbelieved by the Court in respect of a major part of the prosecution case regarding the involvement of the accused persons the testimony of those witnesses can not be accepted without independent corroboration from other sources. The observations made by the High Court Division in that case is not disputed in the present appeals the learned counsel failed to point out any major contradiction in the evidence of the witnesses so as to disbelieve them in respect of the majority part of the prosecution case.

The learned counsel for the appellants also referred in the case of Muslimuddin (38 DLR (AD) 311) wherein the appellants were convicted for the charge of murder relying upon the evidence of the deceased wife Majeda (P.W.1) which is corroborated by P.W. 3 another eye witness but she was examined by the police long after the occurrence. The High Court Division maintained his conviction. The Appellate Division on consideration of the evidence of P.W.1, the wife of the deceased, found that she was present in the hut at the time of occurrence but she was not corrroborated by other

witnesses, and it was totally improbable on her part to recognise so many accused persons with detailed description. In that case this Division as observed:

> "In a criminal trial determination of a disputed fact is the main task before the Court and such determination is depended upon consideration of answers given by prosecution witnesses in their cross-examination. Cross-examination is therefore, indispensably necessary to bring out desirable facts of a case modifying the examination in chief or establishing the cross-examiner's own case. The object of cross-examination is two fold, to bring out the case of the party cross-examining and to impeach the creadieof the witness. In examination in chief the witness discloses only those facts which are favourable to the party examining him and does not disclose the necessary facts which go in favour of the other side. Cross-examination in a criminal case aims at extraction of the facts which support the defence version which is very often sought to be supposed by the prosecution. The opponents can of course establish facts favourable to them by calling their own witnesses; but "there is some thing dramatic in proving one's own case from the mouth of the witnesses of the opponent."

As observed earlier, in the present appeals, the defence did not challenge the incriminating part of the material evidence adduced by the witnesses and therefore, their evidence remained uncontroverted. The defence failed to establish facts favourable to them by cross-examining the witnesses. Therefore, this decision instead of helping of defence helps the prosecution case.

In the case of Safdar Ali Vs. Crown (5 DLR (FC) 107(64) referred by the appellants it has been observed that in a criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence and if, after examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused must be true and it is clear that such a view reacts on the whole prosecution in such circumstances, the accused

is entitled to get benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt.

The above statement of law is not disputed being the established principle of law in the administration of criminal justice. But in the present appeals the defence version put forwarded by the appellants does not affect the prosecution case, rather supports the prosecution case.

Further in the case of Moyezuddin (31DLR (AD) 37) it has been observed as follows:

> "We like to observe that the contradiction in the statement of a witness, either with his own statement or with the statement of another witness, is a task of appreciation of the evidence, and therefore, it is within the jurisdiction of the trial court and the Court of appeal on fact, to deal with the question. No doubt there is certain rule of prudence governing the case of contradicting statements. It is first to be seen whether the alleged statement is a discrepant statement or contradictory statement. The discrepant statement is one which is either irrelevant or incoherent, but it is not irreconcilable. A discrepant statement is not fatal to the credibility of a witness. A contradictory statement is one which is conflicting and is not reconcilable with other statements either of his own or any other witness. The question in such case is, that it is upon to a court of fact either to reject the whole evidence of a witness as untrustworthy or to reject the contradictory part as unreliable or to rely upon that portion, which in the opinion of the court, fits in with other evidence and the facts and circumstances of the case."

Accordingly what Mr. Mamun argued pinpointing on certain portions of the evidence of the witnesses regarding the presence of Major Bazlul Huda at the place of occurrence and his identification by the witnesses which are minor in nature not to speak of even discrepant statements. The learned counsel failed to point out any contradictory statements of any witness, rather he avoided our query as to whether the

incriminating statements made by the witnesses about the complicity of Bazlul Huda had been challenged in course of cross-examination.

Further, earlier, the question of considering such issues of fact in these appeals under Article 103(3) of the Constitution has already been discussed.

Regarding the charge made against Sultan Shahriar under section 302/34 of the Penal Code.

Md. Abdur Razzak Khan, submitted that Sultan Shahrier was not present at or about the place of occurrence and in the absence of any overt act or his participation in the incident of killing with the other accused persons, his conviction under section 302/34 is totally illegal and in order to bring Sultan Shahrier within the ambit of section 34 of the Penal Code some overt act or acts on his part relating to the incident must be established to lead to the inference that he has participated with the participators in the crime in pre-concerted or pre-arranged plan and except the evidence of P.W.14 that he saw him at the parade ground at Balurghat, there is no other corroborating evidence on record that he was in any way involved in the alleged occurrence and further the presence of Sultan Shahrier at the Radio Station at or around 6 A.M. on 15th August after the occurrence was part of his official duty, for which, he can not be saddled with the charge of murder.

Mr. Razzak Khan further submitted that since Sultan Shahriar was not present at House No.677 of Road No.32 and has not actively participated in the murder his act cannot justifiably be held guilty for the offence committed by other principal offenders and his act at best attracts an offence of abetment of murder punishable under Section 109 of the Penal Code as held in the cases of Md. Shamsul Hoque vs. State 20 DLR 540, Amor Kumar Thakur and others Vs. The State 40 DLR(AD) 147, Hazrat Ali and others Vs. The State 44 DLR (AD) 51 and Dharan Pal and others V. State of Haryana 1978) 4 S.C.C. 440.

Mr. Khan further submitted that conviction in the charge of conspiracy could not be given after the conspiracy has borne its fruits.

Mr. Khan Saifur Rahman, submitted that Farooque Rahman and Mohiuddin (Artillery) were not found present in House No.677 at Road No.32 and that there is also

no nexus between the deployment of artillelry troops at Kalabagan play ground by Mohiuddin (Artillery) and the killing of President and the members of his family and therefore both of them have been illegally convicted under section 302/34 of the Penal Code and further if the offence committed is found to be a mutiny which being a military offence, the provisions of sections 34 or section 38 of the Penal Code as regard common intention and the responsibility arising therefrom, will have no manner of application in the present appeals.

Mr. Anisul Huq and the Advocate-General on the other hand submitted that even if it is assumed that Section 34 is not applicable in respect of Sultan Shahriar this would however be of little practical in benefit to him because his participation in the criminal conspiracy to implement the object has been established by the prosecution.

It was further contended by Mr. Huq that section 120A being an independent offence, order of conviction and sentence may be passed in respect of Sultan Shahriar under section 120B of the Penal Code.

To meet the points of common intention and the responsibility arising therefrom, the true purports of sections 34, 35 and 38, which read as follows, are be examined.

> "34.When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.
>
> 35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.
>
> 38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act."

A reading of these provision shows that Sections 34 and 35 create responsibility for the total result while Section 38 creates individual responsibility only. Section 34

applies where there is a common intention and for a criminal act done in furtherance of common intention of all, every one is equally responsible. Section 35 requires the existence of the knowledge or intent in each accused before he can be held liable if knowledge or intent is necessary to make the act criminal. Thus if two persons beat a third and one intent to cause his death and the other to cause only grievous injury and there is no common intention, their offences will be different . This would not be the case if the offence is committed with a common intention or each accused possess the necessary intention or knowledge. Section 38 provides for different degrees of responsibility arising from the same kind of act.

Following illustrations will clear the point:-

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicidal not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

A criminal intention within the meaning of section 34 is simultaneous conscientious of the minds of persons participated in the criminal action to bring such particular result and if one facilities the execution of the common design such person commits an act as much as his co-participants actually committing the planned crime. The essence of section is that the person must be physically present at the actual commission of the crime. This must be coupled with actual participation, which may be of passive character such as standing by a door or near about the incident with the intention of assisting in furtherence of common intention of all the accused and with a readiness to play his part when the time comes for him to act.

Now the question is what will be reuslt if the above principles are applied apply to the facts of the present appeals?

As stated earlier, the appellants attended the night parade, and it was organized to fulfill and implement their object. The appellants and other accuseds deployed jawans under the command of officers at key points such as, Rakhibahani Head Quarter, BDR

Head Quarter, Radio Station, Mintoo Road. and Road no. 32 .This deployment of army at Rakhibahini Head Quarter and BDR Head Quarter was a part of their pre-plan to prevent these paramilitary forces to come forward to protect the President in case of any information or help was sought for. The deployment at the Radio Station was for preventing any person on behalf of the Government to seek any help from the army, navy, air force, paramilitary forces, political activists or from other sources. The deployment at Mintoo Road was also to prevent the Ministers to mobilize the public or any other force for the protection of the President.

The records show that Mohiuddin(artillery) was deputed with cannon at Kalabagan playground near Road No. 32, Sultan Shahriar was deputed at the Radio Station, Farooque Rahman came from Rakhibahani Head Quarter to the house of the President, Mohiuddin (lancer), Bazlur Huda and some other officers were given the main task of implementing the main object of killing the President and the members of his family. The movement of the appellants with arms and cannons at different vital points was a part of the criminal conspiracy to fulfill the common design of of killing the President and his family members without any interruption. Bazlur Huda and Mohiuddin (lancer) actively participated in the killing. Farooque Rahman as it appears though did not join in the killing but his presence near the house of the President with a tank at the time of killing was in furtherance of common intention of all of them to implement the act and with the end in view to resist others to come in the way of implementing their ultimate goal and though his participation was passive and diverse but he was present at or about the occurrence. Mohiuddin (artillery) aided co-accuseds Bazlur Huda, Mohiuddin (lancer) and others by way of guarding the house of the President with his troops and cannon from Kalabagan playground with the motive that if force come forward to rescue the President he would resist them, and with that object he fired four cannon balls letting others to show that he was prepared to use the cannon- balls. Thus actions of Faruque Rahman and Mohiuddin (Artillery) come within the ambit of Section 34 as they were ready to participate in the crime in case of necessity.

Regarding Sultan Shahriar admittedly he was not present at the place of occurrence and he was deployed at the Radio Station from before the time of occurrence. As stated earlier, his task was also to prevent anyone from seeking help through the Radio Station. So question arises whether his act falls within the ambit of section 34 since he was not physically present at the place of occurrence? The learned Judges of the High Court Division were of the view that he shared the common intention with other accused persons, although his participation was not active it was passive, which act also fell within the ambit of section 34. The first learned Judge observed that besides being present at the night parade, his presence at the Radio Station was part of the said agreement that he entered into agreement with other convicts for the purpose of causing the incident in the house of the President. The second learned Judge also noticed his presence at the Radio Station about 4.30/5.00 A.M. and expressed similar views. The learned Judges considered the cases of Barendra Kumar Ghose V. Emperor, AIR 1925 (P.C.)1, Shreekantiah Ramayya Muni Palli, V. The State of Bombay AIR 1955 SC. 287, Tukaram Gonapat V. State of Maharashtra AIR 1974 SC 514, Ramaswami V. State of T.N. AIR 1976 Sc. 2027, Abdur Rahman Mandol Vs. The State , 29 DLR(SC)247, Bangladesh Vs. Abed Ali , 36 DLR(AD) 234, Abdus Samad @ A.K.M. Abdus Samad Vs. The State 44 DLR (AD) 233 and State Vs. Tajul Islam and others 48 DLR 305 in coming to their conclusion.

As observed earlier, the dominant feature of Section 34 of the Penal Code is the element of participation is actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. This section requires that there must be a general intention shared by all the persons united with a common purpose to do any criminal offence, all of those who assist in the accomplishment of the object would be equally guilty. It follows, therefore, that common intention is an intention to commit a crime actually committed and every one of the accused should have participated in that intention.

In Barendra Kumar Ghosh's case, (supra) their Lordships of the Privy Council have clearly expounded the principles animated in the section. In that case three men

fired at the post master, of whom Barendra Kumar, the appellant, was one. He wore distinctive clothes by which he could be and was identified; and while these men were just inside the room, another was visible from the room through the door standing close to the others but just outside on the doorstep in the courtyard. This man was armed but did not fire. The defence of Barendra was that he was the man outside the room, that he stood in the courtyard and was very much frightened. Whether he was present as one of the firing party or as its commander or as its reserve or its sentinel was of no special importance on the case made for the crown. Why he was there at all and why he did not take himself off again he did not say, nor did he even indicate his precise position in the yard. Their Lordships while maintaining the conviction of Barendra expounded the ambit of Section 34 as follows:

> "By S. 33 a criminal act in S.34 includes a series of acts and, further "act includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S.37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait." By S. 38 when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar or diverse by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it."

Therefore, the dominant feature of Section 34 is the element of participation in action, this participation need not be in all cases be by physical presence. The Supreme Court of India has distinguished the cases in which the physical presence of the accused person at the place of incident is prerequisite and in which cases the physical presence of the accused was not necessary- his participation by doing separate acts similar or diverse would bring him within the ambit of the Section.

In the case of Ramaswami (supra) it has been observed Section 34 is to be read along with the preceding Section 33 which makes it clear that the "act" spoken of in Section 34 includes a series of acts as a single act. It follows that the words "when a criminal act is done by several persons". So Section 34, may be construed to mean "when criminal acts are done by several persons." The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Sec.34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or prompting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act.' The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can also be developed at the spot and thereby intended by all of them.

In the case of Sreekantiah (supra) it was observed :

> "The essence of S.34 that the person must be physically present at the scene of occurrence couple with actual participation which, of course can be of a passive character such as standing by a door, provided that is done

> with the intention of consisting in furtherence of common intention of them all and there is a readiness to play his part in the prearranged plan when the time comes for him to act".

In five member Bench of this Court also took similar views Abdur Rahman Mondal's case (supra) as follows :

> "The common intention to bring about a particular result may will develop on the spot as between a number of persons. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarilylead to that inference or the incriminating acts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. Further it is the essence of S.34 that the person must be physically present at the actual commission of the crime."

In the case of Rasool Bux Vs. The State 22 DLR (SC) 297 the Supreme Court of Pakistan approved the views taken in the case of Barendra Kumar Ghosh and considered the case in the light of the observations made by their Lordships of the Privy Council. In that case accused Lal Bux and Rasul Bux abducted Mst. Roshna from the house of her father, if necessary, by the use of force. They were both armed with deadly weapons. When their presence was discovered in the courtyard they abandoned their original plan but were nevertheless determined to escape, if necessary by use of weapons carried by them. It was observed this "common intention though originally not present was formed at the spur of the moment when they found themselves being surrendered by persons attracted to the place.....". Lal Bux fired at the person who was ahead of those coming to prevent their escape and Rasul Bux also fired two shots . It was further observed that they "fired with the common intention of preventing the interception from cutting of their escape. It is difficult, therefore, to appreciate how it can be said that they were not acting in furtherance of the common intention of them both."

In Tajul Islam's case (supra) the High Court Division noticed the evidence produced by the prosecution in support the charge that Badsha in his confession stated

that he pressed the legs of second son of Biroja Rani, and accused Inu cut him into two pieces by a dao. Other confessing accused stated that for the purpose of committing the offence they went to the house of Biroja and were on guard either in the boat or in front of the door of neighbours of Biroja or in the road leading to the house of Biroja presumably to present any person from coming in the way of their committing the offence. In the facts of the case the learned Judges observed as follows:

> "In offence involving physical violence, normally presence at the scene of the occurrence of the offender sought to be rendered liable on the principle of joint liability is necessary such is not the case in respect of other offences where offence consists of adverse acts which may be done at different time and place."

In the case of Noor Mohammad Mohd. Yusuf Momin(appellant) V. The State of Maharastra (supra), the trial Court convicted Mohd. Taki Haji Hussain Momin under Section 302 and acquitted three other accused including the appellant. On appeal against acquittal, the Bombay High Court reversed the acquittal and convicted the appellant and two others under Section 120B and 302 read with Section 34 I.P.C. The appellant was also convicted under Section 302/109 IPC and sentenced to imprisonment for life on two counts separately. The appellant's conviction under Section 302/34 IPC was set aside on the following observations:

> "From the evidence it seems highly probable that at the time of the actual murder of Mohd. Yahiya the appellant was either present with other three co-accused or was somewhere nearby. But this evidence does not seem to be enough to prove beyond reasonabole doubt his presence at the spot in the company of the other accused when the murder was actually committed ..... we are, therefore, inclined to give to the appellant the benefit of doubt in regard to the charge under Section 302 read with Section 34 IPC."

The application of Section 34 in respect of the offences other than physical violence have been explained in Tukaram Ganpat's case (supra) wherein the facts against

the accused including the appellant Tukaram were that they stole some bundles of copper wire from the godown of a company after breaking open the godown and removed them away by a lorry which stopped at a weigh-bridge where the brokers for sale were present. There was no evidence about the presence of the appellant at the scene of offence. The concurrent findings of the courts below were that the appellant was in possession of duplicate keys of the burgled godown found missing from the factory and that he was present at the weigh bridge. The appellant had no explanation for possessing of godown keys nor for his presence at weigh-bridge. In the context of the matter the Supreme Court maintained the conviction of the appellant on applying the principles of common intention as under:

> "Mere distance from the scene of crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. In Barendra Kumar Ghosh v. The King Emperor (1924) 52 IA 40- (AIR 1925 PC 1) the Judicial Committee drew into the criminal net those 'who only stand and wait.'. This does not mean that some form of presence, near or remote, is not necessary, or that mere presence without more, at the spot of crime, spells culpability . Criminal sharing, overt or covert by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of Section 34. Even assuming that presence at the scene is a pre-requisite to attract Section 34 and that such propinquity is absent. S. 107 which is different in one sense, still comes into play to rope in the accused. The act here is not the picking the godown lock but house-breaking and criminal house trespass. This crime is participated in by those operating by remote control as by those doing physical removal.. Together operating in concert, the criminal project is executed. Those who supply the duplicate key, wait at the weigh bridge for the break-in and bringing of the booty and later secrete the keys are participles criminal.

> And this is the role of accused No.2 according to the Courts below. Could this legal inference be called altogether untenable?.....

The above decision discussed the principles of joint liability mere distance from the scene of crime cannot exclude culpability under Section 34 of the Penal Code in criminal sharing making out a certain measure of jointness in the commission of the act. However the learned Judges of the High Court Division failed to appreciate the ratio decidendi of the above decisions regarding the presence of appellants Sultan Shahriar.

I am accordingly of the view that the prosecution is required to prove the presence of Sultan Shahriar and his participation in the commission of the offence in furtherence of the common intention of all in order to bring his offence within the ambit of section 34 of the Penal Code but failed.

Regarding the submission that conviction in the charge of conspiracy could not be given after the conspiracy has borne fruits, as it appears in Shamsul Hoque's case, following the case reported in AIR 1938 Mad 130 which was also followed in 8 DLR 48, it was observed that where an offence is alleged to have been committed by two or more persons, the person responsible for commission of the offence should be charged with the substantive offence, while the persons alleged to have abetted it by conspiracy should be charged with the offence of abetment under section 109. As it appears the views taken AIR 1938 Mad 130 which was follows in 8 DLR 48 have been overruled in Kandimalla Subbaiah's case (AIR 1961 S.C. 1241 (paras 7 and 8). The facts and the principles of law involved in Amar Kumar Thakur's case are quite distinguishable since the offence charged against the accused is under sections 302/34, in which, this Court found no legal evidence that the "appellants no.2-4 had any intention of their own to cause the death of Nandalal particularly when he was proceeding at their request to hold the mediation at that hour of the night."

In Hazrat Ali's case, the Appellate Division on assessment of the evidence of record came to the conclusion that Hazrat Ali abetted the offence of murder of Zahura Khatun and acordingly converted his conviction to 302/109 from an offence of 302/34.

In Dharam Pal's case, it was observed that the existence or otherwise of the common intention depends upon the facts and circumstances of each case, and in the absence of materials, "the companion or companions can not justifiably be held guilty for every offence committed by the principal offender." The facts of the above cases are quite distinguishable from the present case.

As it appears that there is no substantial difference between conspiracy as defined in Section 120A and acting on a common intention as contemplated in Section 34. In the former the gist for the offence is bare agreement and association to break law even though illegal act does not follow while the gist of an offence under section 34 is the commission of a criminal act in furtherence of a common intention of all the offenders which means that there should be a unity of criminal behaviour resulting in something for which an individual will be punishable if it is done by himself alone.

Sub-Section (1) of Section 120B imposes a penalty equal to the punishment for abetment on participation in criminal conspiracy to commit an offence. The Section appears to have been introduced to fill up the gap in section 107 defining abetment. Under section 107 "secondly" provides that a person abets the doing of a thing who engages with others in a conspiracy for doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy. Abetment of an offence is punishable under section 109 and 116 as the case maybe, if the offence is not committed; but it is clear that a conspiracy will not amount to an abetment unless an act or illegal omission takes place in pursuance of the conspiracy. Therefore, the first class of cases which section 120B is designed to cover, is that in which the conspiracy is formed for the commission to a serious offence. But no act or illegal omission has taken place in presence appeals.

Section 120A provides the extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of Section 107; Section 120B provides punishment for criminal conspiracy where no express provision is made in the Penal Code for the punishment of such conspiracy.

In the case of Noor Mohammad Mohol Yusuf Momin (Supra) the distinctive features of sections 34, 107 and 120B have explained as follows:

"so far as S.34. Indian Penal Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109. Indian Penal Code on the other hand may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. Turning to the charge under section 120 B. Indian Penal Code criminal conspiracy was made a substantive offence in 1913 by the introduction of chapter V-A in the Indian Penal Code. Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. In deed in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or

more persons have conspired to commit an offence then anything, done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences `committed pursuant thereto. ”

In the case of State of Ahdhra Pradesh V. Kandimalla Subbaiah and another, AIR 1961 SC S.1241 the point for consideration was whether an offence is said to have been committed in consequence of abetment, when it has been committed in pursuance of the conspiracy, and the abettor by conspiracy can be made punishable with the punishment provided for the actual offence. The Supreme Court replied the point as under:

“Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy. There is no analogy between S.120 B and S.109 I.P.C. There may be an element of abatement in a conspiracy; but conspiracy is something more than an abetment. Offences created by Ss. 109 and 120B, I.P.C are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, that is, abetment when the allegation is that what a person did was something over and above that. Where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those offences as well as with the offence of conspiracy to commit those offence.”

Latter on in the case of the State of Andhra Pradesh V. Cheemalapati Ganeswara Rao and another, AIR 1963 S.C.1850 it has been observed:-

“The offence of conspiracy is an entirely independent offence and though other offences are committed in pursuance of the conspiracy the liability of the conspirators for the conspiracy itself cannot disappear. In the Indian Penal Code, as originally enacted, conspiracy was not an offence . Section 120 B which makes criminal conspiracy punishable was added by the Indian Criminal Law Amendment Act, 1913 (8 of 1913) along with S. 120-A. Section 120-A defines conspiracy and S. 120-B provides for the

> punishment for the offence of conspiracy. Criminal conspiracy as defined in S. 120 A consists of an agreement to do an illegal act or an agreement to do an act which is not illegal by illegal means. Section 120 B provides that whoever is a party to a conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards shall be punishable in the same manner as if he has abetted such offence unless there was an express provision in the Code for the punishment of such conspiracy. Criminal conspiracy was, however, not an unknown thing before the amendment of the Indian penal Code in 1913. But what the amendment did was to make that conspiracy itself punishable. The idea was to prevalent the commission of crimes by, so to speak, nipping them in the bud. But it does not follow that where crimes have been committed the liability to punishment already incurred under S. 120B by having entered into a criminal conspiracy is thereby wiped away. No doubt, as already stated, where offences for committing which a conspiracy was entered into have actually been committed it may not, in the particular circumstances of a case, be desirable to charge the offender both with the conspiracy and the offences committed in pursuance of that conspiracy. But that would be a matter ultimately within the discretion of the court before which the trial takes place."

Accordingly the appellants were duly convicted under section 120B as well.

On a overall consideration of the evidence and the laws applicable in this case I am of the view that the High Court Division is justified in arriving at the conclusion that the appellants and other accuseds hatched up conspiracy to kill the President the members of his family present in the house, and accomplished their object by killing them and other three security personnel.

But however in view of the discussion made above I am of the view that the legal conviction of the appellants Farooque Rahman, Mohiuddin (artillery), Mohiuddin Ahmed (Lancer)and Bazlul Huda should have been under section 302 read with Section 120B

and Section 34 of the Penal Code instead of 302/34 of the Penal Code and the legal conviction of Sultan Shahriar should have been under Section 302/120B of the Penal Code.

Their convictions are modified accordingly.

The learned counsel of the the appellants raising the point of commuting of sentence submitted that since the appellants have been in the death cell for a long period, even this Division finds that the learned Judges of the High Court Division have rightly found the charges leveled against them, ends of justice demands that the sentence awarded to the appellants be reduced to imprisonment for life.

Mr. Khan Saifur Rahman, the learned counsel, in this contention, referred a decision in the case of Nurul Hoque Kazi V.State 7 BLC (AD)52.

Mr. Abdullah-Al Mamun the learned counsel submitted that the appellants have been in death cell for a long time , this prolonged delay in carrying out a sentence of death after their sentence had been passed amounts to inhuman punishment and torture and violative fundamental rights guaranteed in Article 35(5) of the Constitution inasmuch as under this provision provided that no person shall be subjected to torture or to cruel, inhuman or the grading punishment or treatment and so in view of the principle laid down in the case of Pratt and another V. Attorney General for Jamaica and another, (1993) 4 All E.R. 768, Henfield V. Attorney General of Commonwealth of Bahamas, 3 W.I. R. (P.C) 1079 and Guerra V. Baptiste and others (1995) 4 All. E.R. 583, sentence of death awarded to these appellants is liable to be commuted to imprisonment for liave the sentence of death awarded to these appellants is liable to be commuted to imprisonment for life.

Learned Attorney General contends that the delay in concluding hearing of the appeal is not due to the laches of the State but it is in fact for the latches of the accused appellants and further the accused persons including the appellants in a planned manner committed the heinous crime with their knowledge of the consequences and therefore, they do not deserve any special sympathy in awarding the sentence.

Mr. Anisul Huq however contended that the appellants deserved extreme sentence since they not only brutally killed the President of the country who was also the father of the nation but killed 3 women and a child and by their act they committed crime against the humanity- they also extinguished the pedigree of the first family in the country and they deed the same act with motive that nobody could take any legal action in future against them. Accordingly when the murder is committed in such extremely brutal, and grotesque, diabolical, manner and when victims of murder is an innocent child or a helpless woman whom or a public figure generally loved and respected by the community extreme sentence is the proper way. In this connection the learned counsel has referred the case of Machhi Singh and others V State of Punjab, (1983) 3 Supreme Court Cases 470.

In order to satisfy ourselves we have called for the records of the High Court Division and perused the order sheet. We noticed that the appellants ever made any endeavor to dispose of the appeals either in the High Court Division or in the Appellate Division. It was the State that frequently prayed for fixation of the death reference in the High Court Division and on its prayer a Bench was constituted for hearing the death reference. After the death reference was disposed of by the High Court Division, the appellants after filing leave petitions did not take any step for hearing of their petitions. It was only on the prayer of the State that the leave petitions were heard and the appeals were also heard. Over and above, the appellant Md. Bazlul Huda and Mohiuddin(Lancer) remained in absconsion in course of the trial of the case and at the time of hearing of the death reference and Mohiuddin (lancer), after many years, filed leave petitions with a prayer for condonation of delay . The delay, in the premises, was not due to the latches on the part of the State. Since the condemned prisoners did not take any steps for hearing of the death reference and their appeals at any point of time. So they are not entitled to submit that by reason of their detention in condemned cell they have been subjected to “torture or to cruel, inhuman, or degrading punishments or treatment. Further they also did not raise this point at any point of time, rather from their conducts it is apparent that they have tried to delay the disposal of the appeal.

Originally Sub-section (5) of or Section 367 provided as follows:

"If the accused is convicted of an offence punishable with death, and the Court sentenced him to any punishment other than death, the Court shall in its judgment state the reasons why sentences of death were not passed."

This shows that the impsition of death sentence was the rule and the awarding of a lesser sentence was an exception- discretion was directed towards death penalty.

This provision was however substituted by Ordinance No.XLIX of 1978 with effect from 1979 as follows:

"Section 367(5) provides that "if the accused is convicted of an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term years, the Court shall in its judgment state the reasons for the sentence awarded."

The result of this amendment is that it was left to the discretion of the Court on the facts of each case to pass a sentence of death or a lesser sentence.

The Appellate Division in the case of Abul Khair V. The State, 44 DLR(AD) 225 held that delay itself is no extenuating circumstances to commute the sentence. The observations are as under:

"Delay by itself in the execution of sentence of death is by no means an extenuating circumstances for commuting the sentence of death to imprisonment for life. There must be other circumstances of a compelling nature which together with delay will merit such commutation. We find no compelling extenuating circumstances in this case and therefore, find no ground whatsoever to interfere."

As it appears in India Section 367(5) has been reenacted in the Code of 1973. The corresponding provision is provided in Section 354(3) which reads as follows:

" Section 354(3) When the conviction is for a sentence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in case of sentence of death, the special reason for such sentence".

Under this new provision life sentence is now the rule and it is only in exceptional cases, for special reasons to be assigned the death sentence can be imposed.

In the case of Jogmohan Singh V. State of U.P. AIR 1973 SC 947 it has been observed as follows:

> "A large number of murders is undoubtedly of common type. But some at least are diabolical in conception and cruel in execution. In some other where the victim is a person of high standing in the country society is liable to be rocked to its very foundation. Such murders can not simply be whisked away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks. In opinion of many for the inevitability of death penalty not only by way of deterrence, but as a token emphatic disapproval by the society".

In Bachan Singh V. State of Punjab, AIR 1980 SC 898 Bachan Singh was convicted and sentenced to death under Section 302 for murder of three persons. His sentence of death was confirmed by the Punjab High Court. His appeal by Special Leave came up for hearing before a Division Bench. The leave was granted to consider whether the facts found by the courts below would be 'special reasons' for awarding the death sentence as required under S. 354(3) of the Code of Criminal Procedure 1973". The Division Bench of the Supreme Court referred the matter to a Constitutional Bench for a decision in regard to the constitutional validity of death penalty for murders provided in Section 302 and the sentencing procedure embodied in Section 354(3) of the Code. The Supreme Court by a majority maintained the sentence of death observing as follows:

> "Attuned to the legislative policy delineated in Sections 354(3) and 235(2) propositions (iv)(a) and (v) (b) in Jagmohan, shall have to be recast and may be stated as below:
>
> (a) The normal rule is that the offences of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for

doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution , a source of grave danger to the society at large, the court may impose the death sentence."

In the case of Rajiv Gandhi the, ex-Prime Minister of India, the Supreme Court of India while maintaining of death sentence in accordance with Section 354(3) of the Code in the case of Nalini (1999 5 S.C.C. 253).

D.P.Wadhwa,J observed as :

"Cruelty of the crime committed has known no bounds. The crime sent shock waves in the country. General elections had to be postponed. It was submitted more than once that principal perpetrators in the present case are already dead but then for the support which Nalini(A-1), Santhan (A-2), Murugan (A-3) and Arivu (A-18) afforded for commission of the crime it could not have been committed. Each one of these four accused had a role to play. Crime was committed after previous planning and executed with extreme brutality. There were as many as two dry runs as to how to reach Rajiv Gandhi after penetrating the security cordon. A former Prime Minister of the country was targeted because this country had entered an agreement with a foreign country in exercise of its sovereign powers. Rajiv Gandhi being the head of the Government at that time was signatory to the Accord which was also signed by the head of the Government of Sri Lanka. The Accord had the approval of Parliament. It was not that Rajiv Gandhi had entered into the Accord in his personal capacity or for his own

> benefit. Though we have held that object of the conspiracy was not to commit any terrorist act or any disruptive activity, nevertheless murder of a former Prime Minister for what he did in the interest of the country was an act of exceptional depravity on the part of the accused, an unparalleled act in the annals of crimes committed in this country. In a mindless fashion not only was Rajiv Gandhi killed but along with him others died and many suffered grievous and simple injuries. It is not that intensity of the belt bomb strapped on the waist of Dhanu was not known to the conspirators as after switching on the first switch on her belt bomb Dhanu asked Sivarasan to move away. Haribabu was so keen to have close-up pictures of the crime that he met his fate in the blast itself. We are unable to find any mitigating circumstance not (sic) to upset the award of sentence of death on the accused."

In the Indira Gandhi killing case being Kehar Singh and others Vs. The State, AIR 1988 SC 1883 similar question was raised about the extreme sentence of death in the context of Section 354(3) of the Code of 1973. The Supreme Court of India maintained the conviction of death sentence of Kehar Singh and Satwant Singh Ozha J. observed as follows .

> "Then is the question of sentence which was argued to some extent. But it must be clearly understood that it is not a case where X is killed by Y on some personal ground for personal vendatta. The person killed is a lady and no less than the Prime Minister of this Country who was the elected leader of the people. In our country we have adopted and accepted a system wherein change of the leader is permissible by ballet and not by bullet. The act of the accused not only takes away the life of popular leader but also undermines our system which has been working so well for the last forty years. There is yet another serious consideration. Beant Singh and Satwant Singh are persons who were posted on the security duty of the Prime Minister. They are posted there is protect her from any intruder or from any attack from outside and therefore if they themselves resort to this king of offence,

there appears to be no reason or no mitigating circumstance for consideration on the question of sentence. Additionally, an unarmed lady was attacked by these two persons with a series of bullets and it has found that a number of bullets entered her body. The manner in which mercilessly she was attacked these two persons on whom the confidence was reposed to give her protection repels any consideration of reduction of sentence. In this view of the matter, even the conspirator who inspired the persons who actually acted does not deserve any leniency in the matter of sentence.In our opinion, the sentence awarded by the trial court and maintained by the High Court appears to be just and proper."

In Machhi Singh's case (supra) The Supreme Court of India after classifying the cases in which death penalty may be imposed calculated as follows:

> "When the victim of murder is (a) an innocent child who could not have or has not proved even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

In Pratt's case refered in Mr. Manun it appears the rules in force in Jamaica laid down a strict time table for appeals to the Judicial Committee of the Privy Council and further provided that execution would only be stayed so long as the time table was adhered to . There were also certain others please were also raised. The Privy Council accepted their plea and commuted their sentence to imprisonment for life on the following reasons:

> "prolonged delay in carrying out a sentence of death after that sentence had been passed could amount to inhuman.....punishment or other treatment contrary to s. 17(1) of the Jamaican Constitution irrespective of whether the delay was caused

by the shortcomings of the state or the legitimate resort of the accused to all available appellate procedures. A state that wished to retain capital punishment had to accept the responsibility of ensuring that execution followed as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve and, if the appellate procedure enabled the prisoner to prolong the appellate hearings over a period of years, the fault was to be attributed to the appellate system that permitted such delay and not to the prisoner who took advantage of it."

In Henfield's case the Privy Council following Pratt's case and the principles applied in that case accepted the petition and commuted the sentence of death with imprisonment for life observing as follows:

> "They therefore reviewed the relevant considerations, at pp. 34-35, and concluded that in any case in which execution was to take place more than five years after sentence there would be strong grounds for believing that the delay was such that execution thereafter would constitute inhuman punishment contrary to section 17(1)".

In Guerra's case. The Privy Council followed the principles taken in Pratt's case observed as follows:

> "Where a person was sentenced to death in a common law jurisdiction, execution was required to be carried out by the state as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve, since under the common law a long-delayed execution was not in accordance with the due process of law. In Trinidad and Tobago such an execution, if not stayed, would constitute a cruel and unusual punishment contrary to s. 5(2)(b) of the constitution and would not be in accordance with the due process of law under s. 4(a) of the Constitution." It thus appears that the principles laid down in the above decisions are not applicable in the present applying as the principles of due process of law as applicable in a common law jurisdiction is not applicable to our legal judicial system since we have codified laws on the subject and (2) there are uniform

decisions of our Superior Court that mere delay is not a legal ground for commutation of a sentence.

As it appears the principles laid down in the above decisions are ot applicable in the present applying as the principles of due process of law as applicable in a common law jurisdiction is not applicable to our legal judicial system since we have modified laws on the subject and (2) there are uniform decisions of our Superior Court that mere delay is not a legal ground for commutation of a sentence.

Accordingly I find that the accused persons including the appellants in a planned manner committed the heinous crime with their knowledge of the consequences and therefore, they do not deserve any special sympathy in awarding the sentence.

Therefore, I find no merit in these appeals accordingly the appeals are dismissed with modification as stated earlier.

J.

Md. Abdul Aziz, J: I have gone through and I am fully agree with the judgment delivered by my learned brother Mr. Md. Tafazzul Islam, **J,** dealing the case exhaustively on merit discussing facts, evidence, law and case laws. I also agree with the observations made by my learned bothers, Mr. Md. Muzammel Hossain, **J** and Mr. Surendra Kumar Sinha, **J**.

Having so agreed with my learned brothers, I take this opportunity to add, from unfolded facts and circumstances of the case and from Counsel's submissions, untold suffering and agony of two broken hearted daughters of the murdered President and the humiliation of long waiting of the whole nation since 1975 to bring the culprits of the devilish killing to justice.

Murder of innocent unarmed men and women and children is the greatest sin in Islam and also in all other religions and a great crime against civilization and mankind. In Islam, death is the only punishment for murder. Similar punishment has also been

provided in all other religions and under criminal law with exception to transportation for life in some circumstances.

The learned Counsels for the appellants took us to the facts, evidence and materials on record of the case including the 3 (three) confessional statements made by convict appellants Lt. Col. (Retd.) Syed Faruque Rahman, Ltd. Col. (Retd.) Mohiuddin Ahmed (Artillery) and Lt. Col. (Retd) Sultan Shahariar Rashid Khan.

In the instant case, the convicts in the early morning (Fazar Prayer time) of 15th August, 1975 dastardly murdered the then President of the Republic, Bangabandhu Sheikh Mujibor Rahman., the father of the nation and founder of the Republic, his wife Begum Fazilatunnessa Mujib, their 3 (three) sons, Sheikh Kamal, Sheikh Jamal and the 9-10 years old youngest son Sheikh Russel, wives of Sheikh Kamal and Sheikh Jamal and Sheikh Naser Rahman, the brother of the President along with other inmates and security officers, in all 11 (eleven) persons, at the residence of the President at Road #32, Dhanmondi Residential Area, Dhaka.

Mr. Anisul Huq, the Chief Prosecutor for the respondent termed the incident of unprovocated killing of unarmed men, women and child as heinous and barbarous unknown to civilization and rare in the history of mankind.

Mr. Mahbubey Alam, the learned Attorney General, termed it as tragic and inhuman (he burst into tears while placing the evidence on murder of Sheikh Russel). Mr. Ajmalul Hossain, Q.C., described it as horrendous killing, Sr. Advocate Mr. Tawfique Newaz, Sr. Advocate Mr. Abdul Matin Khasru, former Law Minister, Sr. Advocate and President of the Supreme Court Bar Association, Mr. A. F. M. Mesbahuddin Ahmed, for the Apex Bar and on behalf of all the Bars of the Country, with tears rolling on their cheeks, termed the incident as pathetic, brutal and barbarous referring to and reminding us the tragic incident of "Karbala massacre" in the hand of devil forces of Yeazid.

They all in unison with chocked voice sought justice narrating the events unfolding the evidence and materials on record as to how brutally the convicts perpetrated the incident and how the criminals were protected, sheltered, rewarded and maintained under State patriotism by the then Governments up to 1996.

The learned Counsels for the respondents drew our attention from evidence and materials on record that the convicts from time to time met and discussed about their conspiracy with Kh. Mostaque Ahmed, a the then Minister, Maj. Gen. Ziaur Rahman, the then Deputy Chief of Army, who after 15th of August, 1975 became Chief of Army, later Chief Martial Law Administrator and thereafter usurped power as President of the Republic, his reaction in the very morning of 15th August, 1975, hearing about the killing of the President from Col. Shafayet Jamil, how a Police Officer of the local Police Station driven out the P.W.1 A.F.M. Mohitul Islam with filthy language refusing to record F.I.R. from him apprehending threat on his life and service, which came true shortly with the passing of the Indemnity Ordinacne,1975 by Khonkder Mustaque Ahmed, who became the President of the Republic after the incident, sending the culprits abroad on 4th November,1975 by him/Major Gen. Khaled Mosharaf and inclusion of the Indemnity Ordinance, 1975 in the schedule of 5th Amendment of the Constitution and rehabilitating them in different foreign missions of Bangladesh by President General Ziaur Rahman and subsequently by the next President General H.M. Ershad and thereafter under State patriotism. They questioned how the State instead of becoming the Prosecutor of such a gruesome mass killing played the role of protector using the State machineries and public exchequer to harbour the notorious criminals providing them shelter and jobs disgracing the country internationally against common sentiment of the nation to bring and put them to trial.

Sr. Counsel, Mr. Ajmalul Hossain, Q.C., strongly voiced that role of Government visa-vis state as grudain of the people is to protect, safeguard and uphold the right and liberty of its citizens and law and order of the country. But after killing of the President, General Ziaur Rahman hijacked the constitutionally guaranteed rights and liberties of the citizens, justice delivery system totally failed and collapsed after proclamation of the Indemnity Ordinance, 1975 and the aggrieved persons failed to secure justice by bringing the heinous offenders to trial. He added that the then Governments took the role of protector of the criminals instead of discharging the responsibilities of prosecuting them resulting colossal and catastrophic failure of dispensation of justice and law and order.

Mr. Hossain contended that the Constitution was eclipsed by the acts of the parties, although Martial Law is no law but a Jungle law our Supreme Court termed the Martial Law as 'Supra Constitutional.' Hon'ble Chief Justice, a Civilian, was made Chief Martial Law Administrator, who later obliged to administer oath to the hijacker, who grabbed State power as the President of the Republic.

Mr. Anisul Huq, the learned Counsel for the respondent, pointed out with deep voice that, prosecution, with a view to get justice and to see rule of law has been established, unsuccessfully moved from Court to Court in High Court Division with heavy pain and agony, with humiliation and disgrace for early hearing of the Criminal Appeals filed by the convicts, but the learned Judges declined feeling embarrassed for reasons best known to them. He concluded that, having taken oath to dispense justice without fear and favour, such attitude of the learned Judges shown to this case must not repeat to any case in future except on the grounds as provided in their Code of Conduct.

The learned Counsels of the appellants took this opportunity and pleaded for commutation of death sentence of the convicts to transportation for life on the ground of prolonging of the appellants in condemned cell for delay in hearing of the appeals due to embarrassment of the learned Judges.

Learned Attorney General drew our attention to the intensity of the brutality from the evidence and submitted that when weeping Russel wanted to go back to the lap of his mother, wounded Sheikh Naser taking shelter in a bathroom, was crying for water, Begum Fazilatunnessa Mujib seeing her husband Bangabandhu lying dead in a pool of blood in the stair cried out and asked to kill her, 'biwckvPiv' (devils) silenced all of them with shower of bullets exceeding the cruelty perpetrated by demon force of devil Yeazid in "Karbala'.

Mr. Attorney General added that the then Government not only harboured those criminals but also allowed Ltd. Col. (Retd.) Syed Faruque Rahman to float a political party in the country named "Freedom Party" and a National Daily named "The Millat" and also allowed to contest as a Presidential candidate in the general election, Major (Retd.) Bazlul Huda and Ltd. Col. (Retd.) Kh. Abdur Rashid were allowed to contest in

the general election in 1996 and were elected as Members of the Parliament and Kh. Rashid was made leader of the opposition earning hatred and discord of the people. He submitted that this was not a murder of an individual but they wanted to kill the ideals, values and the achievement of our War of liberation.

Mr. Attorney General continued that the heinous criminals neither deserve any mercy nor any sympathy to get shelter in any country having minimum respect for law and justice not to speak of any Muslim country being great enemies of Islam and mankind.

Mr. Attorney General strongly urged upon us to ensure that no learned Chief Justice should bow and yield to force and pressure and take the post of Chief Martial Law Administrator or administer oath to any usurper in future, disgracing the judiciary.

We have heard the learned Counsel for the respondents. Their submissions merit consideration.

The devilish incident of killing occurred in the early morning (Fazar Prayer Time) of 15th August,1975 in the Official House of the then President Bangabandhu Sheikh Mujibor Rahman at Road # 32, Dhanmondi Residential Area, Dhaka under the then Lalbagh Police Station, now Dhanmondi. The convicts brutally killed 11 (eleven) persons there including the then President as stated above. The two daughters of the President, Sheikh Hasina, now Prime Minister of Bangladesh, and her sister Sheikh Rehana luckily escaped death as they were abroad at that time, but unfortunately, became orphans by over night.

Evidence and materials on record show that the convicts brutally killed the unarmed President, his wife, brother and three sons with their wives without any provocation or resistance for their personal gain and interest. Mr. Mohitul Islam, P.W.1, the then resident P.A. to the President sustained bullet injuries in his body and was admitted into Dhaka Medical College Hospital. He escaped from the Hospital and went to Lalbagh Police Station to lodge F.I.R.(First Information Report) over the incident. But he was driven out by the Police Officer instead of recording the information of murder.

On 15th August, 1975 Khondker Mostaque Ahmed a Minister of Sheikh Mujib Government, became the President after the killings. He promulgated Indemnity Ordinance,1975 on 26.09.1975. Scenario of the country rapidly changed thereafter. Martial Law was declared, the convicts were sent abroad, Khandoker Mostaque Ahmed was removed, General Ziaur Rahman became Chief of Army and later Chief Martial Law Administrator and became the President of Bangladesh and later General H. M. Ershad stepped in as President till he was removed in 1990 by people's up rise.

By Proclamation Order No.1 of 1977 dated 23.04.1977 and inclusion of Indemnity Ordinance in the Schedule of subsequent 5th Amendment of the Constitution by President General Ziaur Rahman, the miscreants, including the convicts, were indemnified from trial of the liability of all murders, acts and misdeeds committed by them, the convicts and others were given jobs in different Foreign Mission of Bangladesh etc.

P.W.1, Mr. Mohitul Islam lodged the instant F.I.R. starting Dhanmondi P. S. Case No.10 (10)1996 dated 02.10.1996 after 21 years when the Government led by Awami League came to power through General Election held in late 1996. The Government brought a bill in the Parliament and repealed the Indemnity Ordinance,1975 dated 26.09.1975 by Indemnity Ordinance Repealing Act (Act No.21) of 1996 dated 14.11.1996. Convicts Lt. Col.(Retd.) Syed Faruque Rahman (through his mother Mahmuda Rahman) and Lt. Col. (Retd.) Sultan Shahariar Rashid Khan in Writ Petition No.5313 of 1996 and Writ Petition N0.5321 of 1996 respectively challenged the Repealing Act and the Dhanmondi P.S. Case and also Lalbagh P. S. Case being Lalbagh P. S. Case No.11 (11) 1975 dated 04.11.1975 unsuccessfully before the High Court Division and before the Appellate Division in Civil Appeal No.18 of 1997 and Civil Appeal No.19 of 1997 respectively, and this Division affirmed the judgment and order passed by the High Court Division in the Writ Petitions scrapping the Indemnity Ordinance,1975 and upholding the Indemnity Repeal Act being Act No.21 of 1996 (Ref: 49 DLR 133 and 18 BLD (AD)155). Thereafter, the instant proceeding started and trial of 20 charge-sheeted accused including the convicts held and they (15) were convicted

under Sections 302/34 read with Section 120-B of the Penal Code and were sentenced under Sections 302/34 of the Code to death by the learned Sessions Judge, Dhaka in presence of Lt. Col. (Retd.) Syed Faruque Rahman, Lt. Col. (Retd.) Sultan Shahariar Rashid Khan and Lt. Col. (Retd.) Mohiuddin Ahmed (Artillery) and in absentia against the rest, vide his judgment and order dated 08.11.1998 passed in Sessions Case No.319 of 1997 and made the Death Reference No.30 of 1998 to the High Court Division for confirmation. The aforesaid 3 (three) convicts facing trial filed Criminal Appeals before the High Court Division in 1998.

The above is, in nutshell, the startling picture of colossal erosion of human values, morals, rights and liberties, law and order and of justice delivery system due to passing of the Indemnity Ordinance,1975, obstructing and depriving the constitutionally guaranteed right of the citizens to get justice through due process of law. This is not only unheard of and unexpected to any civilized society but also unconceivable and unthinkable that the Government being bounded by and implementor of the Constitution, being guardian of it's citizens' rights and liberties, law and order of the country, instead of providing and helping it's citizens getting justice, protected, rehabilitated and harboured the criminals by misusing the State machinery and the hard toiled money of the citizens illegally and without authority only to fulfill their personal interest and imporal high ambition.

Creating obstruction to get justice creates agitation among people ultimately creating law and order situation. Delay in dispensing justice due to embarrassment of learned Judges is also shameful and at the same time disgraceful for the judiciary as a whole frustrating ends of justice and causing disrespect to the faith reposed by the people to the judiciary creating vicious atmosphere and impression to shake and lose their confidence in judiciary leading to devastating repercussion among them detrimental to establish rule of law.

We are shockingly in dearth of proper words to deprecate, condemn, disapprove and denounce such treacherous, immoral and unauthorized activities of the beneficiary governments and their misuse of Government machineries. No bereaved family should be

deprived of their right to get justice nor should they move with pain, agony and humiliation seeking justice for decades against Government obstruction under the blanket of black law nor any learned Judge should feel embarrassment beyond their code of conduct to dispense justice being faithful to our oath, out of fear and favour. Such activities of the Government are highly irresponsible, regrettable, disgraceful and shameful not only to the nation but also to the civilized community of the world and lowered down the image of the country internationally. We like to hope resolutely and believe that neither the learned Judges shall indulge to repeat their tarnishing role nor such heinous and nefarious acts at the Government level using Government power, authority and legislation shall repeat.

Mr. Attorney General conducted that the people have Constitutional right to know as to how and under what authority the convicts after committing such devilish offences were protected and patronized by the beneficiary Governments at the cost of the reputation and public exchequer of the country since 15th August, 1975.

In the periphery of the instant case, it is indeed, difficult for us to address the submissions of the learned Attorney General, but we agree that the citizens of the Republic have the right to know how their hard earned money was being spent by the Government and what was the authority of the Government to protect, shelter and rehabilitate the criminals instead of bringing them to face trial.

The arms of law is yet much more longer and mighty than the devilish might and misdeeds of the despotic and treacherous Government. It revealed from the instant case that justice delayed is not always (justice) denied but is available to the endurance.

We have high respect in the people of this country who always held high against all odds, the spirit of democracy and pursued through pain and hardship to restore and retain democratic rights and culture through democratic Government. We believe that the people shall continue their role as vanguard of democracy to make the Government accountable.

God, the Almighty, likes and loves the tolerant and crowns with success. A murderer is always a murderer and a terrorist is always a terrorist and is enemy to

mankind and humanity and an offender in the eye of law. To protect and shelter such killers is a great crime, a great sin and sin spares none.

J.

B.K. Das, J: I agree with the judgment and order delivered by my learned brothers Md. Tafazzul Islam, **J.**

J.

Md. Muzammel Hossain, J: I have gone through the draft judgment and order delivered by my learned brother Md. Tafazzul Islam,J in Criminal Appeal Nos.55-59 of 2007 preferred by the accused-appellants against the judgment and order of conviction and sentence dated 30.04.2001 passed by the Hon'ble High Court Division in Death Reference No. 30 of 1998 along with Criminal Appeal Nos.2604, 2613, 2616 and 2617 of 1998 and Criminal Appeal No.434 of 2007 confirming the death sentences awarded against the accused-appellants by the learned Sessions Judge on 08.11.1998 in Sessions Case No. 319 of 1997 under Sections 302, 34 and 120B of the Penal Code, 1860. In this momentous judgment concurring with the decision pronounced by my learned brother Md. Tafazzul Islam,J, I want to share my thoughts and views as this case involves some vital questions of law having far reaching consequences.

We have already passed a short order dismissing the appeal which forms part of the judgment.

Since my learned brother has stated the facts of this case in details in his judgment and order, I would not repeat the same. The above appeals have arisen out of the gruesome and brutal murder of the President and Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, and members of his family in the early hours of 15th August, 1975 at the official residence of the then President at House No.677, Road No.32, Dhanmondi, Dhaka. The informant, PW1, who was present at the residence of the then President at the time of the incident lodged a First Information Report (FIR) on

02.10.1996. The Investigating Officer (IO), after thorough investigation, submitted a charge sheet against 20 (twenty) accused persons including the present appellants under Sections 302/120B/324/307/201/380/149/34/109 of the Penal Code. The learned Sessions Judge, Dhaka by his Order No.15 dated 07.04.1997 framed charges against 20 (twenty) accused persons under Sections 120B, 302, 34 and 201 of the Penal Code. Accused Jubaida Rashid was discharged by the High Court Division in a Criminal Revision Case. Accordingly, 19 (nineteen) accused persons including the appellants faced the trial. Sixty-one witnesses were examined in total. No evidence was adduced by the defence. Thereafter, the trial court vide his judgment and order dated 08.11.1998 convicted 15 (fifteen) persons including the accused-appellants under Section 302/34/120B of the Penal Code and acquitted 4 (four) of the accused persons. The said 15 (fifteen) accused persons including the accused-appellants were sentenced to death under Section 302/34 of the Penal Code. Notwithstanding the fact that the accused-appellants, along with eleven others, were also convicted under Section 120B of the Penal Code, the learned Sessions Judge, Dhaka did not impose any separate sentence there under.

As against the aforesaid judgment and order of conviction and sentence dated 08.11.1998 passed by the learned Sessions Judge, Dhaka, the convict-appellants, namely, Lt. Col. Sultan Shahriar Rashid Khan preferred Criminal Appeal No.2604 of 1998; Major Md. Bazlul Huda preferred Criminal Appeal No.2613 of 1998; Lt. Col. Syed Farook Rahman preferred Criminal Appeal No.2616 of 1998; Lt. Col. (Retd) Mohiuddin Ahmed (Artillery) preferred Criminal Appeal No.2617 of 1998; and Major (Retd) AKM Mohiuddin Ahmed (Lancer) preferred Criminal Appeal No.434 of 2007 before the Hon'ble High Court Division.

Thereafter, the Hon'ble High Court Division comprising Md. Ruhul Amin,J and A.B.M. Khairul Haque,J conducted analogous hearing of the Death Reference No.30 of 1998 and the aforesaid five Criminal Appeals. However, the Division Bench rendered split opinions in respect of the judgment and order of conviction and sentence awarded against 15 (fifteen) accuseds including the present accused-appellants. The first learned

Judge of the High Court Division, Md. Ruhul Amin,J accepted the death reference in part in respect of four convict-appellants, namely, Lt. Col. Syed Farook Rahman, Lt. Col. Sultan Shahriar Rashid Khan, Major Md. Bazlul Huda and Major AKM Mohiuddin Ahmed (Lancer) and five other convicts, namely, Lt. Col. Abdur Rashid, Lt. Col. Sharful Hoque Dalim, Lt. Col. A.M. Rashed Chowdhury, Lt. Col. S.H.M.B. Nur Chowdhury and Lt. Col. Md. A. Aziz Pasha. Criminal Appeal No.2604 of 1998 filed by the appellant Lt. Col. Sultan Shahriar Rashid Khan (Retd), Criminal Appeal No.2613 of 1998 filed by the appellant Major Md. Bazlul Huda and Criminal Appeal No.2616 of 1998 filed by the appellant Lt. Col. Syed Farook Rahman were dismissed. Convictions of the aforesaid 9 (nine) condemned convicts including the aforesaid four appellants under Sections 302, 34 and 120B of the Penal Code were maintained and the sentences passed by the learned Sessions Judge under Sections 302/34 were upheld by the first learned Judge of the High Court Division and thereby affirmed the judgment and order passed by the learned Sessions Judge. The first learned Judge accepted the death reference in respect of Captain Abdul Majed with modification of conviction and sentence under Sections 302, 34 and 120B of the Penal Code to conviction and sentence under Section 120B of the Penal Code and thereby maintained the death sentence as he was a party to the criminal conspiracy. But his conviction and sentence under Section 302 and 34 of the Penal Code was set aside. The first learned Judge rejected the death reference in respect of appellant Lt. Col. (Retd) Mohiuddin Ahmed (Artillery) and allowed his appeal being Criminal Appeal No.2617 of 1998 and the judgment and order of conviction and sentence passed by the learned Sessions Judge in respect of him was set aside and, accordingly, first learned Judge of the High Court Division set aside the judgment and order of the learned Sessions Judge in respect of those five convicts.

A.B.M. Khairul Haque,J the second learned Judge of Division Bench, accepted the death reference of all 15 (fifteen) accuseds including the accused-appellants and affirmed the judgment and order of conviction and sentence in respect of all the 15 (fifteen) accused persons and dismissed the aforesaid criminal appeals.

In view of the aforesaid split opinions passed by a Division Bench of the High Court Division, the case with their opinions were referred to the third learned Judge of the High Court Division, Mohammad Fazlul Karim,J under Sections 378 and 429 of the Code of Criminal Procedure (Cr.P.C.). The third learned Judge had taken up the hearing of the Death Reference in respect of the aforesaid six accused persons in the matter of whom the learned Judges of the Division Bench had differed in their opinions i.e. those 6 (six) accused persons who were found guilty by the second learned Judge but not found guilty by the first learned Judge. The third learned Judge by his judgment and order dated 30.04.2001 concurring with the opinion of the second learned Judge accepted the death reference so far as it relates to Lt. Col. Mohiuddin Ahmed (Artillery), Captain Abdul Majed and Risaldar Moslemuddin @ Moslehuddin and dismissed the Criminal Appeal No.2617 of 1998 filed by the appellant Lt. Col. (Retd) Mohiuddin Ahmed (Artillery). But the third learned Judge concurring with the first learned Judge dismissed the death reference in respect of following three accused persons, namely, Captain Md. Kismat Hashem, Captain Nazmul Hossain Anser and Major Ahmed Sharful Hossain @ Shariful Islam and their conviction and sentence were also set aside acquitting them from the charge levelled against them.

The convict appellants being aggrieved with the judgment and order dated 30.04.2001 passed by the High Court Division accepting the death reference and dismissing their respective appeals preferred separate criminal petitions for leave to appeal against the judgment and order of the third learned Judge of the High Court Division. The Appellate Division upon analogous hearing of the appeals passed a common leave granting order on five grounds, which have been reproduced by my learned brother Md. Tafazzul Islam,J in his judgment.

As regards the first ground as to the scope and jurisdiction of third learned Judge, Mr. Khan Saifur Rahman, the learned Advocate for the appellants in Criminal Appeal Nos.56 and 58 of 2007, has submitted that the first learned Judge of the Division Bench of the High Court Division discarded all the three confessional statements one of which

was made by Lt. Col. (Retd) Mohiuddin Ahmed (Artillery) whose confession was finally decided by the third learned Judge to be true and voluntary. But the remaining two confessions were kept undecided for his exclusion from the hearing and as such finality of opinion to follow the judgment as per provision of Section 429 read with Section 377 of Cr.P.C. for the purpose of Section 378 has not been achieved. In support of his contention he has referred to the case of Hethubha –Vs- The State of Gujarat reported in 1970 (1) SCC (CR) 280, Union of India –Vs- Ananthapadmanabiah reported in 1971 SCC (CRI), Sajjan Singh –Vs- State of M.P. reported in 1999 SCC (CRI) 44 and Mohim Mondal –Vs- State reported in 15 DLR 615.

Mr. Anisul Huq, the learned Advocate appearing for the respondent-State, has referred to the provisions of Sections 377, 378 and 429 of the Cr.P.C. and has submitted that the decided cases of Bangladesh, Pakistan and India demonstrate that the third learned Judge has been endowed with wide discretion to decide how to deal with the case and that it is completely the third learned judge's discretion as to how he will hear the case, (and in the manner) as he thinks fit. He then submits that where there are more than one accused in the case and the learned Judges of the Division Bench are equally divided on their opinion then the case of the accused as to whom the judges are equally divided on their point shall be laid before the third learned Judge and on the other hand when the learned Judges are equally divided with regard to all the accuseds then the whole case with regard to the accuseds is referred to the third learned Judge. In this context Mr. Huq has argued that the cases of the Sub-Continent are divided into two groups, firstly, where there are difference of opinion in respect of all the accuseds and the cases where there are difference of opinion either on evidence or on points of law relating to conviction or acquittal regarding some of the accuseds. In this context Mr. Huq has referred to the decisions of the cases of Dharam Singh –Vs- State of U.P. reported in 1964 (1) CrL.J.78, Babu –Vs- State of U.P. reported in AIR 1965 SC 1467, Hethubha –Vs- State of Gujarat reported in AIR 1970 SC 1266, Union of India –Vs- B N Ananthapadmanabiah reported in AIR 1971 SC 1836, State of Andhra Pradesh –Vs- P.T. Appaiah and another reported

in AIR 1981 SC 265 and (1980) 4 SCC 316, Tanviben Pankajkumar Divetia –Vs- State of Gujarat reported in 1997 SCC 7156, Sajjan Singh –Vs- State of M.P. reported in (1999) I SCC 315, Mattar –Vs- State of U.P. reported in (2002) 6 SCC 460, Radha Mohan Singh –Vs- State of U.P. reported in (2006) 2 SCC 450, Sarat Chandra Mitra –Vs- Emperor reported in ILR 38 Cal 202, Ahmed Sher –Vs- Emperor reported in AIR 1931 Lah 513, Subedar Singh –Vs- Emperor reported in AIR 1943 Allahabad 272, Nemai Mondal –Vs- State of West Bangal reported in AIR 1966 Calcutta 194, Bhagat Ram –Vs- State of Rajsthan reported in AIR 1972 SC 1502, State of U.P. –Vs- Dan Singh reported in (1997) 3 SCC 747, Granade Venkata –Vs- Corporation of Calcutta reported in 22 CWN 745, Muhammed Shafi –Vs- Crown 6 DLR (WP) 104, Abdur Raziq –Vs- The State reported in 16 DLR (WP) 73, Mahim Mondal –Vs- State reported in 15 DLR (1963) 615 and State –Vs- Abul Khair and 2 others reported in 44 DLR (HCD) 284.

Mr. Mahbubey Alam, the learned Attorney General, has also made identical submission like Mr. Anisul Huq in respect of the scope and jurisdiction of the third learned Judge. He has submitted that when the Judges a Division Bench are equally divided in opinion and not concurrent the provisions of Sections 378 and 429 of the Cr.P.C. are applicable, and accordingly, he referring to the provisions of Section 378 of the Cr.P.C. has submitted that when the judges of the Division Bench are divided in their opinion, the case with their opinions thereon shall be laid before another judge of the same Court and such judge after such hearing as he thinks fit shall deliver his opinion and the judgment and order shall follow such opinion and thereby the opinion of the third learned Judge shall reach to its finality becoming the judgment of the Court. He has argued that in case of split judgment, the question of signing of the judgment by atleast two judges as provided in Section 377 is not applicable in view of the decision of the case of Babu and others –Vs- State of UP reported in AIR 1965 (SC) 1467. As regards power and jurisdiction of the third learned Judge the learned Attorney General has referred to the decision of the case of Sarat Chandra Mitra –Vs- Emperor reported in 15 CWN 18 = ILR 38 Cal 202, Ibrahim and another –Vs- The State reported in PLD 1959 (W.P.)

Lahore 715, the case of Mahim Mondal –Vs- State reported in 15 DLR (Dacca) 615, Sajjan Singh –Vs- Modhya Prodesh reported in AIR 1998 (SC) 2756 and the unreported decision in our jurisdiction in the case of State –Vs- Md. Foysal Alam Ansari and others in death reference No.81 of 2003 with Criminal Appeal No.2798 of 2003 and Jail Appeal No.842 of 2003.

On this point the learned Attorney General after citing the decisions of superior Courts of the Sub-Continent has submitted that in the instant case third learned Judge having heard and considered the applications at the instance of Major Bazlul Huda, Lt. Col. (Retd) Syed Farook Rahman and Lt. Col. (Retd) Sultan Shahriar Rashid Khan by order dated 06.02.2001 rightly opined that the cases of 9 condemned prisoners were not contemplated to be heard and decided to hear the cases of the 6(six) condemned prisoners over whom the judges of the Division Bench are equally divided.

Mr. Azmalul Hossain, the learned Advocate appearing for the respondent-State as special prosecutor has referred to us Chapter XXVII of the Cr.P.C. which contains the provisions in respect of the submissions of sentence for confirmation and also Chapter XXXI under Part 7 of the Code of Criminal Procedure which contains provisions of appeals arising out of the judgment and order of criminal Court. He has submitted that from the scheme of the law Chapter XXVII of the Code contains detailed provisions for submissions of the proceedings to the High Court Division when the Court of Sessions passes the death sentence and the sentence of death shall not be executed unless it is confirmed by the High Court Division. Referring to the scheme of the legislation Mr. Hossain has submitted that when the judges are equally divided in their opinion in confirmation of sentence it cannot be made or signed by two of the judges of the Division Bench and accordingly the case with their opinion, shall be laid to the third learned Judge who after such hearing (if any) as he thinks fit shall deliver his opinion and according to Sections 378 and 429 of the Cr.P.C. the case with their opinions shall be laid before another judge of the same Court who after such hearing (if any) as he thinks fit shall deliver his opinion and the judgment and order shall follow such opinion. He has made

elaborate submissions without referring to any case law on this topics except the case reported 15 DLR 618. He has submitted that by laying down the case with their opinions before the third learned Judge of the same Court means appeal has to come to a finality in the High Court Division unless two judges gave their consent and that the third learned Judge is free for the expression "such hearing (if any) as he thinks fit" refers to the situation where it is up to the third learned Judge's discretion to decide as to how he will hear the case as he thinks fit and that postulates that the third judge is completely free in resolving the decision as he thinks fit. In other words Mr. Hossain has strived hard to argue that Section 378 read with Section 429 of the Cr.P.C. contemplates that it is for the third judge to decide on what points he shall hear the arguments if any. Accordingly he has asserted that there is no illegality in the opinion pronounced by the third learned Judge in deciding to consider the case of the aforesaid six convict persons about whom there was difference of opinion without hearing the other convict appellants in details.

Chapter XXVII of the Code of Criminal Procedure provides for submission of sentence for confirmation. Section 374 of the Code postulates that where the Sessions Judge passes the sentence of death the proceedings shall be submitted to the High Court Division and the sentence shall not be executed unless it is confirmed by the High Court Division. So it is mandatorily required to submit the proceedings before the High Court Division for confirmation of death sentence. Section 377 of the Code contemplates that the confirmation of sentence shall be made and signed by at least two judges of the High Court Division. But when the judges of the High Court Division are equally divided in their opinion, according to provision of Section 378 of the Code, ''the case with their opinions thereon shall be laid before'' another Judge and such Judge after such hearing as he thinks fit shall deliver his opinion and the judgment and order shall follow such opinion. From the scheme of the law it appears that Chapter XXXI under Part VII of the Cr.P.C. contains detailed provisions in respect of appeals. Section 410 of the Code is an enabling provision which enables an accused person convicted on a trial held by a Sessions Judge / Additional Sessions Judge to prefer an appeal before the High Court

Division. It is an well established principles of law that once a criminal appeal is admitted it must be decided on merits and cannot be dismissed for non prosecution. Even if the appellant or his Advocate remains absent in the Court at the time of hearing of the appeal, the Appellate Court cannot avoid its responsibility or duty from perusing the record of the case and giving reasons in deciding the matter on merit. When the judges of the Division Bench as the Court of appeal are equally divided in opinion, ‘‘the case with their opinions thereon shall be laid before another judge’’ of the same Court and such judge after such hearing if any as he thinks fit shall deliver his opinion and the judgment and order shall follow such opinion. From a careful reading of the provision of Section 378 visa vis Section 429 of the Code it appears that though the provisions in both these sections are identical in nature, when the Judges of a Division Bench are equally divided in their opinion yet Section 429 envisages that “the case, with their opinions thereon shall be laid before another judge of the same Court and such judge after such hearing (if any) as he thinks fit shall deliver his opinion and the judgment and order shall follow such opinion”.

From the above expressions we find that the words “of the same Court” after the words “another Judge” and the expression “if any” after the expression “such hearing” do not exist in Section 378. By adding these two expressions in Section 429 of the Code the legislature intended to say that when the judges of the Division Bench are equally divided in opinion while disposing appeal, the case with their opinions thereon shall be laid before another judge of the same Court. Thereby meaning a judge of the appellate Court who is “completely free” to decide on what points he shall hear arguments if any and that third learned judge is free to decide the appeal by resolving the diferences in the manner he thinks proper.

During the course of hearing the learned Advocates from both sides have made elaborate submissions on the scope and jurisdiction of the third learned Judge. It has come to our notice that Mr. Khan Saifur Rahman, the learned Advocate in Criminal Appeal Nos.56 of 2007 and 58 of 2007, whose arguments have been adopted by the learned Advocate for the other appellants, has referred to the case reported in 1999 SCC

(CRI) 44, ILR 38 Cal 202, 1970 (1) SCC (CR) 280, 1971 SCC (CRI) 535, 15 DLR 615 and he has also submitted that the expression “as he thinks fit” does not qualify the word “hearing” and there is no co-relation between “hearing” and “as he thinks fit” and accordingly he has submitted that for breach of the provisions of Section 377 of the Code for not signing the judgment by two judges, there is no judgment in the eye of law. As such the judgment and order of conviction and sentence is not tenable in law. From our careful scrutiny we have found that the same cases are also relied on by the respondents in support of their contentions. It would be profitable for us to examine the relevant decisions in this context. In the case of Dharam Singh –Vs- State of U.P. reported in 1964 (1) Cr.L.J. 78, there was difference regarding all the accuseds. In this case trial judge convicted ten accused persons under Sections 302 and 149 of the Indian Penal Code and acquitted two accused persons. The state appealed against acquittal and ten accused persons preferred appeal against conviction. A Division Bench of the High Court differed in their opinions and the matter was laid before the third learned judge who concurring with one of the judges upheld the conviction of ten appellants and set aside the acquittal of one accused, where the judgment and order of the Court has followed the opinion of third learned judge.

In the case of Babu –Vs- State of the U.P. reported in AIR 1965 SC 1467, the appeal was against conviction and sentence of four accused appellants under Sections 304 and 34 of the Indian Penal Code. First learned judge dismissed the appeal disbelieving some part of the evidence and the second learned judge allowed the appeal. The Supreme Court of India held that Section 429 of the Code of Criminal Procedure contemplates that it is for the third judge to decide on what points he shall hear arguments if any and that postulates that he was completely free in resolving difference as he thinks fit.

In the case of Hethubha –Vs- State of Gujarat reported in AIR 1970 SC 1266 the trial Court acquitted all the three accused persons under Sections 302 read with Section 34 of the Indian Penal Code but convicted all the accused persons for the offences punishable under Sections 304 Part-2 read with Section 34 and sentenced them to suffer

rigorous imprisonment for five years. Accused No.1-Hethubha and No.2-Ranubha were convicted for the offences punishable under Section 323 and accused No.3-Malubha was convicted for the offence punishable under Section 323 read with Section 34 of the Indian Penal Code. The accused Nos.1 and 2 were sentenced to suffer rigorous imprisonment for three months while accused No.2 was sentenced for two months and all the sentences were to run concurrently. All the accused preferred appeals against their convictions before the Division Bench in the High Court of Gujarat. Divan,J held that accused No.1 was guilty for the offence under Section 302 and accused Nos.2 and 3 were found guilty under Section 324 read with Section 34. Shelat,J acquitted all the accused because he was not satisfied with the evidence of proof of the identity of the accused. The case was placed before the third learned Judge Mehta,J under Section 429 of the Code who found accused No.1 guilty under Section 302 and accused Nos.2 and 3 guilty under Section 302 read with Section 34 and all of them were sentenced to suffer rigorous imprisonment for life. The conviction of accused Nos.1 and 2 under Section 323 and of the accused No.3 under Section 323 read with Section 34 was upheld. The conviction of all the accuseds under Section 304 Part-2 was altered as stated above. On appeal, the Supreme Court of India held that the third judge was competent to deal with the whole case.

In the case of Union of India –Vs- B.N. Ananthapadmanabiah reported in AIR 1971 SC 1836 there was difference of opinion regarding all the accused persons. Reference was made to the third Judge. In this case Supreme Court considered the case of Bhagat Ram –Vs- State of Rajasthan reported in (1972) 3 SCR 303 where the third Judge held that Bhagat Ram was guilty of the offence under Section 389 and also Sections 120B, 218 and 347 of the Indian Penal Code. It has been held that it was not permissible for the third Judge to re-open the matter and convict Bhagat Ram of the offences under Section 120B and 218 of the Indian Penal Code as the Division Bench comprising the first and second Judge confirmed the acquittal of Bhagat Ram in respect of charge under Sections 347, 218, 389 and 120B of the Penal Code. In the case the entire matter relating to acquittal of conviction and sentence of Bhagat Ram had not been left open because of

difference of opinion between the two judges. The Supreme Court of India in the case of Hethubha –Vs- State of Gujarat reported in AIR 1970 SC 1266 observed that the scope of Section 429 Cr.P.C. was not confirmed in Bhagat Ram's case. No question was raised whether the judges of the Division Bench restrict the power of the third Judge under Section 429 nor the notice of the Court appears to have been drawn to three earlier decisions of the Court on the point, namely, in the case of Babu –Vs- State of UP reported in AIR 1966 SC 1467, Hethubha –Vs- State of Gujarat reported in AIR 1970 SC 1266 and Unino of India –Vs- B.N. Ananthapadmanabiah reported in AIR 1971 SC 1836 which was unreported when Bhagat Ram's case was decided. Having considered all these three cases the Supreme Court tried in the case of Babu –Vs- State of UP reported in AIR 1966 SC 1467 held that Section 429 Cr.P.C. contemplates that it is for the third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit. In the case of Hethubha –Vs- State of Gujarat reported in AIR 1970 SC 1266 the Supreme Court having considered the decision reported in AIR 1965 SC 1467 held that two things are noticeable in Section 429 of the Code of Criminal Procedure: firstly, the case shall be laid before another Judge, and, Secondly, the judgment and order will follow the opinion of the third learned Judge. Accordingly, the Supreme Court held that the third learned Judge can or will deal with the whole case and that the third learned Judge to whom the case was referred under Section 429 has not overstated the limits in deciding the case as a whole. The appeal was dismissed accordingly.

In the case of State of Andhra Pradesh –Vs- P.T. Appaiah reported in AIR 1981 SC 265, two accused persons were convicted under Sections 302 and 34 of the Indian Penal Code and sentenced each of them to suffer rigorous imprisonment for life. On appeal the Division Bench Judges differed on the nature of the offence that was committed by the accused in causing the injury. Madhava Reddy, J held punishable under Section 304 Part-1 of the Penal Code and Sriramula,J dismissed the appeal holding that the Sessions Judge rightly convicted the accused under Sections 302 and 34 of the Indian

Penal Code. But the third Judge Ramchandra Raju,J acquitted both the accuseds. Supreme Court held that the third Judge before whom the case was laid for opinion is competent to deal with the whole case and he is not bound to confine his judgment only to the matter concerning difference of opinion between the other two judges. The Supreme Court have relied with observations made in the case of Union of India –Vs- B.N. Ananthapadmanabiah reported in AIR 1971 SC 1836 which runs as follows:

> "This question came up for consideration in the recent unreported decision in Hethubha v. State of Gujarat……..…….. This Court held that the third learned Judge could deal with the whole case. The language of Section 429 of the Code of Criminal Procedure is explicit that the case with the opinion of the judges comprising the Court of Appeal shall be laid before another judge of the same Court. The other noticeable feature in Section 429 of the Code of Criminal Procedure is that the judgment or order shall follow the opinion of the third learned Judge."

In the case of Tanviben Pankajkumar Divetia –Vs- State of Gujarat reported in AIR 1997 SCC 7156 the accused appellant was convicted under Section 302 read with Section 34 of the Indian Penal Code against which he preferred appeal before the Gujarat High Court. A Division Bench of the High Court dismissed the appeal preferred by the state against the acquittal of the appellant of the charges levelled under Section 302 read with Section 120B of the Penal Code and Section 302 of the Indian Penal Code. One Judge acquitted the accused and the other Judge convicted the accused. The matter was referred to third Judge. The Third learned Judge upheld the conviction of the appellant under Section 302 of the Penal Code. Accordingly the appeal of the appellant was dismissed by the High Court. On appeal, the Supreme Court of India held that:

> "it is for the third Judge to decide on what points he shall hear arguments, if any, and it necessarily postulates that the third Judge is free to decide the appeal by resolving the difference in the manner he thinks proper."

Mr. Justice G.N. Ray observed as under:

> "In, Babu v. State of Uttar Pradesh, (AIR 1965 SC 1467), it has been held by Constitution Bench of this Court that where the third Judge did not consider it necessary to decide a particular point on which there had been difference of opinion between the two Judges, but simply indicated that if at all it was necessary for him to come to a decision on the point, he agreed with all that had been said about by one of the two Judges, such decision was in conformity with law. That the third Judge is free to decide the appeal in the manner he thinks fit, has been reiterated in, Hethubha v. State of Gujarat, (AIR 1970 SC 1266) and Union of India v. B.N. Ananthapadmanabiah, AIR 1971 SC 1836. In State of A. P. v. P.T. Appaiah, AIR 1981 SC 365, it has been held by this Court that even in a case when both the Judges had held that the accused was guilty but there was difference of opinion as to the nature of offence committed by the accused, it was open to the third Judge to decide the appeal by holding that the accused was not guilty by considering the case on merit."

In the case of Sajjan Singh –Vs- State of M.P. reported in (1999) 1 SCC 315 at page-324 para-10 the Supreme Court held that it is the third Judge whose opinion matters; against the judgment that follows therefrom that an appeal lies to the Supreme Court by way of special leave petition under Article 136 of the Constitution or under Article 134 of the Constitution or under Section 379 of the Code.

In the case of Mattar –Vs- State of UP (2002) 6 SCC 460 two accused persons were convicted under Sections 302 and 34 of the Indian Penal Code, one of the accused died during the pendency of the appeal before the High Court. In High Court first Judge acquitted the appellant and the second Judge convicted him. The matter was referred to the third Judge who dismissed the appeal and convicted the accused appellant. The Supreme Court of India held that the third learned Judge, under these circumstances, was required to independently examine the matter and express his opinion. It is not permissible to only or merely indicate the agreement with one or the other view without giving reasons therefor.

In Radha Mohan Singh –Vs- State of U.P. (2006) 2 SCC 450 five accused persons were convicted under Sections 147, 148, 323, 324 and 302 read with Section 149 of the Indian Penal Code and imposed sentence of various terms of imprisonment including life imprisonment under Section 302 read with Section 149 of the Indian Penal Code. The accused appellant preferred appeal in the Allahabad High Court. In the Division Bench, first learned Judge Agarwal,J allowed the appeal and set aside the conviction and sentence imposed thereunder but the second Judge Mishra,J dismissed the appeal and thereby upheld the conviction and sentence passed by the learned Sessions Judge. The The matter was referred to the third Judge who upheld the conviction for all. On appeal, the Supreme Court held that the third learned Judge is under no obligation to accept the view of one of the judges holding in favour of acquittal of the accused either as a rule of prudence or on the scope of judicial etiquette. It is not possible to accept the contention raised by the appellant.

In the case of Sarat Chandra Mitra –Vs- Emperor reported in ILR 38 Cal 2002 the learned Judges of the Division Bench are equally divided in respect of one of the accused, Sarat Chandra Mitra and the matter was laid before the third Judge. The Supreme Court of India held that in the case of two prisoners, regarding the guilt of one of whom only the Judges of the Appellate Court are divided in opinion, it may be that what has to be laid before another Judge is the case of such prisoner alone. But where they are equally divided as the guilt of one accused, though in certain aspects they may be agreed, the whole case as regards the accused is laid before the third Judge, and not merely the point or points on which there is difference of opinion, and it is his duty to consider all the points involved before delivering his opinion upon the case.

In the case of Nemai Mondal –Vs- State of West Bengal reported in AIR 1966 Calcutta 194 there were ten appellants. Both the learned Judges of the Division Bench were unanimous that the conviction of the appellant Nos.1, 9 and 10 should be set aside. Therefore appellant Nos.1, 9 and 10 has been set at liberty and there is no difference of opinion about them. The difference of opinion that comes up for decision is with respect

to appellant Nos.2-8 were dealt by the third Judge. Mukharji,J held that the case with the differing opinion should be placed before the third Judge.

In the case of State of UP –Vs- Dan Singh reported in (1997) 3SCC 747 32 accused persons were charged under Sections 147, 302/149, 436/149, 307/149 of the Indian Penal Code and under Sections 4(iv), (x) and Section 5.7 of the Protection of the Civil Rights Act,1955. The Sessions Judge acquitted all the 32 accused persons including Dan Singh and others. State preferred appeal before the High Court, Allahabad. Katju,J convicted two accused, namely, Jit Singh and Kishan Sing under Sections 325 and 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for five years and acquitted 30 accused persons. By a separate opinion Rajeshwar Singh,J convicted six accused men and four ladies and acquitted 22 accused persons. The first order was of the Division Bench regarding the acquittal of 22 accused persons. Thereafter the case was laid before the third learned Judge. The third learned Judge Mathur,J after hearing the appeal of ten accused to which the two learned judges differed, agreed with Katju,J convicting two accused, namely, Jit Singh and Kishan Sing and acquitted 30 accused persons. One special leave petition was filed by the state against all the 32 accused persons. Leave was not granted in the case of 4 ladies and accordingly their acquittal has become finality and leave was granted against 28 accused persons. Supreme Court of India observed as under:

> "According to this Section if there is a difference of opinion amongst the Judges of the Bench, then their opinions are laid before another judge. It is only after the third judge gives his opinion that the judgment or order follows. It is clear from this that the judgment or order which can be appealed against, under Article 136 of the Constitution, is only that which follows after the opinion of the third Judge has been delivered. What B.N. Katju and Rajeshwar Singh,JJ. wrote was not their judgments but they were their opinions. Due to disagreement amongst them, Section 392 of the Code of Criminal Procedure required the appeal as a whole to be laid before the third judge (V.P. Mathur,J. in this case) whose opinion was to

prevail. The first order of 15.04.1987 was clearly not contemplated by Section 392 of the Code of Criminal Procedure and is, therefore, non est.

When the appeal as a whole is heard by the third judge, he not only has an option of delivering his opinion but, under the proviso to Section 392 of the Code of Criminal Procedure he may require the appeal to be re-heard and decided by a larger Bench of Judges. This was an option which, under the proviso, was also open for any one of the two Judges, namely, B.N. Katju and Rajeshwar Singh,JJ. to exercise, but they chose not to do so. What is clearly evident is that the appeal is finally disposed of by the judgment and order which follows the opinions of the third Judge. This being so special leave petition could only have been filed after the appeal was disposed of by the High Court vide its final order dated 19.05.1988. Even though the said order purports to related only to ten out of thirty-two accused the said order has to be read along with the earlier order of 15.04.1987 and, in law, the effect would be that the order dated 19.05.1988 will be regarded as the final order whereby the appeal of the State was partly allowed, with only two of the thirty-two accused being convicted under Section 325 read with 34 IPC, while all the other accused were acquitted."

In the case of Granade Venkata –Vs- the Corporation of Calcutta reported in 22 CWN 745 the accused was prosecuted and convicted under Section 495A(1) of the Calcatta Municipal Act for selling adulterated ghee. The Magistrate allowed the defence to rely on this evidence which was obtained by cross-examination of the Assistant Analyst to the Corporation who applied certain processes of analysis to the sample of ghee in question and obtained certain results from which he made the deduction that the ghee had been adulterated with certain percentages of foreign fat. No other witness has been examined on either side and the defence contended that according to the standard works on the subject no such deduction could be made. Defence cross-examined the analyst. The Magistrate allowed the defence to rely on this evidence, dealt with it as being the evidence in the judgment. The Rule, against the conviction was heard before

two Judges, both of whom agreed that the conviction could not stand. Chitty,J was for a retrial on the ground that there was no satisfactory investigation and Smither,J held otherwise. The matter was laid before the third Judge Woodroffe,J who held that in a case referred under Section 420 Cr.P.C., a third Judge would not differ upon a point on which both the referring Judges were agreed unless there were strong grounds for doing so.

In the case of Muhammed Shafi –Vs- Crown reported in 6 DLR (WP) 104 the full Bench of the High Court held that neither Section 378 nor Section 429 prevents the obtaining of the decision of the full bench upon a question of law or subsequent delivery of the opinion of the third Judge upon the whole case. The third Judge before whom the case is laid under Section 429 of the Criminal Procedure Code exercise the authority of a Bench of judges and therefore, he should be considered not as a single Judge, but as a Bench. The case is not one which is dealt with in fact by a single judge, but one which is dealt with by three judges, even though the third judge is dealing with it at a later stage then the two disagreeing judges.

Mahim Mondal –Vs- State reported in 15 DLR (1963) 615. In this case the appellant, Mahim Mondal, along with other accused persons were tried under Sections 304 and 148 and various other sections of the Penal Code. Mahim Mondal was convicted under Sections 304 and 148 of the Penal Code and sentenced him to suffer rigorous imprisonment for five years and one year respectively. Accused Asab Mondal was convicted under Section 323 of the Penal Code and sentenced to suffer rigorous imprisonment for six months. Appellant Mohim Mondal preferred an appeal against the conviction and sentence passed against him. Upon admission of the appeal, a Division Bench issued a Suomotu Rule asking to show cause as to why the conviction and sentence passed against the accused under the said Code should not be set aside. The revision case arises out of the Rule which was issued by the same Court. After hearing the appeal and the revision case a Division Bench differed in their opinion as to whether the accused Mahim Mondal could have been convicted of rioting. Consequently, the matter was laid before the third judge, Morshed, J, under section 429 of the Cr.P.C. In his

judgment Morshed, J held that the whole case is required to be laid before the third Judge and it is his duty to conside all the points involved before he delivers his opinion upon the case.

State –Vs- Abul Khair and others reported in 44 DLR 284. In this case two judges of the Division Bench differed on the validity of conviction and sentence of two appellants but agreed in respect of conviction of one accused, namely, Abul Khair. The case was laid before the third Judge. The third learned Judge only dealt with the case of the two accused, nameloy, Mosharaf and Moinuddin i.e. with regards to whom the Judges had differed.

Mr. Khan Saifur Rahman, the learned Advocate appearing for the appellants in Criminal Appeal Nos.56 and 58 of 2007 submits that on a clear analysis of the evidence and materials on record it appears that the instant case is a case of mutiny leading to murder of the President Bangabandhu Sheikh Mujibur Rahman and member of his family and relations and not a case of murder simplicitor and, as such, the conviction of the accused appellants by a normal criminal Court instead of Court martial has vitiated the trial. Mr. Khan has argued that series of events, activities, briefings, exercises and happenings, having had happened in Dhaka cantonment in the night preceding the fateful event occurring in the House No.677, Road No.32, Dhanmondi, clearly constituted mutiny and it does not indicate any case of murder simplicitor. The place of occurrence includes the cantonment and the cantonment activities, briefings and exercises include the fact of the case and as such no case of agreement or pre-arranged plan, pre-concert, common intention, criminal conspiracy or object for common intention within the scope of Section 34 or Section 120A of the Penal Code can be lawfully inferred. Mr. Khan then submits that killing of persons in the course of mutiny is triable by a Court Martial and in this context he has referred to Section 59 of the Army Act,1952 and submits that since the accused persons were in active service at the time of the commission of offence, they should have been in all fairness tried before a Court Martial instead of criminal Court. In this context he has referred to the case of Jamil Huq –Vs- Bangladesh reported in 34 DLR

(AD) 125 and submits that for the mutiny which took place in the night of 29th/30th May,1981 resulting the death of Ziaur Rahman, President of Bangladesh the trial held exclusively by a Court Martial as per provision of Section 31 of the Army Act and, as such, the murder of the President Sheikh Mujibur Rahman on the fateful night of the 15th August by the Army personnel who were in active service should have been tried by a Court Martial instead of a criminal Court and, as such, the conviction and sentence of the accused appellant is not tenable in law. Mr. Khan has argued that the severity of penalty in case of mutiny and in case of murder not being the same and the difference is to the advantage of the appellants in a trial by Court Martial since in the case of punishment for murder there is only one alternative of death penalty to imprisonment for life. He has argued that under Section 31 of the Army Act any sentence alternative to death sentence carries much lesser punishment as mentioned in the Army Act,1952. Mr. Khan Saifur Rahman has submitted that the plea of concurrent jurisdiction by the respondent for the trial of the case by criminal Court or the Court Martial basing on the provisions of Sections 91 and 92 of the Army Act,1952 had lost its force in view of the proviso to Section 92(2) of the Army Act and that the question of concurrent jurisdiction of trial of the case is misconceived.

Mr. Anisul Huq, the learned Advocate appearing for the respondent has submitted that the present case not being a case of mutiny rather a case of murder simplicitor, no illegality was committed by trying the accused appellants in the Criminal Court because, even if for the sake of argument, though not conceding, along with mutiny there was also murder. Mr. Huq has submitted that in case of civil offence like murder there was a concurrent jurisdiction both in the Court Martial and Criminal Court as per provisions of Sections 94 and 95 of the Army Act and the formalities required thereunder along with Section 549 of the Cr.P.C. have been fully complied with and, as such, no illegality is committed by holding the trial of the case in a criminal court. Mr. Anisul Huq has submitted that the statement in the leave granting order No.3 to the effect that ‘‘whether there is mutiny leading to murder or murder simplicitor’’ is misconceived because for

murder like the present case there is concurrent jurisdiction under Section 59(2) of the Army Act,1952. He then has submitted that in the instant case there being concurrent jurisdiction the Sessions Court having fully complied with the provisions of Sections 94 and 95 of the Army Act and Section 549 of the Cr.P.C. as evidenced by the Sessions Court's order dated 24.03.1997 and 03.04.1997 hold the trial and, as such, no illegality is committed in holding the trial. In this context he has referred to the decisions in the cases of M S K Ibrat V. The Commander in Chief, Royal Pakistan Navy reported in 4 DLR (SC) 128, Balbir Singh and another V. Panjab reported in 1995 1SCC 90.

Mr. Mahbubey Alam, the learned Attorney General appearing on behalf of the respondent, has submitted that in the instant case the offence of murder has been tried and no charge of mutiny has been brought against the accused appellants. The learned Judges of the Division Bench as well as the third learned Judge upon consideration of evidence and materials on record have not found any case of mutiny rather they found the case of murder and accordingly they have awarded their verdict. He has argued that raising the issue of mutiny by the defence to challenge the jurisdiction of the trial Court at the appellate stage for the first time is not tenable in law. He has referred to the case of Haider Ali Khan –Vs- State reported in 14 BLD(AD) 270 and the case of Julfiqur Ali Bhutto –Vs- State reported in PLD 1979 (SC) 53. Mr. Attorney General having referred to the Writ Petition No.2032 of 1997 filed on behalf of the appellant Lt. Col. Syed Farook Rahman, challenging the sitting of the Court to Nazim Uddin Road which has gone upto the Appellate Division having been reported in 49 DLR (AD) 157 and also the Writ Petition submitted on behalf of the appellant Sultan Shahriar Rashid Khan and Lt. Col. Syed Farook Rahman, challenging the vires of the Indemnity Repeal Act,1997 in the High Court Division which has gone upto the Appellate Division reported in 3 BLC (AD) 89 has submitted that the accused appellant had never challenged the jurisdiction of the Court on the ground that it was a case of mutiny leading to murder not a case of murder simplicitor and, as such the appellants contention that the civil Court has no jurisdiction to try the offence of murder is not tenable in law. The learned Attorney General has

drawn our attention to the refusal of the first Judge in granting leave to make submission on the point of mutiny since the prosecution has no case of mutiny but a case of murder committed in the fateful night of 14th August and the early hours of 15th August,1975. Mr. Mahbubey Alam has also referred to the conclusions and observations made by the third learned Judge. The learned Attorney General having drawn our attention to the written statements made by the convict appellants, namely, Lt. Col. Syed Farook Rahman, Sultan Shahriar Rashid Khan and Mohiuddin (Artillery), have submitted that none of the appellants made any averment to the effect that murders were committed in course of mutiny. He has also reiterated the submissions made by Mr. Anisul Huq to the same effect that since in the instant case nither any discretion was exercised in taking a decision by the prescribed officer under Section 94 of the Army Act nor any question was raised by the convict appellants in the trial Court as to the forum of trial and, as such, the convict appellants are not entitled to challenge the forum of trial for the first time in the Appex Court. In this context Mr. Attorney General has referred to the case of Major E.G. Barsay –Vs- State of Bombay reported in AIR 1961 (SC) 1762. Having referred to the case of Jamil Huq –Vs- Bangladesh reported in 34 DLR (AD) 125, he has submitted that forum of trial being governed by a procedural law and the procedure followed in Civil Court is much fairer and transparent than that the procedure followed in Court Martial, the question of prejudice to the convict appellant does not arise at all. The offence of mutiny has not been defined in the Army Act,1952. But Section 31 of the Army Act provides for punishment for the offence of mutiny and insubordination. However, mutiny is defined under Section 35 of the Naval Ordinance,1961. According to Section 94 of the Army Act, a criminal Court under Court Martial has jurisdiction in respect of a Civil offence and the prescribed officer has discretion to decide as to which Court the proceedings shall be instituted and if that officer decides that the proceedings shall be instituted before the Court Martial then he will direct that the accused persons shall be detained in military custody. Sections 94 and 95 of the Army Act,1952 and Section 549 of the Cr.P.C. set out the procedure in the case of concurrent jurisdiction of Court Martial

and Criminal Court. In this context it will be profitable to quote Sections 94 and 95 of the Army Act which are as follows:

''94. When a criminal court and a court martial have each jurisdiction in respect of a civil offence, it shall be in the discretion of the prescribed officer to decide before which court the proceedings shall be instituted and, if that officer decides that they shall be instituted before a court martial, to direct that the accused person shall be detained in military custody.

95.(1) When a criminal court having jurisdiction is of the opinion that proceedings ought to be instituted before itself in respect of any civil offence, it may, by written notice, require the prescribed officer, at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Government.

(2) In every such case, the said officer shall either deliver over the offender in compliance with the requisition or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Government, whose order upon such reference shall be final.''

It is also necessary to reproduce Section 549 of the Cr.P.C. which reads as under:

''549. Delivery to military authorities of person liable to be tried by Court martial. –(1) The Government may make rules consistent with this Code and the Bangladesh Army Act,1952 (XXXIX of 1952), the Bangladesh Air Force Act,1953 (VI of 1953), and the Bangladesh Navy Ordinance,1961 (XXXV of 1961), and any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law, shall be tried by a Court to which the Code applies, or by Court-Martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, to be tried either by a Court to which this Code applies or by Court Martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a

statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment, to which he belongs, or to the Commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by Court-Martial.

(2) Apprehension of such persons. Every Magistrate shall on, receiving a written application for that purpose by the commanding officer of any body of soldiers, sailors or airman stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence."

From the aforesaid provisions of Sections 94 and 95 of the Army Act it appears that in the case of murder there is concurrent jurisdiction by both the Court-Martial and the ordinary criminal Court. But Section 59(2) of the Army Act stipulates that a case of murder can not be tried under the Army Act if the victims are not subject to the Army Act unless the accused commits the offence while on active service or at any place outside Bangladesh or at a frontier post specified by the Government. It also appears that application of Section 59(1) is also limited by Section 92(2) of the Army Act which provides that trial shall commence within 6 months after he had ceased to be subject to this Act. It transpires that in the instant case there is concurrent jurisdiction, the Sessions Court had complied with all formalities necessary under Sections 94 and 95 of the Army Act and Section 549 of the Code of Criminal Procedure by sending notice to the Chief of Staff, Army under Rule 2 of Criminal Procedure Rules (Military Offenders) 1958 with regards to the trial of the accused persons as evidenced by order No.12 dated 03.04.1997. In the case of M S K Ibrat –Vs- the Commander in Chief, Royal Pakistan Navy reported in 8 DLR (SC) 128 the accused, an officer of Pakistan Navy, was charged with theft and was produced before the Special Judge who addressed a letter to the Commanding Officer, in accordance with Section 549 of the Code of Criminal Procedure, enquiring whether the appellant was to be tried by a Court Martial or the Judge himself. The

Commanding Officer in reply informed that the accused should be tried by Court Martial. Thereafter the Judge handed over the accused to the Naval Authority which was challenged. Supreme Court held that the Judge was correct in handing over the accused persons to the Naval Authority after receiving reply from the Commanding Officer.

In the case of Joginder Singh –Vs- Himachal Pradesh reported in AIR 1971 SC 500 the accused, a Lance Naik, raped a ten years old girl. He was convicted under Section 376 of the Indian Penal Code. The conviction was challenged before the Appellate Court on the ground that Section 549 of the Code of Criminal Procedure had not been complied with. While dismissing the appeal the Supreme Court of India observed as under:

> "In respect of an offence which could be tried both by a criminal Court as well as Court-martial, Sections 125, 126 and the Rules have made suitable provisions to avoid a conflict of jurisdiction between the criminal courts and the Court-martial. But it is to be noted that in the first instance, discretion is left to the officer mentioned in Section 125 to decide before which court the proceedings should be instituted. Hence, the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed will have to exercise his discretion and decide under Section 125 in which court the proceedings shall be instituted. It is only when he so exercises his discretion that the proceeding should be instituted before a court-martial, that the provisions of Section 126(1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in the way of a criminal Court exercising it's ordinary jurisdiction in the manner provided by law."

In the case of Balbir Singh and another –Vs- Punjab reported in 1995 1 SCC 90, the accused persons while in the active service of the Air Force were convicted by the Additional Sessions Judge under Sections 302 and 149 of the Indian Penal Code. It was

contended on behalf of the accused that since he was in active service, he should be tried before the court-martial. The Supreme Court dismissed the appeal and observed as follows:

> "When a criminal court and court-martial each have jurisdiction in respect of the trial of the offence, it shall be the discretion of the officer commanding the group, wing or station in which the accused in serving or such other officer as may be prescribed, in the first instance, to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a "court-martial", to direct that the accused persons shall be detained in Air Force custody. Thus, the option to try a person subject to Air Force Act who commits an offence while on "active service" is in the first instance with the Air Force Authorities. The criminal court, when such an accused is brought before it, shall not proceed to try such a person or to inquire with a view to this commitment for trial and shall give a notice to the commanding Officer of the accused, to decide whether they would like to try the accused by a court-martial or allow the criminal courts to proceed with the trial. In case, the Air Force Authorities decide either not to try such a person by a court-martial or fail to exercise the option when intimated by the criminal court within the period prescribed by Rule 4 of the 1952 Rules, the accused can be tried by the ordinary criminal court in accordance with the Code of Criminal Procedure. On the other hand if the Authorities under the Act opt to try the accused by the 'court-martial', the criminal court shall direct delivery of the custody of the accused to the Authorities under the Act and to forward to the authorities a statement of the offence if which he is accused. It is explicit that the option to try the accused subject to the Act by a court-martial is with the Air Force Authorities and the accused has no option or right to claim trial by a particular forum."

It has been well settled by the Appellate Division of the Supreme Court in the case of Haider Ali Khan –Vs- the State reported in 14 BLD (AD) 270 that the jurisdiction

of Court below can not be challenged in appeal at a belated stage. The learned Attorney General during the course of his submission has also drawn our attention to the cases where appellant Syed Farook Rahman challenged the shifting of the Court in Writ Petition No.2032 of 1997 which was reported in 49 DLR (AD) 157 and the case of Sultan Shahriar Rashid Khan and Syed Farook Rahman which went upto the Appellate Division reported in 3 BLC (AD) 89 where the accused appellant never challenged the jurisdiction of the Court on the ground that the murders were committed in the course of mutiny. From the careful scrutiny of the evidence of P.Ws. namely P.W.8 who in cross-examination stated that- in cross-examination stated that- "Bnv mZ¨ b‡n †h ZLb Awgi †PBb Ae Kgv‡Û fvsMqv c‡o| Z‡e ZLb wKQ wec_Mvgx Awdmvi‡`i KgKv‡Ûi Rb¨ wmwbqi Awdmvi‡`i g‡a¨ fxZ mš¿¯ fve j ÿ¨ Kwiqv wKQ wKš Awg †PBb Ae Kgv‡Ûi g‡a¨ wQjvg|"

P.W.9 in cross-examination stated that- "Bnv mZ¨ b‡n †h, Avgvi we‡ePbvq 15B AvM‡ói NUbv GKwU Af Ìvb|"

Chief of Staff M.G. Shafiullah as P.W.45 stated that- "Bnv mZ¨ b‡n †h, Avgvi †PBb Kgv‡Û 15 AvMó/75 †fv‡i GKwU mdj mvgwiK Af¨Ìvb N‡U| Ges GB mvgwiK Af¨Ìv‡b L›`Kvi †gv¯ÍvK Avnv¤§`‡K ivócwZ c‡` AwaôZ Kwi Ges mÐB"Qvq Avgiv mKj ewnbx cavb AvbMZ¨ †`B hvnv †`ke¨wc cPvi cPwiZ nq ev Avgvi eZgvb ivR‰bwZK Ae¯v‡bi Kvi‡Y Awg AvR wfb ai‡bi e³e¨ w`jvg| Avgvi ivR‰bwZK Awfjvl cY Kivi Rb¨ ev 15 AvM‡ói mvgwiK Af¨Ìv‡b Awg mivmwi RwoZ _vKvi Kvi‡Y D³ Af¨Ìvb cwZnZ Kivi Rb¨ †Kvb e¨e¯v ev Av‡`k wb‡`k †`B bvB| wbR †_‡K ewjj H w`b †Kvb Af¨Ìvb nq bvB|"

From careful scrutiny of the aforesaid statements of the P.Ws., it appears that the killing for which the convict appellants and others were convicted and sentenced were not done in course of mutiny. From the judgment of the first Hon'ble Judge of the Division Bench, we found that there was no mutiny in the Army in the night following 14th / early morning of 15th August,1975. The third learned Judge also came to the same conclusion and observed as under:

> "From all this aforesaid evidences of the persons in authority and Army, Navy, Air Force, BDR, Police and Rakkhi Bahini having owed the allegiances and no chain of command was ever disturbed, there was no mutinous situation as contemplated in the aforesaid section.

It also appears from the written statement that none of the convict appellants, namely, Syed Farook Rahman, Sultan Shahriar Rashid Khan, Mohiuddin (Artillery) at the time of examination under Section 342 of the Cr.P.C. had made any averment that the murders were committed in course of mutiny. The evidences adduced in this case do not show that the murders were committed in the course of mutiny rather there was a conspiracy for committing murder of Bangabandhu Sheikh Mujibur Rahman with and members of his family and relations and that if anything had happened in the Army it was after the commission of murder. The offence of murder punishable under Section 302 of the Penal Code is not an offence under the Army Act rather it is a civil offence as defined in Section 8(2) of the Army Act. Sub-Section (2) of Section 59 of the Army Act envisages that a person subject to this Act commits an offence of murder, culpable homicide not amounting to murder or rape in relation to the person not subject to the Army Act shall not be guilty of an offence against the said Act and shall not be dealt with under this Act unless he commits any of the said offences while on active service or at any place outside Bangladesh or at a frontier post specified by the Government.

When a Criminal Court and Court Martial have concurrent jurisdiction to try a civil offence then under Section 94 of the Army Act it is the discretion of the prescribed Officer to decide before which Court the proceedings shall be instituted. If he decides that it should be instituted before a court-martial, then he can direct that the accused shall be detained in military custody. But in the instant case, the prescribed officer has neither exercised his jurisdiction nor instituted the proceedings before the court-martial. Furthermore, the convict appellants did not even raised any objection before the criminal Court during trial. It is only for the prescribed officer to decide as to the forum of trial and, as such, in the instant case, neither the prescribed officer nor the accused appellant

challenged the forum of the trial, rather in the Appellate Division, at a belated stage, such a challenge is not tenable in law. Since in the instant case, trial of a civil offence before a criminal Court is found to be legal and valid and, as such, the argument advanced by the defence is not tenable in law.

Chapter-7 of the Penal Code provides for offences relating to the Army, Navy and Air Force and specifically Section 139 of the Penal Code provides that persons subject to the aforesaid three services are not subject to punishment under the Penal Code for any of the offences defined in Chapter-7. Section 5 of the Penal Code makes it clear that any of the provisions of the Penal Code does not intend to repeal, vary, suspend or affect any of the provisions of any Act for punishing mutiny and desertion of officer, soldiers or airman in the service of Republic. So it appears that Section 139 of the Penal Code makes it abundantly clear that none of the provisions of the Penal Code will repeal, vary or affect the provision of any other law for punishing mutiny. There is no difficulty for trial for mutiny by the court-martial if there is any such necessity. It is well established that forum of trial is governed by a procedural law and the procedure followed by a civil court is much fairer and transparent then those followed in the court-martial and therefore there is no chance of any prejudice to be caused to the accused appellant. In the decision of the case of Jamil Huq –Vs- Bangladesh reported in 34 DLR (AD) 125 at page 138, paragraph 37 the Appellate Division of the Supreme Court has quoted with approval the observations of Prof. Holland published in law of Court Martial (Current Legal Problem 1950 at Page 193) which reads as follows:

> "It is clear that present attitude of the courts whether justified by authority or not is, in favour of abdication controlling authority. There is accordingly I suggest strong case for the further reform ..... I would accordingly suggest that the jurisdiction of court martial should be statutorily confined to the offences against discipline and all the jurisdiction over civil offences should be taken away except where it is reasonable and impracticable to arrange for a civil trial."

We find that before pronouncement of the judgment, the learned Sessions Judge vide his order dated 24.03.1997 had served notice to concerned authorities and the Army Head Quarter as per provisions of Criminal Procedural Rules (Military Offenders)1958 vide Office Memo dated 02.04.1997 notifying that there is no bar to trying retired army personnel in the criminal Court and thereby complied with Section 94 of the Army Act. So we do not find any illegality as to the holding of trial before criminal Court. (i.e. Sessions Court)

From the definitions of mutiny as contained in Section 35 of the Navy Ordinance,1961, we do not find that the prosecution has made out a case of mutiny or there was any sign of failure of command leading to mutiny rather from the evidence of the witnesses both the Courts below, i.e. the Court of Sessions and High Court Division, concurrently found that the accused persons have committed conspiracy and murder. But both the Courts have found that it is a case of murder and not was a case of mutiny leading to murder.

In the case of Major E.G. Barsay –Vs- State of Bombay reported in AIR 1961 (SC) 1762. The Supreme Court of India observed as follows:

> "The scheme of the Act therefore is self-evident. It applies to offences committed by army personnel described is S.2 of the Act; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by a fiction to be treated as offences under the Act; it provides a satisfactory machinery for resolving the conflict of jurisdiction. Further it enables, subject to certain conditions, an accused to be tried successively both by court-martial and by a criminal court. It does not expressly bar the jurisdiction of criminal courts in respect of acts or omissions punishable under the Act, if they are also punishable under any other law in force in India; nor is it possible to infer any prohibition by necessary implication.''

Mr. Khan Saifur Rahman, Mr. Abdur Razzak Khan and Mr. Abdullah Al Mamun, the learned Advocates for the appellants have submitted in unison that the evidence and

materials on record will only show that there was no case of criminal conspiracy of murder but the case of criminal conspiracy to commit mutiny to change the then Mujib Government. Hence, the conviction and sentence of the accused appellant is liable to be set aside. They have has submitted that the allegation of mutiny carries with it the existence of conspiracy within the definition of the offence of mutiny. Having drawn our attention to the evidence of witnesses, Mr. Khan Saifur Rahman has submitted that there was a conspiracy for mutiny and not to commit murder of President Sheikh Mujibur Rahman with members of his family. Mr. Khan Saifur Rahman has also referred to the opinion of the third learned Judge and submits that the third learned Judge commented on the event of 15th August as revolting one and the said findings of the third learned Judge is a finding of the situation as a mutiny obtaining in course of the occurrence. He has submitted that there is no direct evidence to the effect that the murder was intended to be committed by the appellants. He has also submitted that the places of deployment of occurrence in the house of Abdur Rab Sherniabad and Sheikh Fazlul Huq Moni are not included in the charge and in the fact of the case and in the instant case there is no account of conspiracy by any of the co-accused of the case and thereby those places added to the case events in the course of same transaction extending the facts of the case beyond it's place of occurrence are illegal merging of unrelated evidence with the case and embellishing the case with unrelated evidence and, as such, the conviction and sentence of the accused appellant for committing murder and also for committing criminal conspiracy for murder are not tenable in law. Referring to the decision in the case of Md. Shamsul Haque –vs- State reported in 20 DLR 540, he has submitted that when a conspiracy has gone beyond the stage of conspiracy and offence is committed in pursuance thereof, then conspiracy becomes irrelevant i.e. no conviction can be awarded for conspiracy if substantive offence is committed in pursuance thereof.

Mr. Anisul Huq, the learned Advocate for the respondent state, and Mr. Mahbubey Alam, the learned Attorney General, have submitted in unison that in the instant case the accused appellants have been rightly convicted under Section 120B of the

Penal Code as the charge against them for the same offence of criminal conspiracy was proved beyond reasonable doubt. Mr. Mahbubey Alam has submitted that in the charge framed against the accused appellants, nothing was mentioned about the conspiracy to commit the mutiny rather the charge framed was conspiracy to commit murder. In reply to the learned Advocate for the appellants, the learned Attorney General has submitted that the evidence of P.Ws. as referred to by the learned defence lawyer is of two folds, one is relating to the circumstances prior to the occurrence and another is related to the circumstance after the occurrence and thus submitted that the evidence quoted by the learned defence Counsel can not be taken to be an evidence of mutiny rather it is the evidence of murder which shall be taken into consideration in deciding the case. According to the submission of learned Attorney General, the evidences on record and circumstances showed that the first object of the conspiracy was to kill Bangabandhu Sheikh Mujibur Rahman and members of his family and, accordingly, the convicts with pre-plan and pre-design came out to kill Bangabandhu Sheikh Mujibur Rahman and members of his family at House No.677, Road No.32, Dhanmondi and to this end they mobilized force for capturing radio station and other areas of the city. The learned Attorney General also asserted that in the case of conspiracy in most cases direct evidence is not normally found and it is proved by the inference drawn from the circumstances and the acts committed by the perpetrators in pursuance to their common design. He has referred to the decision of Shivnarayan Laxminarayan Joshi –Vs- State of Moharastra reported in AIR 1980 (SC) 439 and Mohd. Osman Mohammad Hossain Maniyur –Vs- State of Moharastra reported in AIR 1981 (SC) 1062. In reply to the contention of the appellants, that all the three learned Judges of the High Court Division discarded the applicability of Section 10 of the Evidence Act and thus prosecution failed to prove the existence of criminal conspiracy through the application of Section 10 of the Evidence Act, both the learned Attorney General and Mr. Anisul Huq have in unison submitted that Section 10 of the Evidence Act only makes certain fact relevant for the purpose of conspiracy. On a clear reading of Section 10 it appears that it is a Rule of evidence which makes certain fact i.e. anything said, done or written by any one of such

person (conspirator) in reference to their common intention after the time when such intention was entertained as a relevant fact. In the case of State of Maharashtra –vs- Damu Gopinath Shinde reported in AIR 2000 SC 1691, the Supreme Court of India held that Section 10 renders anything said, done or written by anyone of the conspirators in reference to their common intention as a relevant fact, not only as against each of the conspirators but for proving the existence of the conspiracy itself. Further, the said fact can be used for showing that a particular person was a party to the conspiracy. The only condition for application of the rule in S.10 is that there must be ‘‘reasonable ground to believe that two or more persons have conspired together to commit an offence.’’

The Supreme Court further held that the basic principle which underlies in S.10 of the evidence Act is the theory of agency and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy.

In reply to the submission of Mr. Khan Saifur Rahman, the learned Advocate for the accused appellant, the learned Attorney General has submitted that the confessional statement made by the accused appellant Lt. Col. Syed Farook Rahman, Lt. Col. Sultan Shahriar Rashid Khan and Lt. Col. Mohiuddin Ahmed (Artillery) are true and voluntary and, as such, those statement should be taken to consideration. The learned Attorney General has futher submitted that on the evidence of witnesses, namely P.W.51 and P.W.61 and also from the case record it appears that the findings of the first learned Judge in respect of Section 10 was totally based on misreading of evidence on record. All of them made confessions voluntarily. The non-filing up of some of the columns of the forms of confession by the recording Magistrate is not fatal. In support of this contention he has referred to the case of State –Vs- Nolini reported in (1999) 5 SCC 353 and the case of State –Vs- Lalu Miah and another reported in 39 DLR (AD) 117. In reply to the submissions of learned Advocate for the appellants to the effect that when a conspiracy has gone beyond the stage of conspiracy and offence is committed in pursuance thereof, then conspiracy becomes irrelevant i.e. no conviction can be awarded for conspiracy if substantive offence is committed in pursuance thereof. To substantiate his argument, he

has also referred to the decision in the case of the State of Andhra Pradesh –Vs- Kandimalla Subbaiah and another reported in AIR 1961 (SC) 1241, State of Kerala –Vs- Sugathan and another reported in AIR 2000 (SC) 3323, Kehar Singh and others –Vs- the State (Delhi Admn) reported in AIR 1988 (SC) 1883.

Mr. Abdur Razzak Khan, the learned Advocate appearing on behalf of the appellant Lt. Col. Sultan Shahriar Rashid Khan, have placed the relevant portion of the evidence and submitted that the learned Judges of the Division Bench erred in law in failing to find out that the learned Sessions Judge relying on extraneous facts and circumstances found the accused appellant guilty under Section 120B of the Penal Code without any specific finding in respect of the said offence, rather the trial Court relied on inadmissible evidence. He has submitted that there was no legal evidence against the appellant showing his complicity in the offence of conspiracy. It appears that P.W.43 had seen accused appellant Lt. Col. Sultan Shahriar Rashid Khan attending in a meeting at the house of Khondker Moshtaq Ahmed in the month of June/July,1975. After the meeting at the premises of a Madrasa at Daudkandi the accused Shahriar, Farook, Khondkar Abdur Rashid also attended a secret meeting with Khondker Moshtaq Ahmed, Taheruddin Thakur and others. It is well established that conspiracy is always hatched in secrecy. In most cases it is impossible to adduce direct evidence in proof of conspiracy. In the case of Shivnarayan Laxminarayan Joshi –Vs- State of Moharastra reported in AIR 1980 (SC) 439, Fajal Ali,J observed that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design.

In the case of Mohd. Usman Mohammad Hossain Maniyar –Vs- State of Moharastra reported in AIR 1981 (SC) 1062, at page 1067 para 16 Baharul Islam,J observed:

> “It is true that there is no evidence of any express agreement between the appellants to do or cause to be done the illegal act. For an offence under Section

120B the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act; the agreement may be proved by necessary implication. In this case, the fact that the appellants were possessing and selling explosive substances without a valid licence for a pretty long time leads to the inference that they agreed to do and / or caused to be done the said illegal act, for, without such an agreement the act could not have been done for such a long time."

From a careful scrutiny of the evidence of the prosecution witnesses and also from the confessional statement made by aforementioned three accused appellants it appears that the conspiracy started in the month of March,1975 at BARD, Comilla, then in the month of June / July,1975 in the house of Khondker Moshtaq Ahmed at Doudkandi, Comilla which was also attended by Lt. Col. Syed Farook Rahman, Lt. Col. Sultan Shahriar Rashid Khan, Khondaker Abdur Rashid, Major A.K.M. Mohiuddin Ahmed, Taheruddin Thakur and others. Thereafter the conspiracy continued in the house of Khondker Moshtaq Ahmed in Agha Masi Lane, Ramna Park, and subsequently in Balurghat parade ground on the following night of 14th August,1975. P.W.11, P.W.12 and P.W.14 in their evidence gave detailed descriptions about the night parade held on the night following on 14th August,1975. At the end of the night parade, there was conference and briefings by the accused Lt. Col. Syed Farook Rahman and others. After midnight all the accused persons and others who were assembling in the parade ground of the Lancer Regiment and after giving final task to their conspiracy First Bengal Lancer Unit with tanks and troops from 2nd Field Artillery Regiment with cannons and light arms were deployed in different place in the city ending at Road No.32, Dhanmondi, Dhaka to commit the offence. The second learned Judge of the Division Bench has also considered the evidence of P.W.21, P.W.22, P.W.24, P.W.26, P.W.32, P.W.34, P.W.35, P.W.39, P.W.40, P.W.42 and P.W.44 proving conspiracy against the accused persons. The evidence of P.W.21 manifests the preparation in 2nd Field Artillery Regiment, the evidence of P.W.22 shows the preparation for onslaught and the evidence of P.W.24

shows a retired Risaldar of 1st Bengal Lancer Regiment directly participated in the conspiracy.

The second learned Judge having considered the submissions advanced on behalf of the accused appellants and respondent rightly found that P.W.25, P.W.26, P.W.32, P.W.34, P.W.35, P.W.39, P.W.40 and P.W.41 had corroborated each other in proving conspiracy and participation by the accused persons. All the witnesses also stated in their evidence that the accused appellants, namely, Lt. Col. Syed Farook Rahman, Lt. Col. Abdur Rashid and Lt. Col. Shariful Haque Dalim having addressed the troops of the Army indoctrinated them to engage in conspiracy and launch the operation in furtherance of their common intention to achieve the ultimate goal in the early morning of 15th August,1975. The accused persons went to different places as per deployment by Lt. Col. Syed Farook Rahman and his associates and assembled in those places in order to commit the illegal act by illegal means and all of them committed the offence under Section 120B of the Penal Code. It also appears from the evidence of witnesses that First Bengal Lancer Regiment and Two Field Artillery Regiment were indoctrinated and instigated to do a "special urgent duty in the interest of the country". According to the briefings of Lt. Col. Syed Farook Rahman troops under the command of the officers were deployed at the house of Sheikh Fazlul Haq Moni, Abdur Rob Serniabad, Hon'ble Minister of Bangladesh, the radio station, the Cantonment, distance to the Head Quarters of Rakkhi Bahini and some were also deployed to resist BDR; Mohiuddin Ahmed (Artillery) was sent to terrorise the house guards in the residence of the then President and also to resist the Rakkhi Bahini if so required, and Major Bajlul Huda, Major AKM Mohiuddin (Lancer) and Aziz Pasha went over to the residence of the President and Resalder Moslem Uddin went to the house of the then president Bangabandhu Sheikh Mujibur Rahman. This shows that the said deployment of troops at the houses of Fazlul Huq Moni. Andir Ron Sherniabat, the radio station, the corner of the Race Course, near the Tejgaon Air Port, Mirpur Road, Kalabagan Lake Side were made not haphazardly but as a result of a well-laid and pre-planned conspiracy in order not only to kill the then

President with his family members, but also to ensure that no resistance to their activities was raised and no help could be rushed to the place of occurrence to save the life of the then President of Bangladesh with members of his family and others.

It appears that learned Judges of the Division Bench having examined the judgment and order passed by the learned Sessions Judge and also evidence of 16 prosecution witnesses, namely, P.W.43, P.W.11. P.W.12. P.W.14, P.W.21, P.W.22, P.W.24, P.W.25, P.W.26, P.W.32, P.W.34, P.W.35, P.W.39, P.W.40, P.W.41 and P.W.44 found that the prosecution successfully proved the charge of conspiracy under Section 120B of the Penal Code. Moreover, the second learned Judge having found the confessinal statements made by the accused appellants, namely, Lt. Col. Syed Farook Rahman, Lt. Col. Sultan Shahriar Rashid Khan and Lt. Col. Mohiuddin Ahmed (Artillery) true and voluntary admitted the same as legal piece of evidence and rightly convicted the accused appellants under Section 120B of the Penal Code and, as such, no interference is called for by this Hon'ble Court.

Section 120A and 120B of the Penal Code,1860–Conspiracy:

"120A. When two or more persons agree to do, or cause to be done,-

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

The offence of criminal conspiracy is committed where there is an agreement by the two or more persons to do an illegal act or an act by illegal means in furtherance of their common design.

The offence of conspiracy like any other offence can be proved by direct evidence or by circumstantial evidence but in practice it is extremely difficult to get direct

evidence in proof of conspiracy. In the decision of the case of Nur Mohammad Mohd. Yusuf Momin –Vs- The State of Maharashtra reported in AIR 1971 SC 885 L.D. Dua,J held:

> "A conspiracy from its very nature is generally hetched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Sorrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by any one of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto."

In the earlier case of Barindra Kumar Ghose and others –Vs- The Emperor reported in CWN 1114, Jenkins,J observed as follows:

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. Though to establish a charge of conspiracy there must be agreement there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence. The agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design.
>
> Nor is it necessary that all should have joined in the scheme from the first; those who come in at a later stage are equally guilty, provided the agreement be proved." [emphasis added]

Sardar Sardul Singh Caveeshar –Vs- State of Maharashtra reported in AIR 1965 (SC) 682 the Supreme Court of India held:

> "The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties."

In the case of Sanjaya Gandhi and another –Vs- State (Delhi Admn) reported in AIR 1980 (SC) 1382 the Supreme Court of India observed-

> "..... it is well settled that in order to prove a criminal conspiracy which is punishable under Section 120B of the Indian Penal Code, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. This clearly envisages that there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. It is true that in most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference agreement between two or more persons to commit an offence."

In the case of Kehar Singh –Vs- State (Delhi Admn) reported in AIR 1980 SC 1983, K.Jagannatha Shetty,J observed as follows:

> "Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of

physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thought sharing the unlawful design may be sufficient."

In the case of Suresh Chandra Bahri –Vs- State of Bihar reported in AIR 1994 SC 2420, while confronted with the contention that there is no direct illegal evidence against the appellants for their involvement in conspiracy, the Supreme Court of India observed:

"Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to Sub-Section (2) of Section 120A of the I.P.C. then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions in such a situation do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trapping of the provisions of contained in Section 120B since from its very nature a conspiracy must be conceived and hatched in complete secrecy, because otherwise the whole purpose may frustrated and it is common experience and goes without saying that only in very rare cases one may come across direct evidence of a criminal conspiracy to commit any crime and in most of the case it is only the circumstantial evidence which is available from which an inference giving rise to the conclusion of an agreement between two or more persons to commit an offence may be legitimately drawn." [emphasis added]

In the case of State –Vs- Nalini (1999) 5 SCC 253, Quadri,J held that it is not necessary that all the conspirators should participate from the inception to the end of the

conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences. [emphasis added]

Having considered the decision in the case of Leo Roy Frey –Vs- Superintendent, District Jail, Amiritsar reported in AIR 1958 SC 119, S.R. Das,C.J. explained the offence of conspiracy vis-a-vis the substantive offence in the following terms:-

> "The offence of a conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."

In view of the aforesaid decisions we are of the view that even if the acts of the accused have gone beyond the stage of conspiracy and the substantive offence is committed in pursuance thereof, both the specific charges of substantive offence along with the charge of conspiracy can be simultaneously maintained inasmuch as either conspiracy or a substantive offence or both may be proven on the same fact. Just because a conspiracy is culminated into a substantive criminal offence does not render the act of conspiracy, a separate and distinct offence, vitiated or nullified. The act of conspiracy, having once been committed, crystallizes into an offence under Section 120B of the Penal Code, which continues to be a criminal offence, notwithstanding the subsequent events, if any. Offence under Section 120B of Penal Code is generally co-extensive with any substantive offence committed subsequently. Accordingly, in the instant case, charge

under Section 302 and Section 120B of the Penal Code was rightly maintained against the accused appellants in all the appeals.

Matters relating to Section 34 of the Penal Code, 1860– Acts done by several persons in furtherance of common intention:

It has been asserted by Mr. Khan Saifur Rahman and Mr. Abdur Razzak Khan that accused Lt. Col. Syed Farook Rahman (Lancer), Lt. Col. Sultan Shahriar Rashid Khan and Lt. Col. Mohiuddin Ahmed (Artillery) having not been present at the time of killing of Bangabandhu Sheikh Mujibur Rahman and his family members, they cannot be convicted under Sections 302 and 34 of the Penal Code because they were not physically present at the place of occurrence. In this context it appears that the accused appellants were separately deployed in different places, according to their pre-plans and pre-design in furtherance of the common intention of all the accused persons, those who were physically present and those who were not present at House No. 677, Road No.32, Dhanmondi but the deployment was done as per their pre-plan at various places in furtherance of their common intention and, as such, they are also equally guilty of the offences under Sections 302 and 34 of the Penal Code.

Section 34 of the Penal Code being a rule of evidence and not a substantive offence, it is committed when two or more persons intentionally commit a criminal act jointly in furtherance of a common intention of all. Common intention pre-supposes a prior concert or pre-arranged plan between the persons participated to commit an offence. Common intention under Section 34 can be established as an inference from the fact of participation in the commission of the offence.

In the case of Rasod Bux –Vs- The State reported in 22 DLR (SC) (1970) 297, one of the accuseds fired his gun towards the victim but the appellant fired two shots in the air. It was contended that the appellant had no intention to commit any murder. The judgment and order of conviction and sentence was affirmed by the Supreme Court of Pakistan. While passing judgment Hamoodur Rahman,J observed in the following manner:

> "There is no doubt that to bring a case within the ambit of Section 34 PPC, it is necessary that some overt act or acts must be established to lead to the inference that the participators in the crime acted in pre-concert or under some pre-arranged plan but this does not mean that every participant in the crime must be shown to have committed the same kind of act. It is sufficient to show that they joined together in the commission of a particular act, for then they must all be deemed to have intended the natural and inevitable consequences of that act even if some of them did nothing but merely helped by their presence the commission of the act."

In the case of Tunu –Vs- State of Orissa reported in 1988 Cri. L. J. 524, B.K. Behera,J held-

> "Common intention is to be gathered from the acts and conduct of the accused persons preceding, attending and succeeding the occurrence. No doubt, the petitioner, who had stood on the road and blocked it had not participated in the actual assault, but his conduct in blocking the road and forcing P.W.14 to stop the car and thereby facilitating the other two persons to attack P.W.14 would undoubtly show that he had shared the common intention with the other two petitioners to attack and assault P.W.14. It is not necessary that to attract Section 34 of the Code, every person must have assaulted and caused hurt."

In the instant case it has been submitted on behalf of the appellants Lt. Col. Syed Farook Rahman (Lancer), Lt. Col. Sultan Shahriar Rashid Khan and Lt. Col. Mohiuddin Ahmed (2nd Artillery) were not physically present in the house of the then President at Road No.32, Dhanmondi during the occurrence between 4:30 to 5:30 in the early morning of 15th August, 1975. In this context it would be pertinent to consider the case of Tukaram Ganpat Pandare –Vs- State of Maharashtra reported in AIR 1974 (SC) 514, where some articles were stolen from the godown and carried away by a lorry which stopped at a weigh bridge. There was no evidence about the presence of the appellants at the scene of offence but he was found in possession of a duplicate key of the burgled godown and he was present at the weigh bridge. V.R. Krishna Lyer,J held-

> "Mere distance from the scene of crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons**.** In Barandra Kumar Ghosh Vs. The King Emperor, (1924) 52 I.A. 40 = AIR 1925 P.C. I the judicial Committee drew into the criminal net those 'who only stand and wait.' This does not mean that some form of presence, near or remote, is not necessary, or that mere presence without more, at the spot of crime, spells culpability. Criminal sharing, overt or covert, by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of Section 34. The act here is not the picking the godown lock but house-breaking and criminal house trespass. This crime is participated in by those operating by remote control as by those doing physical removal. Together operating in concert, the criminal project is executed. Those who supply the duplicate key, wait at the weigh bridge for the bread-in and bringing of the booty and later secrete the keys are participes criminis." [emphasis added]

In the case of State –Vs- Tajul Islam and 8 others reported in 48 DLR (HCD) 305, commenting on Section 34 of the Penal Code Md. Badruzzaman, J observed as under:

> "Section 34 does not create any distinct offence. This section is intended to meet a case where members of a party acted in furtherance of the common intention of all but it was difficult to prove exactly the part played by each of them. It means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. Common intention within the meaning of this section presupposes a prior concert. There must be prior meeting of minds to form pre-arranged plan to commit an offence. A common intention with meeting of minds to commit an offence in furtherance of the common intention invite the application of Section 34 of the Penal Code. In offences involving physical violence, normally presence at the scene of the offence of the offender sought to be rendered liable on the principle of joint liability is necessary but such is not the

case in respect of other offences where offence consists of diverse acts which may be done at different time and place."

Referring to the case of Bamaswami –Vs- State of Tamil Nadu reported in AIR 1976 (SC) 2027, he further observed-

"Thus we find that some of the confessing accused did not participate in the forcible taking away of the six victims but they played their part truly by remaining on guard so as to overcome any outside interference with the attainment of their object. All the essential conditions so far the presence of a common intention were clearly proved in this case. There cannot be a clearer case of applicability of Section 34 of the Penal Code than this."

While commenting on Section 34 of the Penal Code the Supreme Court of India in the case of Suresh –Vs- State of U.P. reported in AIR 2001 (SC) 1344 at page 1348 para 21 observed as under:

''Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract section 34 i.e. the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electrocic equipment can be etched like this; On of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why section 34 cannot apply in the case of those two persons indicated in the illustration.''

The Supreme Court of India in the case of Rishideo Pande –vs- State of U.P. reported in AIR 1955 (SC) 331 at page 332 para 2 has observed in respect of common intention in the following terms:

> ‘‘It is now well settled that the common intention referred to in section 34 presuppose a prior concern, a pre-arranged plan i.e. a prior meeting of minds. This does not mean that there must be a long interval of time between the formation of common intention and the doing of the act. It is not necessary to adduce a direct evidence of the common intention. Indeed, in many cases it may be impossible to do so. The common intention may be inferred from the surrounding circumstances and the conduct of the parties’’

In the circumstances, it is well established that for Section 34 of the Penal Code to apply, while the presence of accused is essential, but it need not necessarily be the physical presence in all cases. For the purpose of Section 34 of the Penal Code, ‘‘presence’’ of a person depends on the individual facts and circumstances of a case. An accused’s presence could be established if he has joined in the actual doing of the act / offence by being present or making him available for the purpose of ensuring that the criminal act in furtherance of their common intention is committed. The accused’s presence for the purpose for facilitating a criminal act tantamounts to actual participation in the criminal act. All the accuseds including the principal accused in furtherance of their common intention participated in the offence with the knowledge that there is some kind of help / assistance waiting nearby, who are rendering such services / assistance to achieve their common intention or object, and such role of a participant, who is working along the same time as the principal accused, can be held to have joined in commission of the offence under Section 34 since he acted in furtherance of a common intention of all. The “presence” of an accused under Section 34 implies some kind of proximity with the place of occurrence. This “proximity” is a relative term which differs from facts to facts of cases or which depends on the facts and circumstances of the case. The presence or proximity of an accused for the sake of Section 34 does not necessarily require the person to be physically present at the doorstep of the place of occurrence in an extraordinary or exceptional cases. I am of the view that in special extraordinary or exceptional circumstances, an accused’s presence can be proven under Section 34 even if he is

located at some distance from the place of occurrence provided his position/location can be shown to be in participation in the act for ensuring success in furtherance of the common intention of all. These extraordinary and exceptional circumstances would depend on the facts and circumstances of cases.

Both the learned Attorney General and Mr. Anisul Huq having referred to the evidence of P.W.1, P.W.4, P.W.11, P.W.12, P.W.14, P.W.37, P.W.42, P.W.48, P.W.50, P.W.20, P.W.45, P.W.47, P.W.48 and P.W.49 submitted that all the accused-appellants with their common intention and common design did their respective assigned tasks at designated places and thereby participated in the commission of offence causing the killing of Bangabandhu Sheikh Mujibur Rahman and other victims on 15th August,1975. In the reply, they have submitted that the principles of Section 34 of the Penal Code is very much applicable in the case of all accused-appellants, including the accused-appellants, Lt. Col. Mohiuddin Ahmed (Artillery) and Lt. Col. Sultan Shahriar Rashid Khan, who had not gone to the House No.677 of the then President at Road No.32, Dhanmondi.

In extraordinary and exceptional circumstances of the instance case, I am of the opinion that physical presence at the place of occurrence at House No.677, Road No.32 is not necessary, where all the accused-appellants in furtherance of their common intention performed their respective criminal acts at designated places which were assigned to them by the other accused persons as evident from the evidence of prosecution witnesses. The requirement of physical presence in a given case depends on its facts and circumstances. Fact of the instant case is that the victims of murder includes Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation, who was also the President of the Republic with members of his family and others at the relevant time. I agree with the submissions of Mr. Tawfiq Nawaz, learned Senior Advocate and State Counsel in the instant appeals, that constitutional and legal personality, status, functions, privilege and immunities as enjoyed by the President of the Republic under the Constitution of the Peoples' Republic of Bangladesh should be borne in mind in treating

the instant case as an extraordinary or exceptional case. Any harm done to the President of the Republic amounts to an offence and violation of the Constitution and resulting in irreparable damage to the democratic institutions of the Country. The facts of the instant appeals involve an exceptional circumstance inasmuch as it relates to the unsavoury acts of the accused-appellants killing the Father of the Nation and President of the Republic, Bangabandhu Sheikh Mujibur Rahman, with members of his family and relations. In view of the constitutional privileges, special security measures and safeguards rendered to the President, the ambit of the net of conspiracy pre-plan and illegal support required for the heinous killing of the President cannot be equated with that of an ordinary citizen residing in a dwelling hut or any other place. To materialise the common objective of the killing of Bangabandhu Sheikh Mujibur Rahman with the members of his family the accused appellants participated in their respective assignment covering a greater range of area starting from Cantonment, Parade Ground of Balurghat, New Airport, Mohakhali, area of Manik Mia Avenue, Mirpur Road, Ministers' Residence, Shahbagh Radio Station, Corner of Race Course, Lake Side at Kalabagan, Dhanmondi and finally to House No.677, Road No.32, Dhanmondi, and that provisions of Section 34 of Penal Code contains rule of evidence which does not create a substantive offence and, as such, the said participations of the accused-appellants were made in furtherance of their common intention to do the illegal act of the killing of the then President with members of his family and relations comes within the purview of Section 34. In accordance with the pre-plan pre-design and in order to materialise the same, the accused appellants were deployed for committing the illegal act of killing the then President with members of his family and relations and accordingly I am of the view that the convictions against the accused-appellants under Sections 302, 34 and 120B of the Penal Code do not suffer from any illegality and, as such, the same do not call for any interference by this Apex Court. Since the trial Court and the High Court Division made concurrent findings as to the commission of the offence, there is no scope at this stage to interfere with the concurrent findings of facts as to the involvement of the accused-appellants in the

commission of offence and, as such, all the appeals are liable to be dismissed and the Death Reference is liable to be affirmed.

Now it has to be analyzed evidentially whether the accused appellants have committed offence under Section 302 read with Section 34 of the Penal Code.

From the evidence of prosecution witnesses namely, P.W.44, P.W.43, P.W.11, P.W.12, P.W.13 and P.W.14, it appears that the accused Lt. Col. Syed Farook Rahmen was in charge of the operation and he was mobilizing his force according to his plans for killing the then President Bangabandhu Sheikh Mujibur Rahman and member of his family at House No. 677, Road No.32, Dhanmondi. From the evidence of P.W.20, P.W.23, P.W.24, P.W.25, P.W.35, P.W.39, P.W.40, P.W.44, P.W.1, P.W.4, P.W.15, P.W.16, P.W.42, P.W.44, P.W.45 and P.W.46 it is manifested that the presence of Lt. Col. Syed Farook Rahman in the residence of the then President at 32, Dhanmondi, Radio Station and Balur Ghat in briefing the troops and also mobilized them are all connected and the same were done in furtherance of his common intention to materialize the ultimate goal of killing Bangabandhu Sheikh Mujibur Rahman. P.W.43 stated in his deposition about the conspiracy in the house of Khondker Moshtaq Ahmed with Major Khondker Abdur Rashid, Lt. Col. Farook Ahmed, Lt. Col. Shahriar Rashid and some other army officers in July,1975 after the meeting in a Madrassa at Daudkandi and also at BARD, Commilla in 1975. P.W.14 stated about the presence of the appellant on the night following on 14th August,1975. After the night parade, he saw in the parade ground Lt. Col. Syed Farook Rahman, Major Mohiuddin (Lancer), Major Ahmed Sharful Hossain, Lt. Kismat Hasem, Nazmul Hossain Ansar and some other persons in civil dress. Accused Lt. Col. Syed Farook Rahman introduced Major Dalim and Lt. Col. Shahriar in civil dress. Accused Lt. Col. Farook Rahman directed them to obey their order. In the radio station, he saw Lt. Col. Shahriar Rashid coming from the radio station after 5:30 a.m. in the morning. P.W.14 proved the presence of the accused Lt. Col. Shahriar Rashid in the parade ground in the cantonment near Balurghat at 2:30 a.m. in the morning and at about 5:30 a.m. in the Radio Station. P.W.24 also in his deposition stated that Major

Khondker Abdur Rashid went to the parade ground at about 3:00/3:15 a.m. on the night following on 14th August,1975 where Lt. Col. Syed Farook Rahman briefed them in presence of their Commanding Officer ("CO"), Major Khondker Abdur Rashid and other officers. Major Khonedker Abdur Rashid and Lt. Col. Syed Farook introduced them with the dismissed officers, namely, Major Dalim, Major Rashid Chowdhury, Lt. Col. Shahriar and Captain Majed. Then Lt. Col. Syed Farook Rahman and Major Khondker Abdur Rashid ordered them to take ammunitions from the unit. When they started from the Lancer unit and stopped on a road, P.W.24 also saw Lt. Col. Shahriar, Captain Majed and Captain Mostafa. He also saw Major Dalim, Major Nur, Lt. Col. Shahriar, Major Khondker Abdur Rashid, Major Rashed Chowdhury, Captain Majed, Captain Mostafa and other officers going inside the Radio Station.

P.W.37 saw Khondker Moshtaq, Taheruddin Thakur, Major Dalim and Lt. Col. Shahriar inside the radio station. P.W.38 left the Radio Station at 10 a.m. in the morning of 15th August, 1975 with permission of Lt. Col. Shahriar. P.W.42 also saw Major Mohiuddin (Lancer) and others inside the Radio Station. In Banga Bhaban he also saw Major Shafiullah, Lt. Col. Farook Rahman and Major Mohiuddin Ahmed (Lancer) in the afternoon of 15th August, 1975.

P.W.48 saw Lt. Col. Sultan Shahriar Rashid Khan in the Radio Station as well as in the Banga Bhaban on 15th August,1975. P.W.15, P.W.20, P.W.46 and P.W.47 also proved the presence of the accused Lt. Col. Sultan Shahriar Rashid Khan in the Banga Bhaban.

P.W.60, Director General, Ministry of Foreign Affairs, Government of Bangladesh produced a file on absorption issued by the Army Head Quarters in respect of the services of the Army Officers including the accused Lt. Col. Sultan Shahriar Rashid Khan, who was placed on a secondment in the Ministry of Foreign Affairs. Lt. Col. Sultan Shahriar Rashid Khan was given employment in their Ministry and various Missions abroad which is evident from the deposition of P.W.57 and P.W.60.

P.W.17 saw Lt. Col. Mohiuddin Ahmed (Artillery) in the night parade on the night following on 14th August, 1975 and afternoon in the Regiment Parade Ground and in the evening at Balurghat. From the evidence of P.W.17, it transpires that Lt. Col. Mohiuddin Ahmed (Artillery) with Lt. Col. Khondker Abdur Rashid and others and thereafter on the order of Lt. Col. Mohiuddin Ahmed (Artillery), six guns were mobilized and deployed by the side of the lake of Kalabagan and four rounds of cannon shells were fired from the Kalabagan lake side. The cannons were also returned to the barrack on his order. P.W.18 also stated the involvement of Lieutenant Colenel Mohiuddin Ahmed (Artillery). According to P.W.18 by order of Lieutenant Colenel Mohiuddin Ahmed (Artillery) they collected arms and ammunitions and under his order they went towards the north of Ganabhaban at about 7/7:30 a.m. in the morning. They went around the city before returning to their unit. P.W.18 stated that Lt. Col. Mohiuddin Ahmed (Artillery) along with Lt. Col. Khandker Abdur Rashid (Artillery) in presence of Lt. Col. Mohiuddin Ahmed (Artillery) gave necessary instructions for mobilization of the Artillery troops and cannons with live shells.

P.W.21 stated that on 15th August, 1975 they had the night pared on 14th August,1975 at 9 in the evening. At 2:00 p.m. their CO Major Khondker Abdur Rashid, Lt. Col. Mohiuddin Ahmed (Artillery), Captain Bazlul Huda and other officers came over at the parade ground. Lt. Col. Khondker Abdur Rashid ordered them to take arms and ammunitions for a special emergency duty. This witness also identified Lt. Col. Mohiuddin Ahmed (Artillery). He saw Lt. Col. Mohiuddin Ahmed (Artillery) at 2:00 p.m. at the parade ground. He also saw Major Bazlul Huda and other officers when Lt. Col. Mohiuddin Ahmed (Artillery) ordered them to take arms and ammunitions.

P.W.22 also stated that they had night parade on 14th August,1975 at New Airport and confirmed the presence of Lt. Col. Mohiuddin Ahmed (Artillery) on the parade ground. He stated that on the order of Lt. Col. Mohiuddin Ahmed (Artillery), they reached at about 9:00 p.m. on 14th August,1975 and they continued the night parade till 12:00 mid night. At about 2:30 a.m. on 15th August, 1975 Lt. Col. Khondker Abdur

Rashid along with Lt. Col. Mohiuddin Ahmed (Artillery) and Major Bazlul Huda met with some other unknown officers and Major Rashid told them that they would have to go for a special duty with necessary ammunitions. He was also dropped by the side of a small canal on Road No.32, Dhanmondi along with P.W.21. This witness proved the presence of Lt. Col. Mohiuddin Ahmed (Artillery) at 2:30 a.m. in the early morning of 15th August,1975 when Lt. Col. Mohiuddin Ahmed (Artillery) was briefing the troops.

P.W.27 stated that his Battle Commander was Lt. Col. Mohiuddin Ahmed (Artillery) and that P.W.27 was with him. Lt. Col. Mohiuddin Ahmed (Artillery) told them that at Balurghat there were 130 / 150 soldiers from Lancer and 60/ 70 from Artillery. P.W.27 proceeded from the Green Road through Mirpur Road to Kalabagan. P.W.27 and 2/3 others where dropped in Kalabagan where they were ordered by Lt. Col. Mohiuddin Ahmed (Artillery) not to allow any vehicle to pass through the said road. P.W.27 proved the presence of the appellant Lt. Col. Mohiuddin Ahmed (Artillery) at New Airport at about 3/3:30 a.m. in early morning at Kalabagan and at the Ganabhaban.

P.W.34 also proved the presence of Lt. Col. Mohiuddin Ahmed (Artillery) in the night parade of 14th August, 1975. He also saw that six guns were taken to New Airport. P.W.34 saw Lt. Col. Mohiuddin Ahmed (Artillery) by the side of gun and he asked the troops not to allow anyone to pass through the road. P.W.34 heard sounds of light arms from the north western corner and then shells were fired from the gun by the side of Lt. Col. Mohiuddin Ahmed (Artillery).

P.W.35 also stated in his deposition that Lt. Col. Mohiuddin Ahmed (Artillery) was commander of 2nd Field Artillery Regiment. He heard from P.W.18 that Lt. Col. Mohiuddin Ahmed (Artillery) took most of his troops to Dhanmondi. From the aforesaid evidence it appears that the PWs corroborated each other in proving the guilt of Lt. Col. Mohiuddin Ahmed (Artillery).

In order to prove the charge against the appellant, Major Bazlul Huda, the prosecution examined a number of witnesses, namely, P.W.1, P.W.4, P.W.5, P.W.6,

P.W.7, P.W.8, P.W.9, P.W.11, P.W.12, P.W.15, P.W.21, P.W.22, P.W.46, P.W.47 and P.W.60 in support of their case.

P.W.11 stated that at the time of night parade the army officers went to the office of Major AKM Mohiuddin Ahmed (Lancer) which was located opposite to the quarters of P.W.11 where he saw some unknown army officers in civil dress, and at about 12:00 mid night, he saw Major AKM Mohiuddin Ahmed (Lancer) calling one person in civil dress as "Huda come here". Then Huda asked another one "Dalim wait". Thereafter P.W.11 as SDM asked him to go the "KOTE" (i.e. light armoury) straightway for arms. Accordingly, he went to the "KOTE" at about 3:30 a.m. and took one G-3 rifle with 18 round cartage and a magazine. The troops were divided into several groups. Major AKM Mohiuddin Ahmed (Lancer) briefed his group and asked them to board the vehicle. P.W.11 saw the said two persons were previously in civil dress but thereafter in army uniform, one of them was a Major and the other one was a Captain. He came to know from Risaldar Sarwar that one was Lt. Col. S.H.M.B. Nur Chowdhury and another was Major Bazlul Huda. P.W.11 with the vehicle came at about 4:30 a.m. near the house of Bangabandhu Sheikh Mujibur Rahman which was about 80 feet away from the house. He heard reports of fierce gun shots from the side of the house of the then President and immediately thereafter he heard the words 'hands up', 'hands up'. He also heard the sound of 3 / 4 artillery gun shots. P.W.11 was posted outside the gate of the house of Bangabandhu with orders not to allow any entry or exit into / from the house and where he saw that Major AKM Mohiuddin Ahmed (Lancer), Lt. Col. S.H.M.B. Nur Chowdhury and Major Bazlul Huda were entering into the house of Bangabandhu Sheikh Mujibur Rahman at Road No.32, Dhanmondi.

P.W.12 in his deposition stated that there was night parade on the night following 14th August which was attended by them till 3:30 a.m. He saw three unknown officers in uniform who were introduced by Lt. Col. Syed Farook Rahman (Lancer) as Lt. Col. Shariful Huq Dalim and Major Bazlul Huda. Lt. Col. Syed Farook Rahman briefed them that they should not support monarchy but Sheikh Mujibur Rahman was going to declare

monarchy next day and as such troops must obey his orders as well as the orders of his officers and further directed them to take ammunition from the "KOTE" for the action.

P.W.1 A.F.M. Mohitul Islam, the informant of the case was the Personal Assistant of the then President of Bangladesh, Bangabandhu Sheikh Mujibur Rahman and was on duty in his residence at House No.677, Road No.32, Dhanmondi from 8:00 pm on 14th August, 1975. He spent his night there. At about 4:30 -5:00 a.m. on 15th August, 1975, the President told him to get in touch with the Police Control Room (P.C.R). As he could not get in touch with P.C.R properly, the President came down to PW1's Room. Suddenly a barrage of gun shots was fired on their windows. When the firing stopped, the President on his own valiantly enquired about the firing from the army and police sentries present nearby. Immediately thereafter, Sheikh Kamal came down. At that time 3/4 Khaki and Black dressed army personnel entered into the house and Major Bazlul Huda fired a bullet at Sheilkh Kamal and he fell down in the room. The bullets also wounded the informant P.W.1 and P.W.50 (DSA) who was in charge of Police House Guard. They could not escape as they were caught hold of Major Bazlul Huda who put them in line in front of the main gate of the house. The Special Branch Officer, standing on the line was shot down. Thereafter some of the accused went upstairs shooting through the way. The informant and PW.50 heard intermittent gunshot sounds and the cries of the women from upstairs. Sheikh Naser, brother of Bangabandhu Sheikh Mujibur Rahman, was brought down from upstairs, and was shot in the bath room attached to their office. Sheikh Rassel, the youngest son of the President and domestic servant Rama alias Abdur Rahman were also brought down. When Sheikh Rassel wanted to meet with his mother, the accused persons snatched him away from the informant on the pretext of taking him to his mother on the first floor and thereafter the P.W.1 again heard sound of gunshot. At that time Major Bazlul Huda, who was at the gate told Lt. Col. Syed Farook Rahman (Lancer) that "all are finished". Then P.W.1 realised that the President of Bangladesh, Bangabandhu Sheikh Mujibur Rahman, along with the members of his family and other inmates of the house were all brutally killed. At that time tanks were moving on the road in front of the

house of the then President at Road No.32, Dhanmondi. Lt. Col. Jamil's dead body was brought in the house at about 8:00 a.m. According to the evidence of witnesses it appears that in the early morning of 15th August,1975, the Father of the Nation, President Bangabandhu Sheikh Mujibur Rahman, Begum Mujib, Sheikh Kamal, Sheikh Naser and one Police Officer of the Special Branch and others were all brutally killed. P.W.1 saw the presence of Lt. Col. Syed Farook Rahman (Lancer), Lt. Col. Shariful Huq Dalim, Lt. Col. S.H.M.B. Nur Chowdhury and Major Bazlul Huda in the house of the then President at the time of occurrence and also after the occurrence. It transpires from PW.1's evidence that he made his acquaintance of Major Bazlul Huda in 1973 in the ferry ghat at Aricha Ghat.

P.W.4 in examination-in-chief stated that he along with 8 soldiers went to the residence of Bangabandhu Sheikh Mujibur Rahman at House No. 677, Road No.32, Dhanmondi and while they were hoisting the National Flag in the early morning, a barrage of fire was coming from the lake side. P.W.4 saw Major Bazlul Huda, Lt. Col. S.H.M.B. Nur Chowdhury and Major AKM Mohiuddin Ahmed (lancer) at the gate of the residence of the President. Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury came up to the veranda and, seeing Sheikh Kamal there, the accused Major Bazlul Huda shot him by his sten gun at the Veranda and then again went to the reception room. Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury lined up the police personnel and others. Major A.K.M. Mohiuddin Ahmed (Lancer) accompanied by Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury having started gun shot went to the upstairs of the house of Bangabandhu Sheikh Mujibur Rahman. Thereafter P.W.4 saw that Major A.K.M. Mohiuddin Ahmed (Lancer) was bringing Bangabandhu downstairs. P.W.4 was standing behind Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury. They said something to Major A.K.M. Mohiuddin Ahmed (Lancer). At that time Bangabandhu Sheikh Mujibur Rahman wanted to know something from them but in reply Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury fired at him mercilessly by their sten gun. Thereafter, Major Bazlul Huda, Lt. Col. S.H.M.B. Nur Chowdhury and Major A.K.M.

Mohiuddin Ahmed (Lancer) came down and went outside the gate to the road towards south of the house. Thereafter Lt. Col. Syed Farook Rahman (Lancer) came back and got down from the tank. He talked with Major Bazlul Huda and other officers. Lt. Col. Syed Farook Rahman changed the badges of Major Bazlul Huda and Subedar Major Abdul Wahab Joarder in presence of Lt. Col. Shariful Huq Dalim, Lt. Col. S.H.M.B. Nur Chowdhury, Lt. Col. Md. A. Aziz Pasha, Major A.K.M. Mohiuddin Ahmed (Lancer) and Major Bazlul Huda and kept P.W.4 in charge of the house of Bangabandhu Sheikh Mujibur Rahman at Road No.32, Dhanmondi. Later on, in the evening, he took P.W.4 to Mohammadpur to prepare the coffin boxes. On 16th August, 1975, in the morning after Fazre prayer nine dead bodies were taken away by Supply Transport Company of the Army. At 9:00 / 10:00 a.m., Major Bazlul Huda took the dead body of Bangabandhu Sheikh Mujibur Rahman in a pick-up van to the Airport.

P.W.5 in his examination-in-chief stated that he was in one Field Artillery at Comilla and Major Lt. Col. Shariful Huq Dalim was his CO and Major Bazlul Huda was his Adjutant. He was transferred to Dhaka and was on guard duty since 6:00 a.m. on 14th August, 1975 he saw Major Bazlul Huda riding a motor cycle in Road No.32, Dhanmondi at 5:00/5:30 in the evening on 14th August, 1975. At about 4:00/4:15 a.m. in the morning of 15th August, 1975, Subedar Major Abdul Wahab Joarder went there and checked the guard and took their old ammunitions on the plea of giving new ammunitions. At about 4:45 a.m., P.W.4 came to take over his duty and while hoisting the flag suddenly a barrage of fires started coming from the South and after 5/7 minutes later Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury came there with khaki and black dressed soldiers.

P.W.5 also saw Major Bazlul Huda in the afternoon of 14th August, 1975 and also on 15th August, 1975, he saw Major Bazlul Huda, Lt. Col. S.H.M.B. Nur Chowdhury and a force of 7/8 soldiers.

P.W.6 stated that he was posted in One Field Artillery at Comilla. They were in a group of 25 soldiers to guard the house of the then President at Road No.32, Dhanmondi

with Habilder P.W.4 and P.W.5. On his way to guard room, P.W.5 made them fall in at about 4:15 / 4:30 in front of the guard room and took their ammunitions. Thereafter, army forces in 2/3 trucks came from the east and stopped 1 / 2 house to the west of the house of the then President. They saw that the gun shots were coming from the side of the lake to the South. They took shelter by the side of the wall on the east side of the house. At that time, P.W.6 saw Bangabandhu Sheikh Mujibur Rahman was walking from the reception room to first floor and thereafter Sheikh Kamal came down. At that time Major Bazlul Huda and another officer in Khaki dress and officers and soldiers of Lancers in black dresses came there and Major Bazlul Huda and another officer shot Sheikh Kamal and he fell down on the doorstep of the reception room but Major Bazlul Huda shot him again. He also saw the dead body of Bangabandhu Sheikh Mujibur Rahman lying in the stairs. At that time Major Bazlul Huda ordered the guards not to allow any civilian to enter into the house and, in fact, Major Bazlul Huda controlled the house of the President.

P.W.7 in examination-in-chief stated that he joined One Field Regiment at Comilla, where lt. Col. Shariful Huq Dalim was serving as Second-in-Command and Major Bazlul Huda was the Adjutant. He was assigned with guard duty in the house of the then President at the relevant time. On 1st / 2nd August, 1975, Lt. Col. Syed Farook Rahman was in Command of 1st Bengal Lancer Regiment. P.W.7 heard announcement in the morning of 15th August, 1975 made by Lt. Col. Shariful Haque Dalim that Sheikh Mujib had been killed. He saw Major Bazlul Huda with the badge of Major and Major Abdul Wahab Joarder with a badge of Lieutenant.

Mr. Khan Saifur Rahman, Mr. Abdur Razzak and Mr. Al Mamun, the learned Counsels for accused-appellants have submitted in unison that charge of murder against convict appellants under Section 302 read with Section 34 of the Penal Code has not been proved on the basis of proper evaluation and sifting of evidence on record and, as such, miscarriage of justice has occurred. Mr. Saifur Rahman Khan has submitted that the confessional statement of accused appellant Lt. Col. Syed Farook Rahman and Lt. Col. Shahriar Rashid Khan were not true and voluntary. Since those statements were recorded

under duress after prolong remand in police custody which has been rightly found by the learned first Judge of the Division Bench and, accordingly he has disbelieved the alleged confessional statement made by them. The learned Advocate has submitted that the second learned Judge of the Division Bench without proper consideration of the material evidence on record wrongly found that the confessional statements were true and voluntarily and, accordingly, accepted those statements as legal piece of evidence against the so-called confessing accuseds and the other co-accuseds in the case. Mr. Khan Saifur Rahman has also submitted that there was no conspiracy committed by the accused appellants. The learned Advocates have submitted that the alleged confessional statements were not true and voluntary and, as such, these should not be taken into consideration.

Mr. Abdur Razzak Khan, the learned Advocate appearing for the accused appellant Lt. Col. Sultan Shahriar Rashid Khan, has submitted that the High Court Division delivered two separate parallel judgments and two individual judgments and the same is not the judgment in the eye of law. He then submitted that the First Information Report having been lodged after 21 years after the date of occurrence, there was embellishment in the facts of the case. He then submitted that the accused appellant Lt. Col. Sultan Shahriar Rashid Khan was not present at the place of occurrence. Trial Court as well as the High Court Division misconceived the evidence on record and convicted the accused appellant Lt. Col. Sultan Shahriar Rashid Khan.

Mr. Abdur Razzak Khan also has submitted that P.W.57 Investigating Officer made Seizure List as Exbt.9 relating to service record of Lt. Col. Sultan Shahriar Rashid Khan who stated that he was attached to the then President Secretariat from 15.08.1975 till he joined the Foreign Service and that he had been formerly absorbed in the Foreign Ministry and that he had been promoted to Lt. Col. on 29.11.1977 and as such he has no role in the alleged occurrence since he was not physically present and none of the witnesses stated his complicity in the commission of offence and as such his conviction and sentence is liable to be set aside.

Mr. Abdullah Al Mamun, appearing on behalf of the accused appellant Major Bazlul Huda and Major A.K.M. Mohiuddin Ahmed (Lancer), has made identical submissions like Mr. Saifur Rahman Khan and Mr. Abdur Razzak Khan. He has further submitted that the alleged confessional statement made by Major Bazlul Huda is not true and voluntary since the same was obtained after pre-long remand in police custody and he also stated that since the first Judge of the Division Bench discarded the confessional statement not being true and voluntary, the second learned Judge should not have taken into consideration. He has also submitted both the learned Judges of the Division Bench discarded Section 10 and, as such, confessional statement alleging conspiracy by the accused appellant could not be proved since Section 10 of the Evidence Act was not made applicable in a case where conspiracy has gone beyond the stage of conspiracy and the substantive offence has been committed in pursuance of conspiracy as in the instant case after commission of the murder.

Mr. Anisul Huq, the learned Special Prosecutor for the respondent State, and Mr. Mahbubey Alam, the learned Attorney General, has submitted in unison that the learned Sessions Judge of the Trial Court and the Hon'ble three Judges of the High Court Division gave concurrent findings on proper assessment of evidence on record; that the accused-appellants have committed offence under Section 302, 34 and 120B of the Penal Code. They have submitted that on careful scrutiny of the evidence of the witnesses it appears that out of the convict appellant, Major Bazlul Huda, Major A.K.M. Mohiuddin Ahmed (Lancer) and Lt. Col. Syed Farook Rahman, went to the place of occurrence at House No.677, Road No.32, Dhanmondi and referring to the relevant evidence of the eye witnesses he has asserted that Major Bazlul Huda shot at Sheikh Kamal, Sheikh Naser and Bangabandhu Sheikh Mujibur Rahman, a Police Officer, placed on as security guard of the residence of the President. The have contended that Major A.K.M. Mohiuddin Ahmed (Lancer) also participated in the commission of the offence by making some gun shots towards the lake, shooting towards Bangabandhu Sheikh Mujibur Rahman and killing some of the inmates. They have also referred to the evidence of witnesses and

showed that Lt. Col. Syed Farook Rahman took a leading role and conspired in the killing of Bangabandhu Sheikh Mujibur Rahman along with his family members and closed relations and, as such, he managed the entire episodes and events that took place from Balurghat to New Airport, then at Cantonment area along with various places and thereafter at House No.677, Road No.32, Dhanmondi, Radio Station, near race course and after the occurrence at Bangabhaban and thereby Lt. Col. Syed Farook Rahman played the principal role in the conspiracy and killing of Bangabandhu Sheikh Mujibur Rahman and 11 other persons of his family and two officials at the residence Road No.32, Dhanmondi. All of them committed the criminal act in furtherance of common intention.

In respect of Lt. Col. Sultan Shahriar Rashid Khan and Lt. Col. Mohiuddin Ahmed (Artillery), they have submitted that they have also took active part in furtherance of common intention to kill Bangabandhu Sheikh Mujibur Rahman and members of his family, and referring to the eye witnesses, they submitted that the eye witnesses have witnessed them at designated places. They finally submitted that all the accused-appellants committed conspiracy to kill Bangabandhu Sheikh Mujibur Rahman and member of his family and ultimately killed them. It is not a conspiracy to commit mutiny, and to that end the learned Attorney General and Mr. Anisul Huq have submitted that the accused-appellants first assembled at Balurghat parade ground and proceeded towards their assigned places. They further submitted that from the evidence of witnesses previous conducts of the accused-appellants were relevant in finding their participation in the conspiracy and these accused-appellants moved to their designated places in furtherance of the common intention to commit murder and their subsequent acts after the murder of Bangabandhu Sheikh Mujibur Rahman and members of his family. Their presence at the Radio Station and at Bangabhaban also proved their participation in the conspiracy and the premeditated killing of the then President and members of his family. They submitted that there was no violation of Section 377 of the Cr.P.C. As per Sections 378 and 429 of the Cr.P.C., since the judges of the Division Bench were equally divided

in their opinions, the case with their opinions thereon were laid before the third learned judge of the same Court who after such hearing delivered his opinion whereupon the judgment or order followed such opinion. In the light of the scrutiny of evidence and discussion, I am of the view that there is no illegality in the judgment and order passed by the High Court Division, which has been passed in accordance with law. As such, all the appeals are liable to be dismissed and the Death Reference is liable to be affirmed.

Scope and Jurisdiction of the Third Learned Judge

In these appeals leave was granted on five grounds. The first ground relates to scope and jurisdiction of the third learned Judge.

In the instant case, the learned Sessions Judge, Dhaka convicted 15 accused persons including the present 5 appellants under Sections 120B, 302 and 34 of the Penal Code and sentenced them to death. It appears that the learned Sessions Judge though convicted the accuseds under Section 120B of the Penal Code, yet he did not pass any separate sentence thereunder. As against the said judgment and order Sessions Judge, the accused-appellants preferred separate appeals before a Division Bench of the High Court Division. The first learned Judge of Division Bench found the present appellants and four others guilty for the offence charged against them and upheld the conviction and sentence under Section 302, 34 and 120B of the Penal Code, and the judgment and order of Sessions Judge was thereby affirmed in respect of those nine accused-condemned convicts. The Death Reference so far as it relates to the convict Captain Abdul Majed was confirmed by the learned presiding Judge with modification of conviction and sentence from Sections 302, 34 and 120B of the Penal Code into Section 120B of the Penal Code and sentenced him to death and his conviction and sentence under Sections 302 and 34 was set aside. But the Death Reference so far as it relates to the remaining six condemned convicts was rejected including Lt. Col. Mohiuddin Ahmed (Artillery) and, accordingly, Criminal Appeal No.2617 of 198 was allowed by the learned presiding Judge of the Division Bench. However, the second learned judge of the Division Bench upheld convictions of all the fifteen accused-convicts. In view of this division of opinions of the

two learned Judges of the Division Bench, the case with their opinions thereon was laid before Mohammad Fazlul Karim,J the learned third Judge of the High Court Division under Sections 378 and 429 of the Cr.P.C. and such judge after hearing as he thought fit delivered his opinion, and the judgment and order followed such opinion. We have already noticed that on the application of Major Huda, Lt. Col. Farook and Lt. Col. Shahriar Rashid the third learned Judge after hearing the parties as he thought fit by judgment and order dated 06.02.2001 observed as under:

> ‘‘In view of the discussion above and equally divided opinion of the learned judges of the Division Bench, I am of the opinion that the cases of above 9 condemned prisoners over whom the learned judges not being divided in opinion are not contemplated to be heard both unde the provision of section 378 and 429 of the Code of Criminal Procedure. But only the case of accused Abdul Mazed over whom there is diference as regard the conviction under the two separate sections of Penal Code and the cases of those five othe condemned prisoners over which the learned judges are equally divided in opinion i.e. convicted by one learned judge and acquitted by another learned judge are before this court for an opinion. Upon delivery of the opinion by this court, the judgment and order shall follow such opinion in order to dispose of the entire death reference.’’

Thereafter the third learned Judge was pleased to dispose of the Death Reference and the connected appeals as per provisions of Sections 378 and 429 of the Cr.P.C. It has transpired that the decisions of Supreme Court of the Sub-continent have not laid down a clear guide-line as to how the third learned Judge should deal with the cases where there is a difference of opinion between the judges of the Division Bench. From a long series of cases, it has come to our notice that the Supreme Court of the Sub-continent has categorized the cases into two broad groups. Firstly, where there is difference of opinion in respect of all the accuseds i.e. where first learned Judge acquitted all accuseds and the second learned Judge convicted all, and secondly, when there is difference of opinion either on evidence or points of law leading to conviction under different provisions of law

or acquittal of some of the accused person. In this context, the position of this Apex Court is not very clear. However, in the case of Mohim Mondal –Vs- State reported in 15 DLR (1963) 615, where six accused persons were convicted under Sections 304 and 148 and other provisions of the Penal Code. The learned companion Judge of the Division Bench of the then Dhaka High Court differed only with regards to the conviction of accused Mohim Mondal under Section 148 of the Penal Code. The case was laid before the third learned Judge under Sections 378 and 429 of the Cr.P.C. The third learned Judge, Murshed,J as he then observed as under:

> "Although my learned brothers have both concurred in affirming the conviction of appellant Mahim Mondal under Section 304 of the Pakistan Penal Code as well as the sentence pronounced upon him thereunder, the entire case with regards to this appellant also is now before me inasmuch as there has been a disagreement with regard to his conviction under Section 148 of the Penal Code."

Murshed,J further observed as follows:

> "Under the provisions of Section 429, Cr. Procedure Code upon the difference of opinion between the Judges the case has to be laid before a third Judge, and this necessarily means that the whole case has to be referred to the third Judge and not merely the point or points on which the Judges differ. The judgment or order shall follow the opinion given by the third judge."

So far as the concerned accused in respect of whom there was difference of opinion the whole case shall be laid before the third learned Judge who he is duty bound to consider all the points involved before he delivers his opinion upon the case. In the case of State –Vs- Abul Khair and 2 others reported in 44 DLR 284, where two judges of the Division Bench were equally divided on the validity of conviction and sentence of two appellants, but they agreed with regard to the conviction of one accused i.e. Abul Khair. The case was laid before the third learned Judge under Sections 378 and 429 of the Cr.P.C. The third learned Judge dealt with the case of two accused persons with regard to whom the learned Judges of the Division Bench had differed.

In respect of the decisions of the Indian Courts, we may refer to the case of Dharam Singh –Vs- State of U.P. reported in 1964 (1) Cri.L.J. 78, where it was held that in a trial of 12 accuseds, trial Court convicted 10 accused persons under Sections 302, 34 and 149 of the Indian Penal Code and acquitted two accused persons. The state preferred appeal against the acquittal and 10 convicts preferred appeal against the conviction. The learned Judges of the Division Bench equally differed in their opinion. Consequently, the matter was laid before the third learned Judge. The third learned Judge concurring with on of the judge upholding the acquittal of one of the appellants and set aside the acquittal of one accused. The Supreme Court of India examined the scope of Section 429 Cr.P.C in the following words:

> "All that S.429 says is that the opinion of the two judges who disagree shall be laid before another judge who, after giving such hearing, if any, as he thinks fit, shall deliver his opinion and the judgment or order should be in accordance with such opinion. Now it is obvious that when the opinions of the two Judges are placed before a third judge he would consider those two opinions and give his own opinion and the judgment has to follow the opinion of the third judge. Consequently on that opinion is based the judgment of the court. For all practical purposes the third judge must consider the opinions of his two colleagues and then give his own opinion but to equate the requirements with appeals against acquittals is not justified by provisions of S. 429 or by principle or precedent."

In the case of Babu –Vs- State of UP reported in AIR 1965 SC 1467, where there was difference of opinion between the two judges of the High Court, the matter was laid before the third Judge. Supreme Court of India held that Section 429 of the Cr.P.C. contemplates that it is for the third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit.

In the case of Hethubha –Vs- State of Gujrat reported in AIR 1970 SC 1266, there was difference of opinion between the two judges of the High Court Division and

accordingly the matter was laid to the third learned Judge under Section 429 of the Cr.P.C. In this decision Ray,J observed as under-

> "Counsel for the appellants contended first that the third learned Judge under Section 429 of the Criminal Procedure Code could only deal with the differences between the two learned Judges and not with the whole case. The same contention had been advanced before Mehta J, in the High Court who rightly held that under Section 429 of the Criminal Procedure Code the whole case was to be dealt with by him. The Court in Babu v State of Uttar Pradesh)1965) 2 SCR 771 = (AIR 1965 SC 1467) held that it was for the third learned Judge to decide on what points the arguments would be heard and therefore he was free to resolve the difference as he thought fit. Mehta J, here dealt with the whole case. Section 429 of the Criminal Procedure Code states "that when the Judges comprising the Court of Appeal are equally divided in opinion, the case with their opinion thereon shall be laid before another Judge of the same Court and such Judge, after such hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment and order shall follow such opinion". Two things are noticeable: first, that the case shall be laid before another Judge, and, secondly, the judgment and order will follow the opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case."

In the case of Union of India –Vs- B N Ananthapadmanabiah reported in AIR 1971 SC 1836, there was difference of opinion with regard to all the accused persons. Supreme Court of India held that the third learned Judge could deal with the whole case. The language of Section 429 of the Cr.P.C. is explicit that the case with the opinion of the Judges comprising the Court of Appeal shall be laid before another Judge of the same Court. The other noticeable feature in Section 429 of the Cr.P.c. is that the ''judgment or order shall follow the opinion'' of the third learned Judge.

In the case of State of Andhra Pradesh –Vs- P.T. Appaiah reported in AIR 1981 SC 265, the Judges of the High Court Division differed in opinion regarding all the

accused persons. The Supreme Court of India held that the third Judge is competent to deal with the whole case and he is not bound to confine his judgment only to the matter concerning difference of opinion between the other two judges.

In the case of Tanviben Pankajkumar Divetia –Vs- State of Gujrat reported in (1997) SCC 7 156 = AIR (1997) SC 2193 the observation of Supreme Court of India on identical provisions of Section 429 (own law) reads as under:

> "The plain reading of Section 392 clearly indicates that it is for the third Judge to decide on what points he shall hear arguments, if any, and it necessarily postulates that the third Judge is free to decide the appeal by resolving the difference in the manner he thinks proper." Citing the case of Babu –Vs- State of UP reported in AIR 1966 SC 1467 it has been held that where the third Judge did not consider it necessary to decide a particular point on which there had been difference of opinion between the two Judges, but simply indicated that if at all it was necessary for him to come to a decision on the point, he agreed with all that had been said about by one of the two Judges, such decision was in conformity with law. That the third Judge is free to decide the appeal in the maner he thinks fit has been reiterated in Hethubha –Vs- State of Gujrat reported in AIR 1948 All 237 and Union of India –Vs- B.N. Ananthapadmanabiah reported in AIR 1971 SC 1836. In State of Andhra Pradesh –Vs- P.T. Appaiah reported in AIR 1981 SC 265 it has been held by this Court that even in a case when both the Judges had held that the accused was guilty but there was difference of opinion as to the nature of offence committed by the accused, it was open to the third Judge to decide the appeal by holding that the accused was not guilty by considering the case on merit."

While commenting on the scope and jurisdiction of the third learned Judge the Supreme Court of India in the case of Sajjan Singh –Vs- State of MP reported in (1999) 1 SCC 315 observed as follows:

> "It is the third Judge whose opinion matters; against the judgment that follows therefrom that an appeal lies to this Court by way of special leave petition under Article 136 of the Constitution or under Article 134 of the Constitution or under Section 379 of the Code. The third judge is, therefore, required to examine whole of the case independently and it cannot be said that he is bound by that part of the two opinions of the two Judges comprising the Division Bench where there is no difference. As a matter of fact the third Judge is not bound by any such opinion of the Division Bench. He will not hear the matter as he is sitting in a three-Judge Bench where the opinion of majority would prevail."

In the case of Mattar –Vs- State of UP (2002) 6 SCC 460 where there was difference in respect of only one accused persons. The Supreme Court of India observed-

> "The Judges in different dissenting opinions have given detailed reasons, for and against the acceptance of the version as deposed by these eyewitnesses. The third learned Judge, under these circumstances, was required to independently examine the matter and express his opinion. It is not permissible to only or merely indicate the agreement with one or the other view without giving reasons therefor."

In the case of Sarat Chandra Mitra –Vs- Emperor reported in ILR 38 Cal 202, where the High Court Division of India observed-

> "Two points are worthy of note in connection with this section: first, that what is laid before another Judge is the "case" and, secondly, what the judgment or order follows is the opinion delivered by such Judge. I am not now concerned with the question of the trial of two prisoners with regard to one of whom the Judges composing the Court of Appeal may be agreed in their opinion, while as regards the other the Judges may be equally divided in opinion. In such a contingency it is quite possible to maintain the view that, upon a reasonable interpretation of the term "case" what has to be laid before another Judge is the case of the prisoner as to whom the Judges are equally divided in opinion. I am now concerned only with the contingency in which the Judges of the Court of Appeal are equally divided in

> opinion upon the question of guilt of one accused person, though upon certain aspects of the case they may be agreed in their view. In such a contingency, what is laid before another Judge, is not the point or points upon which the Judges are equally divided in opinion, but the "case". This obviously means that, so far as the particular accused is concerned, the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case. The judgment or order follows such opinion which neen not necessarily be the opinion of the majority of the three Judges; for instance, at the original hearing of the appeal, one Judge may consider the prisoner not guilty, another Judge may consider him guilty under one section of the Indian Penal Code, and liable to be punished in a certain way; the third Judge may find him guilty under a different section and pass such sentence as he thinks fit. It is this last opinion which prevails, subject to the provisions of section 377 of the Criminal Procedure Code in the case of confirmation of sentences of death."

In the case of Ahmed Sher –Vs- Emperor reported in AIR 1931 Lah 513. In this case there is difference in opinions against some of the accused persons. There are in total 41 accused persons. First judge convicted 9 accuseds under Sections 325, 149 and 147 of the Indian Penal Code and acquitted the others. Both the two Judges acquitted all the accused persons. On a suomotu appeal under Section 302 the case was laid before the third Judge under Section 429 of the Cr.P.C. It has been held that the third learned Judge has to look only as to the case of those accused with regard to whom the two Judges had differed. As regard the case of accused with regards to whom the Judges had differed the third Judge could look at all the points not just point of difference.

In the case of Nemai Mondal –Vs- State of West Bangal reported in AIR 1966 Calcutta 194, the two Judges differed in respect of some of the accused persons and accordingly a third Judge was referred under Section 429 of the Code. Mukharji,J observed-

> "what is laid before the third judge is "the case" itself and not merely the points of difference or the views of difference. The case with the differing opinion is placed before the third Judge. In other words, it is the duty of the third Judge to decide "the case" and not merely the points on which the Judges differed. No doubt in doing so, the two differing opinions have to be considered by the third Judge.....
>
> At the same time, the word "case" normally would mean in the case of a number of appellants, the case of each appellant considered separately. In other words, if out of three, two Judges of the Division Bench agree on one and disagree in respect of the other two appellants, then the "case" that is referred to under Section 429 of the Code of Criminal Procedure is the case not of the appellant on which they agree but the appellants on whom they had disagreed. The case in such a context means the case in respect of the appellants on which the two Judges are equally divided. The words "equally divided" in Section 429 of the Criminal Procedure Code seem to support that construction."

In the case of Bhagat Ram –Vs- State of Rajsthan reported in AIR 1972 SC 1502, there was difference of opinion in respect of only one accused person. The matter was laid before the third Judge under Section 429 of the Code of Criminal Procedure. The Supreme Court of India held-

> "In view of the fact that the State appeal against the acquittal of Bhagat Ram for offences under Sections 120B, 218, 347 and 389 IPC had been dismissed by the Division Bench, it was, in our opinion, not permissible for the third judge to reopen the matter and convict Bhagat Ram for offences under Sections 347, 389 and 120B IPC. The matter had been referred under Section 429 of the Code of Criminal Procedure to Jagat Narayan,J because there was a difference of opinion between Tyagi,J and Lodha,J regarding the correctness of the acquittal of Bhagat Ram for offences under Section 161 IPC and Section 5(1) (a) of Prevention of

Corruption Act. Jagat Narayan,J could go only into this aspect of the matter and arrive at his conclusion."

The Supreme Court further held-

"The present was not a case wherein the entire matter relating to the acquittal or conviction of Bhagat Ram had been left open because of a difference of opinion between the two judges. Had that been the position, the whole case relating to Bhagat Ram could legitimately be considered by Jagat Narayan,J and he could have formed his own view of the matter regarding the correctness of the order of acquittal made by the trial judge in respect of Bhagat Ram. On the contrary, as mentioned earlier, an express order had been made by the Division Bench upholding the acquittal of Bhagat Ram for offences under Sections 120B, 218, 347 and 389 IPC and the State appeal in that respect had been dismissed. The above decision of the Division Bench was binding upon Jagat Narayan,J and he was in error in convicting Bhagat Ram for offences under Section 120B, 218 and 347 IPC despite the order of the Division Bench. It was, in our opinion, not within the competence of the learned judge to reopen the matter and pass the above order of conviction in the face of the earlier order of the Division Bench."

In the case of State of UP –Vs- Dan Singh reported in (1997) 3 SCC 747, there was difference of opinion against some of the accused persons. Kirpal,J observed-

"What is clearly evident is that the appeal is finally disposed of by the judgment and order which follows the opinions of the third Judge. This being so special leave petition could only have been filed after the appeal was disposed of by the High Court vide its final order dated 19.05.1998. Even though the said order purports to relate only to ten out of thirty-two accuseds the said order has to be read along with the earlier order of 15.04.1987 and, in law, the effect would be that the order dated 19.05.1998 will be regarded as the final order whereby the appeal of the State was partly allowed, with only two of the thirty-two accused

being convicted under Section 325 read with Section 34 IPC, while all the other accuseds were acquitted."

In the case of Granade Venkata –Vs- The Corporation of Calcutta reported in 22 CWN 745. Where Supreme Court of India held that in a case referred under Sec. 429 Cr.P.C., a third Judge would not differ upon a point on which both the referring Judges were agreed unless there were strong grounds for doing so.

In the case of Mohammed Shafi –Vs- Crown reported in 6 DLR (WP) 104, there was difference of opinion in respect of single accused person between two learned judges of the High Court and the matter was laid before the third learned Judge under Section 429 of the Code of Criminal Procedure. It has been held that the third learned Judge before whom the case is laid under Section 429 of the Code of Criminal Procedure exercises the authority of a Bench of three judges and therefore, he should be considered not as a single Judge, but as a Bench. The case is not dealt with by a single judge, but one which is dealt with by three judges, even though the third judge is dealing with it at a later stage then the two disagreeing judges.

In the case of Abdur Raziq –Vs- The state reported in 16 DLR (WP) 73, where it has been held that the plain reading of Sections 378 and 429 of the Code of Criminal Procedure shows that the third learned Judge to whom the case is referred need not agree with the finding of either of the two Judges. He is to give an independent opinion and then give his finding.

From the careful scrutiny of the case laws of the Sub-continent including the decisions of our Apex Court it appears that when the Judges of the Division Bench of the Court of Appeal are equally divided in their opinion and the matter is laid before the third learned Judge the case with their opinions are laid before the third judge of the same Court as per provisions of Section 378 and 429 of the Cr.P.C. Such Judge after such hearing as he thinks fit shall deliver his opinion and the judgment or order shall follow such opinion. The expression "after such hearing (if any) as he thinks fit" envisages that it is completely the discretion of the third learned judge as to how he will hear the case.

The third learned judge is completely free to resolve the matter as he thinks fit in his full discretion. According to Section 429 of the Code of Criminal Procedure the third judge is free to decide on what point he shall hear argument. The expression "if any" postulates that the third judge is free in resolving the difference between the two judges of the Division Bench. From a careful scrutiny of the case law of the Sub-continent, mostly from the decisions of the Supreme Court of India, the considered view is that it is for the third judge to decide on what points he shall hear the arguments whether he will hear the whole matter or only the part where difference in opinion lies between the two judges in the Division Bench. From the provisions of Sections 378 and 429 of the Cr.P.C., the expression "judgment or order shall follow such opinion" postulates that it is the decision of the third judge which is the judgment of the Court, in other word the judgment of the court is based upon the opinion of the third judge. In the instant case we have seen that the third learned Judge Mohammad Fazlul Karim,J initially heard an application separately filed on behalf of some of the accused-appellants for hearing all the appeals in respect of all the accused persons upon whom there was a difference of opinion between the judges of the Division Bench. It has already been noticed that the third learned Judge after hearing the application on this particular issue passed a separate order dated 06.02.2001 holding the case of 9 condemned prisoners over whom the learned Judges of Division Bench were not divided in opinion are not contemplated to be heard both under the provision of Section 378 and 429 of Cr.P.C., and accordingly third learned judge decided to take up the hearing of six accused persons in respect of whom there was difference in opinions between the two judges of the Division Bench. Having considered all the aspect of the case, the third learned Judge upheld the conviction confirming the death references so far as it relates to Lt. Col. Syed Farook Rahman, Lt. Col. Sultan Shahriar Rashid Khan, Lt. Col. Khandker Abdur Rashid, Major Md. Bazlul Huda, Lt. Col. Shariful Hoque Dalim, B.U. Lt. Col. A.K.M. Rashed Chowdhury, Major A.K.M. Mohiuddin (Lancer), Lt. Col. S.H.B.M. Nur Chowdhury, Lt. Col. Md. Aziz Pasha, Lt. Col. Mohiuddin Ahmed (Artillery), Risalder Moslemuddin @ Moslehuddin and Captain Abdul Majed and accordingly dismissed the Criminal Appeal No.2616 of 1998 filed by

accused Lt. Col. Syed Farook Rahman, Criminal Appeal No.2604 of 1998 filed by accused Lt. Col. Sultan Shahriar Rashid Khan, Criminal Appeal No.2613 of 1998 filed by accused Major Md. Bazlul Huda and Criminal Appeal No.2617 of 1998 filed by Lt. Col. Mohiuddin Ahmed (Artillery) were dismissed but rejected the Death Reference No.30 of 1998 so far as it relates to accused Captain Md. Kismat Hashem, Major Ahmed Shariful Hossain @ Shariful Islam and Captain Nazmul Hossain Ansar.

So it appears that the third learned judge after proper compliance with the Provisions of Section 378 and 429 of the Cr.P.C. has decided the points on which he had to hear the arguments and in that matter the third learned Judge was completely free in resolving the difference as he thinks fit. So we do not find any illegality in the judgment and order passed by the third learned Judge. Having gone through the record we also find that the third learned judge delivered the judgment in accordance with Section 378 and 429 of the Cr.P.C. So we do not find any merit in the contention of the accused-appellants in this regard.

Delay in Lodging F.I.R.

On the second ground of delay in lodging the First Information Report (FIR), my learned brother Md. Tafazzul Islam, J in his judgment has extensively discussed the facts, relevant laws, grounds of delay in lodging the FIR including the background and the scenario which prevailed in Bangladesh after the assassination of the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, along with members of his family and relations in the early hours of 15th August, 1975. My learned brother in his judgment have considered the respective opinions of the learned Judges of the High Court Division and found that the learned Judges have given cogent reasons in believing the explanation of delay given by the prosecution. Accordingly, my learned brother has found that the delay in lodging FIR has been sufficiently explained. In that view of the matter, I fully agree with my learned brother.

Mutiny Leading to Murder or Murder Simplicitor

The third ground on which leave was granted relates to as to whether the case concerns mutiny leading to murder or murder simplicitor.

In reply to the submissions of the learned Advocates for the accused-appellants, Mr. Anisul Huq, learned Advocate appearing for the respondent-state has submitted that the statement in the leave grounding order whether it is mutiny leading to murder or murder simplicitor is misconceived because from the thorough scrutiny of the evidence of the prosecution witnesses and the materials on record, a case of murder has been made out. There was no case of mutiny leading to murder and, as such, the offences of mutiny and murder are two distinct offences. The offence of mutiny has not been defined in the Army Act,1952. However, Chapter 5 of the Army Act, 1952 provides for offences under the Army Act and punishments for mutiny and insubordination. Punishment for mutiny and insubordination has been provided in Section 31 of the Army Act, 1952. It appears that Section 35 of the Navy Ordinance, 1961 defines mutiny which reads as under:

"35. In this Ordinance, mutiny means a combination between two or more persons subject to service law, or between persons two at least of whom are subject to service law-

(a) to overthrow or resist lawful authority in the armed forces of Bangladesh or any forces co-operating therewith or in any part of any of the said forces;

(b) to disobey such authority in such circumstances as to make the disobedience subversive of discipline, or with the object of avoiding any duty or service, or in connection with operations against the enemy; or

(c) to impede the performance of any duty or service in the armed forces of Bangladesh or in any forces co-operating therewith, or in any part of any of the said forces."

The offence of murder has been defined in Section 300 of the Penal Code. When an offence of mutiny is committed it is exclusively triable by Court-Martial. The offence

of murder is not defined under Chapter 5 of the Army Act. According to Section 3(2) of the Army Act, ‘civil offence’ means an offence committed in Bangladesh triable by a criminal Court. Criminal Court has been defined under Section 8 (7) of the Act as a court of ordinary criminal justice in Bangladesh or established elsewhere by the authority of the Government. Section 59 of the Army Act deals with the civil offences. Sub-Section (1) of Section 59 of the Act provides that any person subject to this Act who commits any civil offence shall be deemed to be guilty of an offence under this Act, and on conviction to be punished in accordance with provisions of this Act. But Sub-section (2) of Section 59 provides that a person subject to this act who commits an offence of murder against a person not subject to this Act shall not be shall not be dealt with under this Act unless he commits any of the following offence

(a) while on active service or

(b) at any place outside Bangladesh, or

(c) at frontier post.

This means that a case of murder cannot be tried under the Army Act if the victims are not subject to the Army Act, unless the perpetrators were persons subject to Army Act and on 'active service’ while committing the offence Section 8(1) of Army Act defines 'active service’ as the time during which such person is attached to a force engaged in operation against an enemy or military operation, or is on line of march to a place occupied by an enemy, or is part of a force engaged in military operation against a foreign country.

Suffice it to say, none of the accused persons were on ‘active service’ as defined under Section 8(1) of the Army Act. Accordingly, the accused persons cannot be tried under the Army Act in view of Sub-Section (2) of Section 59 inasmuch as the three alternative conditions enumerated therein have not been satisfied.

Furthermore, Sections 94 and 95 of the Army Act, 1952 provides for the concurrent jurisdiction to the Court-Martial and ordinary criminal Court. Section 94 envisages that in respect of a civil offence, when a Court-Martial and a criminal Court have concurrent

jurisdiction, the prescribed officer of the Army has discretion to decide before which Court the proceeding shall be instituted and if he decides that the case shall be instituted before a Court-Martial, it shall direct that the accused persons be detained in military custody. However, in a case under Section 95 of the Army Act, when a criminal Court having jurisdiction is of the opinion that proceedings ought to be instituted before itself in respect of any civil offence, it may by written notice require the prescribed officer to produce the offender to nearest Magistrate or to postpone proceedings pending a reference to the Government. Section 549 of the Cr.P.C. provides the procedures to be complied with regards to a person liable to be tried by a Court-Martial by delivering them to the military authority.

On perusal of the Order No.11 dated 24.03.1997, it appears that the learned Sessions Judge sent a notice to the Chief of Staff Army under Rule 2 of Cr.P. Rule (Military Offenders),1958 in respect of the trial in the Sessions Court. It also transpires from the Order No.12 dated 03.04.1997 passed by the learned Sessions Judge that there was memo sent by the Judge Advocate, General Division, Dhaka Cantonment dated 02.04.1997 under Memo No.5525 / 2 / JAG notifying that there was no bar in holding trial of retired Army Officers under the Army Act in the Sessions Court.

In the instant case, it appears that the learned Sessions Judge before proceeding with the case has complied with the provisions of law by issuing orders as stated above and the prescribed officer in the instant case did not exercise his discretion to hold the trial before a Court-Martial.

In this case Mr. Anisul Huq has referred to the case of of Joginder Singh –Vs- Himachal Pradesh reported in AIR 1971 SC 500. Where the accused being a Lance Naik in the Indian Army was charged with rape of a ten years old girl. He was convicted under Section 376 of the Indian Penal Code and not by Court-Martial. It was contended before the Supreme Court that before trial of the Court, Section 549 of the Cr.P.C. has not been complied with. The Supreme Court dismissed the appeal holding that in the absence of exercising discretion by the designated officer as to the forum of trial, the Army Act

would not obviously be in the way of the criminal Court exercising its ordinary jurisdiction in accordance with the provisions of law.

In the case of Balbir Singh and another –Vs- Punjab reported in 1995 1 SCC 90 where the accused persons were on the active service of the Air Force at the time of commission of offence, but Commanding Officer did not exercise his discretion to decide before which Court the proceeding should have been instituted. The accused persons were convicted by the Additional Sessions Judge under Sections 302 and 149 of the Indian Penal Code. The Supreme Court dismissed the appeal and observed that the option to try a person subject to Air Force Act who commits an offence while on active service is in the first instance with the Air Force Authorities and, as such, the accused has no option or right to claim trial by a particular forum.

The prosecution in the instant case examined 61 witnesses but none of them was cross-examined on behalf of the defence in respect of killing in the course of mutiny. From the record it appears that no such plea was taken at the trial court by the defence under at a belated stage, while in the High Court Division at the time of hearing of the death reference and the respective appeals.

In the case of Haider Ali Khan –Vs- the State reported in 14 BLD (AD) 270, the Appellate Division of the Supreme Court held that the jurisdiction of the Court below cannot be challenged in appeal at a belated stage. The same principle has also been enunciated in the case of Julfiqur Ali Bhutto –Vs- State reported in PLD 1979 (SC) 53. The learned Attorney General has also pointed out that on behalf of the accused Syed Farook Rahman, the sitting of the Court at Nazim Uddin Road was challenged by filling Writ Petition No.2032 of 1997 which went upto the Appellate Division reported in 49 DLR (AD) 157 and on behalf of the accused Sultan Shahriar Rashid Khan and Syed Farook Rahman, the vires of the Indemnity Repeal Act,1997 was also challegned in the High Court Division, which went upto the Appellate Division reported in 3 BLC (AD) 89 but the accused appellants never challenged the jurisdiction of the Court on the ground

that the murder was committed in course of mutiny and the normal criminal Court has no jurisdiction to try the offence.

On careful examination of the evidence adduced by P.W.8, P.W.9 and P.W.45, it appears that they support the prosecution contention that the evidences do not disclose that the murders were committed in the course of mutiny. Both the first learned judge and third learned judge in their judgment came to the conclusion that there was no case of mutiny leading to murder. No charge was framed rightly before the learned Sessions Judge. We also find substance in the submission of the learned Attorney General that the statement submitted by the accused appellant Syed Farook Rahman, Sultan Shahriar Rashid Khan and Mohiuddin Ahmed (Artillery) at the time of giving statement under Section 342 of the Cr.P.C. did not mention that the murders on the 15th August,1975 were committed in course of mutiny.

We have found that the second and third learned Judges made concurrent findings on this point holding that there is no illegality in holding trial before the Court of Sessions. The forum of trial is governed by procedural law and it is well established that the procedure followed by a civil court is much fairer and transparent than the procedure followed in court-martial. In that view of the matter, there is no question of prejudice caused to the convict appellant. In this end in the case of Jamil Huq –Vs- Bangladesh reported in 34 DLR (AD) 125 at page 138, paragraph 37 the Appellate Division of the Supreme Court has quoted with approval of the observations of Prof. Holland published in Law of Court Martial (Current Legal Problem 1950 at Page 193) which reads as follows:

> "I would accordingly suggest that the jurisdiction of court martial should be statutorily confined to the offences against discipline and all the jurisdiction over civil offences should be taken away except where it is reasonable and impracticable to arrange for a civil trial."

We find that before pronouncement of his judgment, the learned Sessions Judge vide his orders dated 24.03.1997 and 02.04.1997 gave notice to the concerned Army

authority, and in reply the Army Head Quarter as per provisions of Criminal Procedural Rules (Military Offenders),1958 vide Office Memo dated 02.04.1997 informed that there is no bar in trying retired army personnel in the criminal Court and thereby complied with Section 94 of the Army Act. In view of the aforesaid discussions and findings, I am of the view that since the accused-appellants were not on active service within the meaning of Section 8(1) of the Army Act,1952 the accused persons cannot be tried under the Army Act and, as such, there was no offence of mutiny leading to murder in the facts of the instant case. Moreover, even if one were to accept for sake of argument that offences committed were civil offences within the meaning of Section 8(2) read with Section 59(2) of the Army Act, there is no legal bar in trying those accused persons in the Sessions Court in compliance with the provisions of Section 94 of the Army Act read with Section 549 of the Cr.P.C. In that view of the matter, there is no legal bar for trial of the accused appellants in the Criminal Court in the relevant case inasmuch as the offences committed are in the nature of murder simplicitor.

Conspiracy for Murder or Conspiracy for Committing Mutiny

The fourth ground on which leave was granted concerned the question as to whether it is case of criminal conspiracy for murder or a case of conspiracy for committing mutiny. In the instant case the convict appellants and other accused persons were convicted under Sections 302, 34 and 120B of the Penal Code. It has been asserted on behalf of the accused-appellants that the evidence on record does not disclose the case of criminal conspiracy to commit murder of Bangabandhu Sheikh Mujibur Rahman and members of his family, but rather it disclosed a case of criminal conspiracy to commit mutiny to change the then Mujib Government. Confronted with such a situation, we have already discussed above the provisions of Sections 302 and 120B of the Penal Code.

A criminal conspiracy has been defined in Section 120A of the Penal Code. In order to constitute criminal conspiracy there must be an agreement of two or more persons to do an illegal act or to do an act by illegal means in furtherance of their common design. Section 120B of the Code provides for punishment of criminal

conspiracy. So whenever a person is found to be a party to a criminal conspiracy to commit an offence punishable with death or rigorous imprisonment for a term of two years or upwards or where no express provision is made in the Code for the punishment of such conspiracy he will be punished in the same manner as if he had abated such offence.

From the careful scrutiny of the evidence of witnesses in the instant case, we will be dealing with the involvement of the accused-appellants in the conspiracy for the killing of Bangabandhu Sheikh Mujibur Rahman and members of his family. As stated above, the accused-appellants are liable, amongst other, under Section 120B of the Penal Code for conspiracy. Here, it would be determined whether such conspiracy was for killing Bangabandhu Sheikh Mujibur Rahman and his family members or for committing mutiny to change the then Mujib Government. It is well established by the apex court of our country as well as the Supreme Court of India that the evidence of conspiracy is never palpable nor it is crystal clear rather criminal conspiracy is always hatched in secrecy. It is always impossible to get direct evidence for criminal conspiracy. But however in the instant case the learned Advocate for the respondent-state and the learned Attorney General has referred to the evidence of P.W.43 who deposed that in March,1975 Khondker Moshtaq had attended a conference at BARD, Comilla. After the conference Lt. Col. Khondker Abdur Rashid, a relation of Khondker Moshtaq accompanied by another army officer had secret meeting in the rest house with Khondker Moshtaq along with Mahbubul Alam Chashi, Taheruddin Thakur where they had hatched conspiracy.

The evidence of the following witnesses supports the prosecution case.

P.W.11 was in 1st Bengal Lancer whose commanding officer was Lt. Col. Momon and his 2nd-in-command was Lt. Col. Syed Farook Rahman and his squadron commander was Major A.K.M. Mohiuddin (Lancer). There was a night parade in the night following 14th August,1975. Though he has not participated in the night parade but on the direction of his SDM he went in front of his store as the parade fell inthere. P.W.11 saw Lt. Col. Syed Farook Rahman, Risaldar Muslehuddin, Major Mohiuddin, Major Ahmed Shariful

Hossain, Lieutenant Kismat Hashem, Lieutenant Nazmul Hossain Ansar, Risaldar Sarwar, Major Nurul Huq, L.D. Abul Hashem Mridha, Dafadar Marfat Ali and other NCOs and JCOs. By the order of his SDM he went to KOTE (light armoury) at about 3:30 a.m. and took one G-3 rifle with 18 round cartridge and a magazine. Then at 4:30 in the morning he went to the residence of the then President at Road No.32, Dhanmondi. Some time later, a tank came and P.W.11 saw Lt. Col. Syed Farook Rahman and thereafter he also saw Major AKM Mohiuddin Ahmed (Lancer), Lt. Col. S.H.M.B. Nur Chowdhury and Major Bazlul Huda, Risaldar Sarwar, Subedar Major and few others together went in front of the gate of the residence of Bangabandhu Sheikh Mujibur Rahman.

P.W.12 was 1st Bengal Lancer whose Commanding Officer was Lt. Col. Syed Farook Rahman. As the substantive CO Major Momin was on leave and Lt. Col. Syed Farook Rahman was in-charge CO of the Regiment. They assembled in the parade ground at 9 p.m. on the night following 14th August,1975. In the parade ground, Lt. Col. Syed Farook Rahman, Major Mohiuddin, Major Shamsuzzaman, Captain Delwar Hossan, Lt. Kismat Hashem, Lt. Nazmul Hossain Ansar, Risaldar Major Syed Ahmed, Risaldar Muslemuddin, Risaldar Mobarak, RDM Mosaddek or Arshed, MDM Naeb, Risaldar Malek, Naeb Risaldar Nurul Islam, Dafader Jabbar (P.W.14), Dafader Haider Ali, Lance Dafadar Lutfor Rahman, ALD Muslemuddin, ALD Mohsin and others were present. The parade continued till 12:00 mid night. with a break of 20 minutes. The classes continued till 3:30 in the morning again they fell in there. At that time Lt. Col. Syed Farook Rahman, Major Mohiuddin (Lancer), Major Ahmed Sharful Hossain, Lt. Kismat Hashem, Lt. Nazmul Hossain and the JCOs were discussing about something in the corner of the parade ground. P.W.12 saw three unknown officers who were introduced by Lt. Col. Syed Farook Rahman as Major Dalim and Captain Huda, but he could not remember the name of the other officer. Lt. Col. Syed Farook Rahman while briefing the troops stated that Sheikh Mujibur Rahman was going to declare monarchy in the meeting to be held at the University on 15th August but they should not support monarchy and as

such they must obey his command of him and that of his officers. P.W.12 saw that accused Lt. Col. Syed Farook Rahman was instigating his troops and flaring them up without disclosing his actual intentions but inciting them to accomplish his own mission. P.W.12 and other troops from 1st Bengal Lancer and 2nd Field Artillery Regiment started from Balurghat to the then President's residence at Road No.32, Dhanmondi. At that time P.W.12 saw Lt. Col. Farook Rahman in the tank. P.W.12 proved that Farook took part in conspiracy by inciting, arming and deploying the troops on the night following 14th August,1975 and in the early hours of 15th August,1975 and also his presence at Road No.32, Dhanmondi in front of the residence of the then President.

P.W.13 was in 1st Bengal Lancer. He made identical statements like P.W.12. He also attended in the parade ground in the night following 14th August,1975 at 8:30 p.m. In the mid-night he saw Lt. Col. Khondker Abdur Rashid going with Lt. Col. Syed Farook Rahman. But some time later Lt. Col. Syed Farook Rahman returned to the unit. P.W.13 as per order of Lt. Col. Syed Farook Rahman accompanied by Risaldar Muslemuddin, Dafadar Marfat Ali and L.D. Abdul Hashem Mridha in a truck went to the house of Sheikh Fazlul Huq Moni and from there they went to the Road No.32, Dhanmondi. He also heard gun shots from the house of Bangabandhu Sheikh Mujibur Rahman. Some time later Lt. Col. Syed Farook Rahman came out of Road No.32, Dhanmondi in the tank followed by the Risaldar Moslemuddin alias Moslehuddi and others. He saw Lt. Col. Syed Farook Rahman and Lt. Kismat Hashem inside the tank. P.W.13 heard gun shots from the house of Bangabandhu Sheikh Mujibur Rahman but he did not go to that house. He proved the presence of Lt. Col. Syed Farook Rahman who was in full command in front of house of the then President at Road No.32, Dhanmondi. This evidence of P.W.13 was corroborated by P.W.1 in material particulars stating that he had seen tank passing in front of the house of Bangabandhu Sheikh Mujibur Rahman. P.W.13 was also corroborated by the confessional statement of Lt. Col. Mohiuddin Ahmed (Artillery).

P.W.14 was in 1st Bengal Lancer Regiment. He made identical statements like P.W.12 and P.W.13. He also attended the parade ground in the night following 14th

August 1975. After the night parade he saw in the parade ground Lt. Col. Syed Farook Rahman, Major Mohiuddin (Lancer), Major Ahmed Sharful Hossain, Lt. Kismat Hasem, Nazmul Hossain Ansar and some other persons in civil dress. Accused Lt. Col. Syed Farook Rahman introduced Major Dalim, Lt. Col. Shahriar in civil dress. Accused Lt. Col. Farook Rahman directed them to obey their orders. In the Radio Station he saw that Lt. Col. Shahriar Rashid Khan was coming from the radio station after 5:30 O'clock in the morning. P.W.14 proved the presence of the accused Lt. Col. Shahriar Rashid in the parade ground in the cantonment near Balurghat at 2:30 O'clock in the morning and at about 5:30 a.m. in the Radio Station. P.W.24 also in his deposition stated that Lt. Col. Khondker Abdur Rashid went to the parade ground at about 3:00/3:15 a.m. on the night following on 14th August, 1975 where Lt. Col. Syed Farook Rahman briefed them in presence of their CO, Lt. Col. Khondker Abdur Rashid and other officers. Lt. Col. Khonedker Abdur Rashid and Lt. Col. Syed Farook introduced them with the dismissed officers, namely, Major Dalim, Major Rashid Chowdhury, Lt. Col. Shahriar and Captain Majed. Then Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid ordered them to take ammunitions from the unit. When they started from the Lancer unit and stopped on a road P.W.24 also saw Lt. Col. Shahriar, Captain Majed and Captain Mostafa. He also saw Major Dalim, Major Nur, Lt. Col. Shahriar, Lt. Col. Khondker Abdur Rashid, Major Rashed Chowdhury, Captain Majed, Captain Mostafa and other officers went inside the Radio Station.

P.W.17 and P.W.18 also made identical statements.

P.W.23 deposed that they had night parade on the night following 14th August, 1975. He also made identical statements like P.W.17 and P.W.18. On being ordered the troops of B Squadron fell in and Lt. Col. Syed Farook Rahman said that there was tank exercise and the tanks would go outside. Out of 12 tanks, six were found fit and six tanks were started with force and ammunitions. At about 3 / 3:30 a.m., Lt. Col. Syed Farook Rahman again returned there, and he again left and thereafter returned at about 4 / 4:30 a.m. with Major Ahmed Sharful Hossain alias Shariful Islam and Captain Nazmul

Hossain Anser. Lt. Col. Syed Farook Rahman had boarded a tank placed on the front of the line, Captain Md. Kismat Hashem had boarded the next one and Major Ahmed Sahrful Hossain alias Shariful Islam and others had boarded the rest. On the order of Lt. Col. Syed Farook Rahman, the tank fleet started to move. The evidence of this prosecution witness shows that Lt. Col. Syed Farook Rahman had organized his Lancer Regiment and commenced his operation with immaculate precision without disclosing his real intentions to the tank crew and the ordinary sepoys. Lt. Col. Syed Farook Rahman in a very successful manner in getting the tanks ready and deployed in the city in the pretext of tank exercise. According to the prosecution witnesses, those tanks were deployed at designated places in order to facilitate of the killing of the then President and also stop any resistance by any other force or person.

P.W.24 was a Sepoy in 2nd Field Artillery Regiment. They had night training program on 14th August. They were taken to the New Airport at about 10:00 / 10:30 p.m. and during the night parade at about 3:00 / 3:30 a.m. Lt. Col. Khondker Abdur Rashid arrived there and directed them to go to another place for an urgent duty and thereafter they were taken to Lancer Unit, where Lt. Col. Syed Farook Rahman briefed them in presence of their CO, Lt. Col. Khondker Abdur Rashid and other officers. Lt. Col. Khonedker Abdur Rashid and Lt. Col. Syed Farook introduced them with the dismissed officers, namely, Major Dalim, Major Rashid Chowdhury, Lt. Col. Shahriar and Captain Majed. Then Lt. Col. Khondker Abdur Rashid and Lt. Col. Shariful Huq Dalim addressed them by stating that the Government had failed to protect the honour of the women folk and the people are dying of hunger, as such, the Government has to be overthrown. Thereafter Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid ordered them to take ammunitions from the unit. When they started from the Lancer unit and stopped on a road, P.W.24 also saw Lt. Col. Shahriar, Captain Majed and Captain Mostafa. He also saw Major Dalim, Major Nur, Lt. Col. Shahriar, Lt. Col. Khondker Abdur Rashid, Major Rashed Chowdhury, Captain Majed, Captain Mostafa and other officers going inside the Radio Station.

The cross-examination of P.W.24 on behalf of Lt. Col. Syed Farook Rahman has been observed by A.B.M. Khairul Haque,J to the following effect:

"Bnv mZ¨ b‡n †h, †miwbqvev‡Zi evmvq hvevi Kvi‡b cwjk Avgv‡K GB gvgjvi Avmvgx Kwi‡e GB f‡q Awg Avmvgxi †kYx nB‡Z ev` hvIqvi Rb¨ cwj‡ki K_v gZ p¡rÉ w` jvg z

The learned second judge gave a detailed reason stating that the witness gave deposition in his examination-in-chief and also earlier cross-examination on behalf of 5 accused persons.

P.W.25 was also on 2nd Field Artillery. He made identical statement like P.W.12, P.W.13 and P.W.14. He has attended in the night parade on the night following 14th August,1975. On the order of Major Rashid they were grouped in different sections and marched to the New Airport. At about 3:00 / 3:30 a.m. they marched on and reached the open space for tanks and saw there tank with force forces. He saw the accused Lt. Col. Khondker Abdur Rashid at the Lancer Unit. Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid with Major Rashed Chowdhury, Captain Mostafa, Major Dalim, Captain Majed and other officers briefed them. Lt. Col. Syed Farook Rahman, Lt. Col. Khondker Abdur Rashid and Lt. Col. Shariful Huq Dalim addressed them inciting the troops against the Government stating that the Government could not protect the honour of the women folk of this country and the people are dying of hunger, as such the Government had to be overthrown. Lt. Col. Syed Farook Rahman asked them to take ammunitions from their Lancer Unit. Thereafter they were divided in six sections and proceeded towards the city in six trucks. This witness was also on duty on the north east corner of the Radio Station. P.W.25 catagorically stated that Lt. Col. Sayed Farook Rahman in collaboration with Lt. Col. Khondker Abdur Rashid and some disgruntled dismissed officers incited the troops to achieve their own mission.

P.W.35 was Subedar Major in 2nd Field Artillery Regiment. He also stated in his deposition that Lt. Col. Mohiuddin Ahmed (Artillery) was commander of 2nd Field Artillery Regiment. On the night following 14th August,1975 during night training, the accused Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid came

together in a jeep in the office of the accused Lt. Col. Khondker Abdur Rashid at about 10:00 p.m. P.W.35 correctly identified the accused Lt. Col. Syed Farook Rahman.

P.W.39 was a lower driver in the 1st Bengal Lancer Regiment, C Squadron. Their CO in charge was Lt. Col. Syed Farook Rahman. He also made identical statement like other P.Ws. According to him, parade started at about 7:30 p.m. on the nigh following 14th August,1975. At about 2:00 / 2:30 a.m. Lt. Col. Farook Rahman, Major Sharful Islam, Major Mohiuddin (Lancer), Lt. Kismat Hashem, Lt. Nazmul Hossain Ansar, Risaldar Muslemuddin and others including the JCOs and NCOs were present. Lt. Col. Syed Farook Rahman addressed them that the tanks would go out for an special task in an emergency of the country and order them to take preparation and accordingly the troops were started to get ready with tanks. At the time of his duty at Bangabhaban, he used to see Lt. Col. Syed Farook Rahman, Lt. Mismat Hashem, Lt. Nazmul Hossain Ansar and Risaldar Muslemuddin visiting Banga Bhaban by jeep.

P.W.40 was Subedar Major in 1st Bangal Lancer Regiment. He also stated about the night parade on the night following 14th August,1975. At about 2:00 / 3:00 p.m., he was informed that troops of Artillery Regiment were coming. On being directed by the Quarter Master, Captain Delwar, P.W.40 handed over the key of the KOTE. Later on he went to the Quarter Guard himself, and the Quarter Master JCO and the Guard Commander informed him that the soldiers took away the arms and ammunitions. He saw Lt. Col. Farook Rahman and Major Rashid were talking by the side of a jeep fitted with LMG. Lt. Col. Farook Rahman told him to keep an eye on the regiment, and on his querry Lt. Col. Farook Rahman said that they were going for overthrowing the autocratic Government. On a further query from him as to whether Shafiullah Saheb knew about it, Lt. Col. Farook replied that he did not think it necessary. P.W.40 deposed the last minute consultations between Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid presumably about the operation and also about deployment of the tank, although even at that point of time, the ordinary solders including P.W.40 did not know the actual object of the operation.

P.W.44 deposed that on hearing the news of the death of the then President, he rushed to 1st Bengal Regiment and found one tank in offensive position with Lt. Col. Farook Rahman who fired from the tank on the lined-up trucks of supply and transport company with his heavy machine gun.

P.W.1 deposed that in the early morning of 15th August, 1975 he saw Lt. Col. Farook Rahman was asking something to Major Bazlul Huda at the gate of the residence of Bangabandhu Sheikh Mujibur Rahman at Road No.32, Dhanmondi and in reply he said "all are finished". P.W.1 saw Lt. Col. Farook Rahman, Major Dalim, Major Nur, Major Bazlul Huda in the residence of the then President at Road No.32, Dhanmondi at the time of the occurrence and thereafter.

From the aforesaid evidence of the witnesses it appears that there was conspiracy for murder of Bangabandhu Sheikh Mujibur Rahman with members of his family being hatched by the accused persons to achieve their mission in furtherance of their common intention of all the accused persons. This evidence of witnesses described the discussions amongst the accused-appellants with the other accused persons and thereafter briefing the troops by accused Syed Farook Rahman, Khondker Abdur Rashid and Shariful Huq Dalim. While doing the conspiracy as per briefing of Lt. Col. Syed Farook Rahman troops under the command of both Lancer and Artillery Units including some dismissed officers went to the Tejgaon Airport Road, some of them to the house, of Abdur Rob Serniabad, Sheikh Fazlul Hoque Moni, some of them at the Radio Station, Shahbagh and some went to resist BDR and Lt. Col. Mohiuddin Ahmed (Artillery) was sent with cannon Kalabagan Lake Side, Dhanmondi and to House No.677, Road No.32. Major Bazlul Huda, Mahiuddin Ahmed (Lancer), S.H.M.B. Nur Chowdhury and Md. A. Aziz Pasha went to the residence of the then President. This scenario shows that deployment of troops in different places as stated above were deployed in furtherance of their pre-meditated plan to kill the then President with members of his family and relations also to resist any other force.

On careful scrutiny of the evidence of the aforesaid prosecution witnesses, it appears that they proved the prosecution case in corroborating each other as to the allegation of conspiracy to commit murder of the then President Bangabandhu Sheikh Mujibur Rahman and the members of his family and thereby proved the case beyond reasonable doubt.

From the forgoing discussions and findings of the evidence of the prosecution witnesses, I am of the view that learned Judges of the High Court Division rightly found that conspiracy was started in March,1975 Lt. Col. Rashid's house at cantonment, nurtured in different meetings between Khondker Moshtaq Ahmed and the accused Army Officers at BARD, Comilla and in Mushtaqu's house at Daudkandi, Dhaka Aga Mashi Lane, Ramna Park, Shahriar Rashid's residence at Cantonment and Balurghat Parade Ground. Since all the accused persons participated in the conspiracy and some of them started in March,1975, some of them subsequently participated from March-August,1975 and all of them were present in the Balurghat parade ground and having been fully apprised and motivated by Syed Farook Rahman and Shariful Huq Dalim, and as such, the accused persons including the accused appellants participated in the assassination of the then President and the killing of members of his family and, as such, all of them are guilty for criminal conspiracy under Section 120B of the Penal Code. So relying on the case laws discussed above and the materials on record, it can be safely held that there was sufficient legal evidence on record that the accused-appellants along with other accused persons committed criminal conspiracy to murder the then President Bangabandhu Sheikh Mujibur Rahman and the members of his family. There was no case of criminal conspiracy to commit mutiny which has been rightly proved by the evidence of the witnesses.

Whether Charge of Murder has been Proved on the Basis of Proper Evaluation and Sifting of Evidence on Record:

Mr. Khan Saifur Rahman, Abdur Razzak Khan and Abdullah Al Mamun, the learned Advocates appearing for the accused-appellants in all these appeals have

submitted in unison that the charge of murder against convict appellants under Sections 302 and 34 of the Penal Code has not been proved on the basis of proper evaluation and the evidence on record and thereby a miscarriage of justice has occurred. In reply to that Mr. Anisul Huq, the learned Advocate and Mr. Mahbubey Alam, the learned Attorney General appearing for the respondent have submitted in identical terms that both the trial court and the High Court Division made concurrent findings of facts as to the complicity of the accused-appellants in the commission of the offence. The learned Attorney General having referred to the evidence of witnesses has submitted that the eye witnesses deposed that they had seen the presence of Major Bazlul Huda, Major Mohiuddin Ahmed (Lancer) and Syed Farook Rahman at the house of the President Bangabandhu Sheikh Mujibur Rahman at Road No.32, Dhanmondi in committing murder as stated above.

Since my learned brother Md. Tafazzul Islam,J in his judgment has elaborately referred to the evidence of witnesses in respect of the arrival, presence and participation of the accused-appellants in the commission of the offence under Section 302, 34 and also 120B of the Penal Court, I shall be in brief in discussing relevant evidences.

Lt. Col. Syed Farook Rahman

P.W.44 was the commander of 46 Brigade. He deposed that accused Appellant Lt. Col. Syed Farook Rahman was the 2 I.C. of first Bengal Lancer. Syed Farook Rahman did not fight for war of Liberation and did not get seniority of two years and for that he had grievance against Bangabandhu Sheikh Mujibur Rahman. According to him Lt. Col. Farook Rahman was the brother-in-law of Lt. Col. Khondker Abdur Rashid.

P.W.43 stated in his deposition that Lt. Col. Khondker Abdur Rashid, Lt. Col. Farook Rahman and Lt. Col. Shahriar Rashid and some other officers were present in a secret meeting after the function at Daudkandi Madrasha.

P.W.11 stated in his deposition that Lt. Col. Syed Farook Rahman was 2 I.C. of the Lancer Unit and there was a night parade on the night following 14th August,1975 though he did not attended in the night parade as per direction of the authority he went to the store room. Thereafter by the order of SDM P.W.11 went to the KOTE straightway

for arms. Accordingly he went to the KOTE at abut 3:30 a.m. and took one G-3 rifle with 18 round cartage and a magazine. P.W.11 with the vehicle came near the house of Bangabandhu Sheikh Mujibur Rahman which was about 80 feet away from the house at about 4:30 in the morning. He saw Lt. Col. Syed Farook Rahman in a tank at Road No.32. Lt. Col. syed Farook Rahman got down from the tank and talked with Major Mohiuddin, Major Nur, Captain Huda. When he went in front of the gate of the house of Bangabandhu Sheikh Mujibur Rahman and after some time he saw Lt. Col. Farook Rahman went away with the tank.

P.W.12 in his deposition stated that there was night parade on the night following 14th August in which they attended till 3:30 a.m. He saw three unknown officers in uniform who were introduced by Lt. Col. Syed Farook Rahman as Lt. Col. Shariful Huq Dalim and Major Bazlul Huda. Lt. Col. Syed Farook Rahman briefed them that they cannot support monarchy but Sheikh Mujibur Rahman was going to declare monarchy next day and as such troops must obey his orders as well as the orders of his officers and ordered them to take ammunition from the KOTE for the action. P.W.12 through his evidence proved that Lt. Col. Syed Farook Rahman instigated the troops without disclosing the real intention.

P.W.13 was also joined in the night parade on the night following 14th August,1975 at 8:30 p.m. He also made identical statement like P.W.14 as to the involvement of Lt. Col. Syed Farook Rahman at different stages. P.W.13 first went to the house of Sheik Fazlul Haque Moni and from there he went to the house of the then President at Road No.32, Dhanmondi. Lt. Col. Syed Farook Rahman came with a tank at Road No.32, Dhanmondi along with other accused persons and asked them to go to the Radio Station. This witness heard the sound of gun shots in the house of Bangabandhu Sheikh Mujibur Rahman. He saw Lt. Col. Syed Farook Rahman in front of the house of Bangabandhu Sheikh Mujibur Rahman who was in charge of command of the station.

P.W.44 also corroborated the statement of other p.ws. stating that Lt. Col. Syed Farook Rahman was in a tank.

P.W.14 stated about the presence of Lt. Col. Syed Farook Rahman on the night following on 14th August,1975. After the night parade he saw in the parade ground Lt. Col. Syed Farook Rahman, Major Mohiuddin (Lancer), Major Ahmed Sharful Hossain, Lt. Kismat Hasem, Nazmul Hossain Ansar and some other persons in civil dress. Accused Lt. Col. Syed Farook Rahman introduced Major Dalim, Lt. Col. Shahriar in civil dress. Accused Lt. Col. Farook Rahman directed them to obey their order. P.W.14 proved the presence of the accused Lt. Col. Syed Farook Rahman at about 5:30 a.m. in the Radio Station. P.W.14 clearly stated that Lt. Col. Syed Farook Rahman was in charge of the operation and he was mobilizing his troops according to his pre-meditated plan.

P.W.20 was a driver of Lt. Col. Jamil and on 15th August,1975 he was deputed to Bangabhaban for his duty where he saw Lt. Col. Syed Farook Rahman, Major Dalim, Lt. Col. Shahriar Rashid Khan and others.

P.W.23 stated that he attended parade on the night following 14th August,1975. He also talked about the ten tanks which were cleaned. Lt. Col. Syed Farook Rahman came there and talked with Lt. Kismat Hashem. At about 3:00 / 3:30 a.m. Lt. Col. Syed Farook Rahman again returned to Balurghat and on his order officers and forces boarded in their respective tanks. According to P.W.23 Lt. Col. Syed Farook Rahman left with tank at about 4:00 / 4:30 a.m. P.W.23 clearly stated that Lt. Col. Syed Farook Rahman was organized his Lancer Regiment and also commenced his operation without disclosing his real intention to the troops and he succeeded in getting the tanks ready and deployed at different parts of the city in order to fascinate the members of the troops to kill Bangabandhu Sheikh Mujibur Rahman and his family members.

P.W.24 also in his deposition stated about the parade at about 3:00/3:15 a.m. on the night following on 14th August,1975 where Lt. Col. Syed Farook Rahman briefed them in presence of their CO, Lt. Col. Khondker Abdur Rashid and other officers. Lt. Col. Khonedker Abdur Rashid and Lt. Col. Syed Farook introduced them with the dismissed officers, namely, Major Dalim, Major Rashid Chowdhury, Lt. Col. Shahriar and Captain Majed. Then Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur

Rashid ordered them to take ammunitions from the unit. Lt. Col. Syed Farook Rahman and Khondker Abdur Rashid asked them to take ammunitions. He also saw Lt. Col. Farook Rahman, Lt. Col. Mohiuddin Ahmed (Artillery), Lt. Col. Sultan Shahriar Rashid Khan, Lt. Col. Khondker Abdur Rashid and other officers in the Radio Station.

P.W.25 also stated about the night parade on the following 14th August,1975 where Lt. Col. Farook Rahman and Lt. Col. Khondker Abdur Rashid accompanied with other officers briefed them.

P.W.35 stated that Lt. Col. Syed Farook used to visit the office of Khandker Abdur Rashid most frequently. On the night following 14th August,1975 during the night parade Lt. Col. Syed Farook Rahman and Khondker Abdur Rashid together came to the office of Khondker Abdur Rashid at about 10:00 p.m. and after some time they left. He proved the presence of Lt. Col. Syed Farook Rahman on the night following 14th August at Balurghat. He saw that Lt. Col. Syed Farook Rahman was taking necessary action before consultation and also addressing the troops and inciting them against the then Government.

P.W.39 was a driver of first Bangal Lancer Regiment. He also stated about the night parade following 14th August at about 7:30 p.m. According to him parade continued till 12:00 mid night. But subsequently an order was passed to continue the parade till 2:00 / 2:30 a.m. and at about 2:30 a.m. Lt. Col. Syed Farook ordered them to fall in where Lt. Col. Syed Farook Rahman and other officers including JCOs were present. Lt. Col. Syed Farook Rahman addressed that they had to go for an special duty to meet an urgency for the country. While he was in duty he saw Lt. Col. Syed Farook Rahman in Bangabhaban.

P.W.40 also stated about the night parade on the night following 14th August at 12:00 mid night although he was on leave and he was taking rest. He saw Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid were talking by the side of LMG fitted jeep. Lt. Col. Syed Farook Rahman told P.W.40 to keep watch on the Regiment. In reply to the query Lt. Col. Syed Farook Rahman replied that they would go to overthrow the Mujib Government. In reply to a query whether General Shafiullah knew Lt. Col.

Syed Farook Rahman said that he did not think it necessary to inform General Shafiullah. He also saw discussion between Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid at the deployment of the tank of mobilization.

P.W.44 stated that in the morning at 6:00 of 15th August,1975 there was hard thrush on the door and he opened the door and he saw out side the gate truck load armed sepoies, Major Rashid said "we have captured State Power under Khondakr Mostaq, Sheikh is killed, do not try to take any action against us". On hearing the news of the death of Bangabandhu Sheikh Mujibur Rahman he went to the house of General Ziaur Rahman to get a jeep and by that jeep proceeded to 1 Bengal Regiment where at the gate he found Lt. Col. Syed Farook Rahman in a tank in offensive position and from there Lt. Col. Farook fired by heavy Machine Gun on the lined up Vehicles of Supply and transport Company. Lt. Col. Syed Farook Rahman also went to the house of Bangabandhu Sheikh Mujibur Rahman to make the final check thereon.

The informant P.W.1, eye witness, in his deposition stated in details that after the death of Bangabandhu Sheikh Mujibur Rahman and the members of his family Major Bazlul Huda told Lt. Col. Syed Farook Rahman, who was at the gate that "all are finished". At that time tanks were moving on the road in front of the house of the then President at Road No.32, Dhanmondi. P.W.1 saw the presence of Lt. Col. Syed Farook Rahman, Lt. Col. Shariful Huq Dalim, Lt. Col. S.H.M.B. Nur chowdhury and Major Bazlul Huda in the house of the then President at the time of occurrence and also after the occurrence.

P.W.42 also in his deposition stated about the presence of Lt. Col. Syed Farook Rahman in the Radio Station in the morning of 15th August,1975.

P.W.45 the then Army Chief of Staff in his deposition stated that in 1975 Lt. Col. Syed Farook Rahman was 2 I.C. of Tank Regiment. He deposed that in the evening of 15th August there was swearing ceremony of the council of the Ministers and on 19th August he called a conference of formation Commander and in the said conference Major Rashid and Lt. Col. Farook Rahman were present.

It transpires from the above evidences that Lt. Col. Syed Farook Rahman's involvement in the commission of the offence at the house of the President at Road No,32, his presence at designated places including the house of the then President at the time of the occurrence and mobilization and deployment of troops with arms and ammunitions at designated points including Balurghat Parade Ground, New Airport, Cantonment Area, Radio Station at Shahbag and Bangabhaban have not been controverted by the defence. Thus prosecution proved the guilt of the accused-appellant, Lt. Col. Syed Farook Rahman, under Section 302, 34 and 120B of the Penal Code beyond reasonable doubt.

Lt. Col. Mohiuddin Ahmed (Artillery)

The learned Attorney General and Mr. Anisul Huq, the learned Advocate for the respondent drawn our attention to the evidence of witnesses, namely, P.W.16, P.W.17, P.W.18, P.W.21, P.W.22, P.W.24, P.W.25, P.W.26, P.W.27, P.W.29, P.W.32, P.W.34 and P.W.35 and submits that this witnesses proved the complicity of the accused Lt. Col. Mohiuddin Ahmed (Artillery) in the commission of offence.

P.W.17 was Lance Naiek in II Field Artillery Regiment. He stated that Lt. Col. Mohiuddin Ahmed (Artillery) was their commending officer and Lt. Col. Mohiuddin Ahmed (Artillery) was the commander of Pappa Battery. He was also in the night parade on the night following 14th August,1975 and for night parade there was fall-in at Regiment ground at 5:00 / 5:30 p.m. Thereafter they reached at New Airport, Balurghat with six cannons at about 6:30 in the evening. The night training continued till 12:00 midnight and at the night practice he saw Major Khondokar Abdur Rashid, Lt. Col. Mohiuddin Ahmed (Artillery) and other officers were discussing. Then he saw Lt. Col. Mohiuddin Ahmed (Artillery) behind cannons of Papa Battery who gave some orders to Naib Subedar Hashem. P.W.17 was in the cannon of Lt. Col. Mohiuddin Ahmed (Artillery), the cannon reached by the side of lake at Kalabagan at 4:00 in the night and then on the order of Lt. Col. Mohiuddin Ahmed (Artillery) cannons were stationed aiming at Bangabandhu's house at Road No.32, Dhanmondi and Rakkhibahini Head

Quarter facing north. After some time from the house of Bangabandhu he heard sounds of firing of light arms. Then on the order of Lt. Col. Mohiuddin Ahmed (Artillery) they fired four balls of cannon and after some time by the order of Lt. Col. Mohiuddin Ahmed (Artillery) their cannons were returned to the barrack.

P.W.18 was a gunner of II field Artillery Regiment and he was in Papa Battery. On the night following 14th August they fell-in with their arms and cannons in front of M.T. Garage where Lt. Col. Mohiuddin Ahmed (Artillery) and other officers were present. On the order of Lt. Col. Mohiuddin Ahmed (Artillery), Captain Jahangir took them with their cannons to New Airport at Balurghat where training continued till 12:00 / 1:00. At about 3:30 / 4:00 a.m. Lt. Col. Mohiuddin Ahmed (Artillery) and Captain Jahangir told them to get ready for special mission as they has to resist Rokkhi Bahini from south. Captain Jahangir directed them to board on their respective vehicles. After boarding on the vehicle he saw four balls of cannon and a small arms and ultimately he came near the Dhanmondi play ground and there found BHM Kamal and he ordered him to fix his gun there and ordered to resist Rakhibahini from south. He went to the north and while Fazar Azan was going on they heard sound of shots from the north-west and after some time heard sound of firing of 4 cannon balls from a little north and after passing of some more time Lt. Col. Mohiuddin Ahmed (Artillery) made order to get the cannons together and thereupon he took the cannon and personal arms to the vehicles and after some time on the order of Lt. Col. Mohiuddin Ahmed (Artillery) his vehicle and others were sent to north and the vehicle stopped before Ganabhaban where Lt. Col. Mohiuddin Ahmed (Artillery) and others stayed for about 1(one) hour.

P.W.21 was a sepoy of Papa Battery of II Field Artillery. In his deposition he stated that Lt. Col. Mohiuddin Ahmed (Artillery) was a commander of Pappa Battery. He attended in the night parade on the night following 14th August,1975 and at 2:00 a.m. on 15th August,1975 Lt. Col. Mohiuddin Ahmed (Artillery), Major Khondokar Abdur Rashid, Major Bazlul Huda and some other officers were present. Major Khondokar Abdur Rashid ordered them to get ready with arms and ammunitions for a special

emergency duty. They took arms and ammunitions and boarded on a truck and went to Road No32, Dhanmondi at 4:00 / 4:30 a.m. and they were directed not to allow anybody to pass through the Road. At the time of Fazar Azan they heard sound of shots from eastern direction of place of duty and heard sound of firing of cannon.

P.W.22 was sepoy of II Field Artillery. In his deposition he stated that there was a fall-in after Magrib Prayer on 14th August in the evening. On the order of Khondokar Abdur Rashid they went to New Airport at 9:00 p.m. and while was sitting on the south end of runway then Khondokar Abdur Rashid, Lt. Col. Mohiuddin Ahmed (Artillery), Captain Mostafa, Major Bazlul Huda and some other officers were there. There was an order not to allow anybody to pass through Road No.32 and after some time they heard sound of shots from the east and simultaneously heard sounds of firing of cannon. The evidence of P.W.22 shows the presence of Lt. Col. Mohiuddin Ahmed (Artillery) in the parade ground in the night following 14th August,1975.

P.W.27 stated that his battery commander was Lt. Col. Mohiuddin Ahmed (Artillery) and he was with him. P.W.27 and 2/3 others were dropped at Kalabagan when they were ordered by Lt. Col. Mohiuddin Ahmed (Artillery) not to allow any vehicle to pass through the said road. P.W.27 proved the presence of the appellant Lt. Col. Mohiuddin Ahmed (Artillery) at New Airport at about 3/3:30 O'clock at night, at Kalabagan and at the Ganabhaban.

P.W.34 also proved the presence of Lt. Col. Mohiuddin Ahmed (Artillery) in the night parade on the night following 14th August,1975 and also in the evening. He also saw that six guns were taken to the New Airport. P.W.34 saw Lt. Col. Mohiuddin Ahmed (Artillery) by the side of gun and he asked the troops to see that none passes through the road. P.W.34 heard sounds of light arms from the north western corner and then shells were fired from the gun by the side of Lt. Col. Mohiuddin Ahmed (Artillery).

P.W.35 also stated in his deposition that Lt. Col. Mohiuddin Ahmed (Artillery) was commander of 2nd Field Artillery Regiment. He heard from P.W.18 that Lt. Col. Mohiuddin Ahmed (Artillery) took most of his troops to Dhanmondi.

From the aforementioned evidences, it transpires that Mohiuddin Ahmed (Artillery) was present in the night parade on the night following 14th August, 1975 where he had discussed in secret with Major Khandaker Abdur Rashid and other officers and he was in charge of the canons placed by the lakeside of Kalabagan, where by his orders, canons were pointed aiming at Bangbandhu Sheikh Mujibur Rahman's House at Road No. 32, Dhanmondi and Rakhkhi Bahini's Headquarter facing the north. The incriminating part of above evidences of P.W.s implicating the Mohiuddin Ahmed (Artillery) was not challenged during cross-examination and, as such, the evidences proved that the charges against Mohiuddin Ahmed (Artillery) under Sections 302, 34 and 120B of the Penal Code.

Major Bazlul Huda

In reply to the submissions of Mr. Abdullah Al Mamun, the learned Advocate for the appellant Major Bazlul Huda, the learned Attorney Genral and Mr. Anisul Huq, the learned Advocate for the respondent-state have drawn our attention to the findings of the facts of the trial court as well as the High Court Division in respect of the complicity of the accused Major Bazlul Huda in the commission of the offence and they have referred to the evidence of P.W.1. P.W.4, P.W.5, P.W.6, P.W.7, P.W.8, P.W.9, P.W.11, P.W.12, P.W.15, P.W.21, P.W.22, P.W.42, P.W.45, P.W.47 and P.W.60. In a nutshell the evidence of the leading witnesses are stated below.

P.W.1, eye witness, was the Resident P.A. in the official residence of the then President Bangabandhu Sheikh Mujibur Rahman and his duty was from 8:00 p.m. in the night following 14th August, 1975. He spent his nigh there. At about 4:30 -5:00 a.m. on 15th August the President told him to get in touch with the police control room. As he could not do properly the President came down to his room. Suddenly a barrage of gun shots was fired on their windows. When the firing stopped the President on his way enquired about the firing from the army and police sentries present nearby. Then Sheikh Kamal came down. At that time 3 / 4 Khaki and Black dressed army personnel entered into the house and Major Bazlul Huda fired the bullet and he fell down in the room. They

could not escape as they were caught hold of by Major Bazlul Huda and put them in line in front of the main gate of the house. The Special Branch Officer, standing on the line was shot down. Thereafter some of the accuseds went upstairs shooting through the way. At a time Major Bazlul Huda who was at the gate told Lt. Col. Syed Farook Rahman that "all are finished". Then P.W.1 realised that the President of Bangladesh along with his family members and other inmates of the house were all brutally killed. According to the evidence of P.W.1 it appears that on the early morning of 15th August, 1975 Bangabandhu Sheikh Mujibur Rahman, Begum Mujib, Sheikh Kamal, Sheikh Naser, Sultana Kamal, Rozi Jamal, Sheikh Russell and one Police Officer of the Special Branch were brutally killed. P.W.1 saw the presence of Lt. Col. Syed Farook Rahman, Lt. Col. Shariful Huq Dalim, Lt. Col. S.H.M.B. Nur chowdhury and Major Bazlul Huda in the house of the then President at the time of occurrence and also after the occurrence.

P.W.4, eye witness, was on duty to guard the official residence of the then President. He stated that while his companions were hoisting the National Flag in the early morning, a barrage of fire was coming from the lake side. P.W.4 saw Major Bazlul Huda, Lt. Col. S.H.M.B. Nur chowdhury and Major AKM Mohiuddin Ahmed at the gate of the residence of the President. Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury came up to the veranda and seeing Sheikh Kamal there, the accused Major Bazlul Huda shot him by his sten gun at the Veranda and then again went to the reception room. Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury lined up the policemen and others. Major A.K.M. Mohiuddin Ahmed (Lancer) accompanied with Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury by shooting went to the upstairs of the house of Bangabandhu Sheikh Mujibur Rahman. Thereafter P.W.4 saw that Major A.K.M. Mohiuddin Ahmed (Lancer) was bringing Banga Bandhu to down stairs. P.W.4 was standing behind Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury. They said something with Major A.K.M. Mohiuddin Ahmed. At that time Bangabandhu Sheikh Mujibur Rahman wanted to know something from them but in reply Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury fired at him by their sten gun. Thereafter

Major Bazlul Huda, Lt. Col. S.H.M.B. Nur Chowdhury and Major A.K.M. Mohiuddin Ahmed came down and went out of the gate to the road to the south of the house. Thereafter Lt. Col. Syed Farook Rahman (Lancer) came and got down from the tank. He talked to Major Bazlul Huda and other officers. Lt. Col. Syed Farook Rahman changed the badges of Major Bazlul Huda and Subedar Major Abdul Wahab Joarder in presence of Lt. Col. Shariful Huq Dalim, Lt. Col. S.H.M.B. Nur Chowdhury, Lt. Col. Md. A. Aziz Pasha, Major A.K.M. Mohiuddin Ahmed. At 9:00 / 10:00 a.m. Major Bazlul Huda took the dead body of Bangabandhu Sheikh Mujibur Rahman in a pick-up Van to the Airport.

P.W.5, eye witness, was in 1 Field Artillery and handed over security duty of the then President's official residence in the morning of 15th August,1975 to P.W.4. He deposed that Major Lt. Col. Shariful Huq Dalim was his CO, Major Bazlul Huda was his adjutant. He was transferred to Dhaka and was on guard duty since 6:00 a.m. on the night following 14th August. He saw Major Bazlul Huda riding a motor cycle in Road No.32 at 5:00 / 5:30 in the afternoon on 14th August. At about 4:45 a.m. P.W.4 came to take over his duty and while hoisting the flag suddenly a barrage of fires started coming from South and after 5 / 7 minutes later Major Bazlul Huda and Lt. Col. S.H.M.B. Nur Chowdhury came there with khaki and black dressed soldiers. P.W.5 corroborated with the evidence of P.W.1 and P.W.4 in material particulars. P.W.5 also saw Major Bazlul Huda on 14th August afternoon and also on 15th August noon with Lt. Col. S.H.M.B. Nur Chowdhury and 7/8 army personnel.

P.W.6 also made identical statements like P.W.4 and P.W.5 and corroborated them.

P.W.2 and P.W.3 being the eye witnesses of the occurrence also corroborated with the evidence of P.W.1, P.W.4, P.W.5 and P.W.6.

P.W.7 deposed that he joined 1 Field Regiment at Comilla. Lt. Col. Shariful Huq Dalim was at that time at Comilla and 2nd-in-Command and Major Bazlul Huda was Adjutant. He was assigned guard duty in the house of the then President at the relevant time. P.W.7 heard announcement on the morning of 15th August made by Lt. Col.

Shariful Huq Dalim that Sheikh Mujib had been killed. He saw Major Bazlul Huda with the badge of ‘‘Major’’ and Subedar Major Abdul Wahab Joarder with a badge of ‘‘Lieutenant’’.

P.W.8 was Adjutant (Captain) of East Bengal Regiment. He was directed by his commanding officer to see the condition of the house of Bangabandhu at Road No.32, Dhanmondi and to report to him and at about 8:45 a.m. of 15th August P.W.8 went to the Road No.32 and at the gate of the house of Bangabandhu Major Nur and Major Bazlul Huda received the P.W.8. On query P.W.8 told them that chief of staff General Shafiullah had directed him to report the condition of Bangabandhu’s house and then Major Nur asked Major Bazlul Huda to show the inside of the house and Captain Huda having taken them inside the house and then P.W.8 saw dead body of Sheikh Kamal in reception room and other dead bodies inside the house.

P.W.9 as per direction of chief of staff came to the house of Bangabandhu Sheikh Mujibur Rahman on 15th August at 3:00 p.m. and saw Major Bazlul Huda at the gate of the house. Major Bazlul Huda took him inside the house and saw dead body of Sheikh Kamal and a police officer and in the stair of first floor he saw dead body of the President Bangabandhu Sheikh Mujibur Rahman and when he went to the first floor then saw dead body of Begum Mujib, Sheikh Jamal, Mrs. Jamal, Mrs, Kamal and Sheikh Russel.

P.W.11 was in 1 Bengal Lancer who stated that at the time of night parade the Army Officers went to the office of Major AKM Mohiuddin Ahmed (Lancer) which was situated opposite to the quarters of P.W.11 where he saw some unknown army officers in civil dress and at about 12:00 mid night he saw Major AKM Mohiuddin Ahmed (Lancer) called one person in civil dress as “Huda come here”. Then Huda asked another one “Dalim wait”. At abut 3:30 a.m. Major AKM Mohiuddin Ahmed (Lancer) briefed his group and asked them to board on the vehicle. P.W.11 saw the said two persons in civil dress now in army uniform one of them is a ‘‘Major’’ and the other one is a ‘‘Captain’’. He came to know from Risaldar Sarwar that they were Lt. Col. S.H.M.B. Nur Chowdhury and Major Bazlul Huda. P.W.11 with the vehicle came near the house of Bangabandhu

Sheikh Mujibur Rahman at 4:30 a.m. which was about 80 feet away from the house. He heard reports of fierce gun shots from the side of the house of the then President and he also heard sound of 3 / 4 artillery gun shots. P.W.11 was posted outside the gate of the house of Bangabandhu with direction not to allow any person to enter into the house and then he saw Major AKM Mohiuddin Ahmed (Lancer), Lt. Col. S.H.M.B. Nur Chowdhury and Major Bazlul Huda entered in the house of Bangabandhu Sheikh Mujibur Rahman.

P.W.12 in his deposition stated that there was night parade on the night following 14th August,1975 which was attended by them till 3:30 a.m. He saw three unknown officers in uniform who were introduced by Lt. Col. Syed Farook Rahman as Lt. Col. Shariful Huq Dalim and Major Bazlul Huda. Lt. Col. Syed Farook Rahman briefed them that they should not support monarchy but Sheikh Mujibur Rahman was going to declare monarchy next day and as such troops must obey his orders as well as the orders of his officers and directed them to take ammunitions from the KOTE for the action.

P.W.22 also made identical statements in his deposition like P.W.21. He also proved the presence of Lt. Col. Khondker Abdur Rashid, Lt. Col. Mohiuddin Ahmed (Artillery) and Major Bazlul Huda and other officers at the place of occurrence.

P.W.21 a sepoy of II Field Artillery who stated that they had night parade on the night following 14th August at New Airport. At 2:30 a.m. on 15th August,1975 their CO the accused Lt. Col. Khondker Abdur Rashid, Lt. Col. Mohiuddin Ahmed (Artillery) and Major Bazlul Huda and other officers came there. Accused Lt. Col. Khondker Abdur Rashid directed them to get ready with their arms and ammunitions.

P.W.46 was a Typist in the Bangabhaban who stated that in Bangabhaban in 15th August,1975 he saw Major Bazlul Huda with Moshtaq Ahmed.

P.W.47 was the Director of BDR. In his deposition he stated that on 15th August,1975 at about 10:30 a.m. when he went to his Radio Station he heard an announcement declaring the murder of Bangabandhu Sheikh Mujibur Rahman and from there he with his companions were taken to the Bangabhaban for oath ceremony and in

the said ceremony there were Major Bazlul Huda, Major Rashid, Lt. Col. Farook, Major Nur, Major Shahrior, Major Dalim, Major Aziz Pasha, Major Mohiuddin (Lancer) and Risalder Moslemuddin.

P.W.60, Director General, Ministry of Foreign Affairs, Government of Bangladesh produced a file containing a latter dated 16th August,1976 (Ext.10/5A) issued by the Army Head Quarters about the services of the Army Officers including Major Bazlul Huda and 11 other accused persons were placed on deputation at the Ministry of Foreign Affairs for employment in various Bangladesh Missions abroad.

It appears that the evidence of witnesses implicating Major Bazlul Huda murder Bangabandhu Sheikh Mujibur Rahman, Sheikh Kamal and Special Branch Officer as well as evidence of his presence in House No.677 and parade ground and marching his convoy towards the house of the then President have remained unchallenged and, as such, the same proves Major Bazlul Huda's guilt in commission of the offence under Sections 302, 34 and 120B of the Penal Code.

Major A.K.M. Mohiuddin (Lancer)

In reply to the submissions of the defence counsel, the learned Attorney General and Mr. Anisul Huq, the learned Advocate, have referred to the evidence of P.W.1. P.W.4, P.W.5, P.W.11, P.W.12, P.W.13, P.W.14, P.W.39, P.W.40, P.W.42, P.W.44, P.W.47, P.W.57 and P.W.60.

P.W.11 stated that at the time of night parade the Army Officers went to the office of Major AKM Mohiuddin Ahmed (Lancer) which was situated opposite to the quarters of P.W.11 where he saw some unknown army officers in civil dress and at about 12:00 mid night he saw Major AKM Mohiuddin Ahmed (Lancer) called one person in civil dress as "Huda come here". Then Huda asked another one "Dalim wait". Major AKM Mohiuddin Ahmed (Lancer) briefed his group and asked them to board on the vehicle. P.W.11 with the vehicle came at 4:30 a.m. near the house of Bangabandhu Sheikh Mujibur Rahman which was about 80 feet away from the house. He heard reports of fierce gun shots from the side of the house of the then President and immediately

thereafter he heard the words ‘hands up’, ‘hands up’. He also heard the sounds of 3 / 4 artillery gun shots. P.W.11 was posted outside the gate of the house of Banga Bandhu with orders not to allow anybody to enter / leave the house and where he saw Major AKM Mohiuddin Ahmed (Lancer), Lt. Col. S.H.M.B. Nur Chowdhury and Major Bazlul Huda entered in the house of Bangabandhu Sheikh Mujibur Rahman.

P.W.12 in his deposition stated that Major A.K.M. Mohiuddin Ahmed (Lancer) made over night parade on the night following 14th August in which was attended by them till 3:30 a.m. He also stated that after taking arms and ammunitions from ‘‘KOTE’’ Major A.K.M. Mohiuddin Ahmed (Lancer) asked them to board on a truck and Major A.K.M. Mohiuddin Ahmed (Lancer) was in the front seat of his truck and Major A.K.M. Mohiuddin Ahmed (Lancer) also briefed them and directed them not to allow any vehicle to pass through Road No.32, Dhanmondi.

P.W.13 also attended the parade ground in the night following 14th August, 1975 at 8:30 p.m. and the parade was finally made over by Major Mohiuddin Ahmed (Lancer). After the breakfast having gone to the Road No.32 he saw Major Mohiuddin Ahmed (Lancer) at the conjunction of Road No.32, Dhanmondi. P.W.13 proved the presence of Major Mohiuddin Ahmed (Lancer) at the parade ground and at Road No.32, Dhanmondi.

P.W.14 also made identical statements like other p.ws. As regard the night parade in the night following the 14th August,1975 at Balurghat which ended at 2:00 / 2:30 a.m. on 15th August,1975 In the parade ground he saw Lt. Col. Syed Farook Rahman, Major Mohiuddin (Lancer), Major Ahmed Sharful Hossain, Lt. Kismat Hasem, Nazmul Hossain Ansar and some other persons in civil dress.

P.W.44 was commander of 46 Brigade. He deposed that at one stage of negotiation persons including the Major AKM Mohiuddin Ahmed (Lancer) including the other accused persons after the offence of 15th August,1975 and Jail killing on 3rd November left the country. This shows the convict Major AKM Mohiuddin Ahmed (Lancer) left the country because of his involvement with the offence of 15th August, 1975.

P.W.60, Director General, Ministry of Foreign Affairs, Government of Bangladesh produced a file containing a letter dated 16th August, 1976 (Ext.10/5A) issued by the Army Head Quarters about the services of the Army Officers including Major AKM Mohiuddin Ahmed (Lancer) and 11 other accused persons who were placed on deputation in the Ministry of Foreign Affairs for employment in various Bangladesh Missions abroad.

It appears from the aforesaid evidences that the defence failed to challenge the statements of P.W.s during cross-examination vis-a-vis the involvement of Major A.K.M. Mohiuddin (Lancer) in the offence and as such the evidence of witnesses remained uncontroverted and hence the prosecution proved the guilt of the accused-appellant under Section 302, 34 and 120B of the Penal Code beyond reasonable doubt.

Lt. Col. Sultan Shahriar Rashid Khan

The learned Attorney General and Mr. Anisul Huq, the learned Advocate have referred to the evidence of P.W.1, P.W.14, P.W.15, P.W.20, P.W.24, P.W.37, P.W.38, P.W.42, P.W.43, P.W.44, P.W.46, P.W.47, P.W.48, P.W.51 and P.W.60.

We have already discussed the sum and substance of the evidence of aforesaid witnesses. But about the presence of Lt. Col. Sultan Shahriar Rashid Khan I like to discuss in brief.

P.W.43 stated in his deposition about the commission of the offence at road No.32, Dhanmondi. He stated that there was conference in the house of Khondker Moshtaq Ahmed with Lt. Col. Khondker Abdur Rashid Khan, Lt. Col. Farook Ahmed, Lt. Col. Shahriar Rashid and some other army officers in June/July, 1975. P.W.14 stated that after the night parade on the night following 14th August he saw in the parade ground Lt. Col. Syed Farook Rahman introduced Major Dalim and Lt. Col. Shahriar in civil dress. Accused Lt. Col. Farook Rahman directed them to obey their orders. In the Radio Station he saw Lt. Col. Shahriar Rashid coming from the Radio Station after 5:30 a.m.. P.W.14 proved the presence of the accused Lt. Col. Shahriar Rashid Khan in the parade ground in the cantonment near Balurghat at 2:30 a.m. and at about 5:30 a.m. in the Radio

Station. Then Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid ordered them to take ammunitions from the unit. When they started from the Lancer unit and stopped on a road.

P.W.24 also in his deposition stated that Lt. Col. Khondker Abdur Rashid went to the parade ground at about 3:00/3:15 a.m. on the night following on 14th August, 1975 where Lt. Col. Syed Farook Rahman briefed them. Lt. Col. Khonedker Abdur Rashid and Lt. Col. Syed Farook introduced them with the dismissed officers, namely, Major Dalim, Major Rashid Chowdhury, Lt. Col. Shahriar and Captain Majed. Then Lt. Col. Syed Farook Rahman and Lt. Col. Khondker Abdur Rashid ordered them to take ammunitions from the unit. When they started from the Lancer unit and stopped on a road P.W.24 also saw Lt. Col. Shahriar, Captain Majed and Captain Mostafa. He also saw Major Dalim, Major Nur, Lt. Col. Shahriar, Lt. Col. Khondker Abdur Rashid, Major Rashed Chowdhury, Captain Majed, Captain Mostafa and other officers to enter inside the Radio Station.

P.W.37 saw Khondker Moshtaq, Taheruddin Thakur, Major Dalim, Lt. Col. Shahriar in the Radio Station. P.W.38 left the Radio Station at 10 a.m. of 15th August,1975 with the permission of Lt. Col. Shahriar.

P.W.42 also saw Major Mohiuddin (Lancer) and others in the Radio Station. In Bangabhaban he also saw Major General Shafiullah, Lt. Col. Farook Rahman, Major Mohiuddin Ahmed (Lancer) in the afternoon of 15th August, 1975.

P.W.48 saw Lt. Col. Sultan Shahriar Rashid Khan in the Radio Station as well as in the Bangabhaban on 15th August,1975.

P.W.15, P.W.20, P.W.46, P.W.47 also proved the presence of the accused Lt. Col. Sultan Shahriar Rashid Khan in the Bangabhaban.

P.W.60, Director General, Ministry of Foreign Affairs, Government of Bangladesh produced a file containing a letter dated 16th August, 1976 (Ext.10/5A) issued by the Army Head Quarters about the services of the Army Officers including Lt.

Col. Sultan Shahriar Rashid Khan and 11 other accused persons who were placed on deputation at the Ministry of Foreign Affairs for employment in various Banladesh Missions abroad. P.W.60 stated that Lt. Col. Sultan Shahriar Rashid Khan was dismissed from the Army Officer but he was rewarded by the Foreign Ministry which indicates his involvement in the incident of 15th August, 1975.

From the evidences of the aforesaid prosecution witnesses, which have remained uncontroverted, it is abundantly clear that the presence of Lt. Col. Sultan Shahriar Rashid Khan in the Balurghat Parade Ground on the night following 14th August, 1975, presence in the Cantonment in movement of troops, his presence in the radio station, commanding the troops in the radio station, presence in Bangabhaban and his appointment in the Government service and subsequent absorption in the Ministry of Foreign Affairs for employment in various Bangladesh Missions abroad prove his involvement in the commission of the offences under Section 302,34 and 120B of the Penal Code. In particular, the evidences prove Lt. Col. Sultan Shahriar Rashid Khan's presence within the proximity of the place of occurrence. Moreover, the evidences prove that Lt. Col. Sultan Shahriar Rashid Khan in furtherance of the common intention performed his assignment at the designated places including Balurghat Parade Ground on the night following 14th August, 1975 and thus this proves his participation in the commission of the offence under Sections 302, 34 and 120B of the Penal Code.

At the fag end of the submissions, the learned Advocates of the accused-appellants have submitted that, without prejudice to their submissions of their plea of not guilty, the sentence of death penalty be commuted to rigorous imprisonment for life considering the age, social status and family circumstances of the accused-appellants.

In reply the learned Attorney General and the learned Advocate for the respondent State, Mr. Anisul Huq, have opposed the prayer stating that the accused-appellants are guilty of heinous crime committed against humanity by killing the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, the then President of the Country along with

members of his family and relations and, as such, sentence of death penalty should not be commuted.

Having gone through the materials on records, I have found that the accused-appellants committed gruesome murder of the Father of Nation, Bangabandhu Sheikh Mujibur Rahman and members of his family which included three women and a minor child. Facts reveals that it is a pre-meditated, well thought design to eliminate the entire family of the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, and some of his very close relations who are very dear to him whose contribution and sacrifiese in the liberation movement and war of liberation should be highly remembered. Since the accused-appellants have committed a heinous crime, they do not deserve any sympathy from this court in getting commutation of death penalty.

It is a pity that the surviving family members of Bangabandhu Sheikh Mujibur Rahman and the nation, as a whole, had to wait for about long 34 years to get justice by disposing of the criminal case of the gruesome murder of the early morning of 1975. It has already been noticed that after the murder of Bangabandhu along with members of his family and close relations in the early morning of 15th August,1975 the then Government Khondkar Moshtaq Ahmed promulgated Indemnity Ordinance,1975 and the subsequent Government took some other steps to stop initiation of any criminal case in respect of said gruesome murder of 15th August,1975. Having gone through the evidence of the wintnesses and the materials on record we have been shocked to notice that the then Government of Khonkdar Moshtaq Ahmed and the subsequent Governments, who were the benificiary of the 1975 killings to the utter surprise and dismay of the nation as a whole and the civilized society of the world rewarded the murderers of the 15th August,1975 being dismissed Army Officers and condemned convicts were illegally appointed in the Government service and subsequently absorbed permanently in the Ministry of Foreign Afairs for employment in various Bangladesh missions abroad and thereby undermining the constitutional process and fundamental human rights, conscience of the people and the ideals of the martyrs freedom fighters who have

sacrificed their lives for the independence of the country. It is unfortunate to note that some of those accused persons according to the prosecution were 'self proclaimed killers' and subsequently they were also promoted to higher posts and some of them were posted as deplomats in Bangladesh Misssions in various countries of the world. During the course of his submission the learned Attorney General in his choked voice has submitted before the Court to make some observations so that this kind of activities should not be repeated in future by any Governemnt of the country. In fact all the learned Counsel appeared on behalf of the respondent state in unison have prayed for such observation before the Court. We totally disapprove the aforesaid conduct, behaviour, mentalities and activities of the Government who were in power at the relevant time and hope that this undesirable activities which is shocking to the conscience of the nation should not be repeated by any future Government. We earnestly hope and belief that rule of law, fundamental human rights, democratic institution, over all the constitutional supremacy should prevail in this country.

Having taken into consideration the facts and circumstances of the case and upon detailed analysis of the evidence and judgments of the Courts below, I am of the view that there is no illegality in the judgment and order passed by the High Court Division, and accordingly I concur with my learned brother Md. Tafazzul Islam,J in dismissing all the appeals and affirming the Death Reference.

J.

S. K. Sinha,J: I have read the draft judgment prepared by my learned brethren Mr. Md. Tafazzul Islam, J. It is a judgment so well written I respectfully agree with the conclusions reached by him in all the appeals. Keeping in view, however, the points involve in these matters which are indeed a great public importance and in view of the questions of law raised at the bar, I wish to give my own reasons.

20 (Twenty) army Officers and other ranks including the 5 (five) appellants Major Md. Bazlul Huda, Lt. Col.Syed Farooque Rahman, Lt. Col. Sultan Shahrior A.Rashid Khan, Lt. Col. Mohiuddin Ahmed (artillery) and Major A.K.M. Mohiuddin Ahmed (lancer) were prosecuted for the murder of Bangabangdhu Sheikh Mujibor Rahman, then President of the Republic, his wife Begum Fazilatunnessa, sons Sheikh Kamal, Sheikh Jamal, Sheikh Rashel, sons wives Sultana Kamal, Rozi Jamal, brother Sheikh Naser, Security members A.S.I. Siddiqur Rahman, army sepoy Shamsul Huq and Col. Jamil before the learned Sessions Judge, Dhaka. The appellants and 10 others were convicted under sections 302/34 and section 120B of the Penal Code. They were sentenced to death under section 302/34 of the Penal Code but no separate sentence was awarded under section 120 B of the Penal Code.

The appeals and confirmation proceedings in the High Court Division were heard by a Division Bench. The learned Judges concurred the conviction and sentence in respect of 9 accused persons including 4 appellants Lt. Col. Syed Farooque Rahman, Lt. Col. Sultan Shahriar Rashid Khan, Major Md. Bazlul Huda and Major A.K.M.Mohiuddin Ahmed. They differed in their opinion regarding the conviction of 6 accused including the appellant Lt. Col. Mohiuddin Ahmed (artillery). The first learned Judge acquitted Lt. Col. Mohiuddin Ahmed (artillery), Major Ahmed Sharful Hossain @ Shariful Islam, Captain Md. Ismot Hashem, Captain Nazmul Hossain Ansar and Resalder Moslemuddin @ Mosleh Uddin of the charges. In respect of Captain Abdul Majed the first learned Judge acquitted him of the charge under section 302/34 of the Penal Code but maintained his conviction under section 120B of the Penal Code. The Second learned Judge maintained the conviction and sentence of all accused persons and accepted the death reference.

The matter was accordingly referred to a third learned Judge Mr. Mohammad Fazlul Karim,J. The third learned Judge agreed with the Second learned Judge as regards the conviction and sentence of the appellant Lt. Col. Mohiuddin Ahmed (artillery), Captain Abdul Majed and Resalder Moslemuddin @ Mosleh Uddin. The third learned Judge also agreed with the first learned Judge in respect of 3 (three) convicts.

Prosecution case has been exhaustively narrated by the learned brethren Mr.Md.Tafazzul Islam, J, so I do not consider it necessary to repeat the same here. The occurrence took place at dawn on 15th August, 1975 and over the said incident an FIR was lodged by A.F.M.Mohitul Islam (P.W.1) with the Dhanmondi Police Station on 2nd October, 1996.

The prosecution sought to establish its case against the accused persons by the evidence of 47 (forty seven)witnesses out of 60 witnesses examined, the confessional statements of Lt. Col.Syed Farooque Rahman, Lt. Col. Sultan Shahriar Rashid Khan and Lt. Col. Mohiuddin Ahmed (artillery), the extrajudicial confession of Major Balzlul Huda, Lt.Col. Sultan Shahriar Rashid Khan, Major A.K.M. Mohiuddin (lancer) ,Lt. Col. Syed Farooque Rahman, Lt. Col. Khandaker Abdur Rashid, Major Shariful Haque Dalim, Major Noor and Major Aziz Pasha proved by Major (Rtd) Shahadat Hossain Khan (P.W.8) and Commodore Golam Rabbani (P.W.15), and the circumstantial evidence relating to the previous and subsequent conducts of the appellants and other accused persons. The accused persons including the appellants asserted their innocence at the trial. The confessional statements, according to them, were not voluntarily made; the killing was result of a successful revolt of the army against the then Government.

Opinion of the third Judge.

In view of the difference of opinion as regards conviction of 6 accused persons, the Division Bench by order dated 14th December, 2000 passed the following order:

> "Death Reference accepted in part, Crl.A. 2604 of 1998, 2613 of 1998, and 2616 of 1998 are dismissed. Crl.A. 2617 of 1998 is allowed by Mr. Justice Md. Ruhul Amin by judgment in separate sheets.
>
> Death Reference accepted in part, Crl.A. 2604 of 1998, 2613 of 1998, 2616 of 1998 and 2617 of 1998 are dismissed by Mr. Justice A.B.M.Khairul Haque vide judgment in separate sheets."

B.O.

> "14.12.2000. As the judgment in Death Reference No. 30 of 1998 is split one, let the matter, as per provision of Section 378 of the Code of Criminal Procedure be placed before the learned Chief Justice for necessary orders.
>
> Md. Ruhul Amin
>
> A.B.M.Khairul Haque,J.J.

Before the third learned Judge the appellants filed applications for hearing of the death reference in respect of all the condemned prisoners for ends of Justice. The third learned Judge heard the learned counsels at length and by a reasoned order dated 6th February, 2001 rejected the application. The operating portion of the order is as follows:

> "In view of the discussion above and equally divided opinion of the learned Judges of the Division Bench, I am of the opinion that the cases of above 9 condemned prisoners over whom the learned Judges not being divided in opinion are not contemplated to be heard both under the provisions of Sections 378 and 429 Cr.P.C. But only the case of accused Abdul Majed over whom there is difference as regards the conviction under the two separate sections of Penal Code and the cases of those 5 other condemned prisoners over which the learned Judges are equally divided in opinion i.e. convicted (sic) by one learned Judge and acquitted by another learned Judge are before this Court for an opinion. Upon delivery of the opinion by this Court, the judgment and order shall follow such opinion in order to dispose of the entire death reference."

This is an independent speaking order and the appellants have not taken any exception against the aforesaid order of the third learned Judge. The appellants on accepting the views taken by the learned Judge pressed the appeals and the reference without challenging the said order before this Court. The third learned Judge thereupon by judgment and order dated 30th April, 2001 maintained the conviction and sentence in respect of three condemned prisoners including the appellant Lieutenant Col. Mohiuddin Ahmed (artillery) and accepted their death reference and finally disposed of the death reference, the operating portion of the judgment is as follows:

> "In the result, the Death Reference No.30 of 1998 so far as it relates to Lt. Col.Syed Farooque Rahamn, Lt. Col. Sultan Shahriar Rashid Khan, Lt. Col. Abdur Rashid, Major Md. Bazlul Huda, Lt. Col. Shariful Huq Dalim,B.U., Lt. Col. A.M.Rashed Chowdhury, Lt. Col. A.K.M.Mohiuddin (lancer), Lt. Col. S.H.B.M.Nur Chowdhury, Lt. Col Md. Aziz Pasha, Lt. Col. Mohiuddin Ahmed (Artillery), Risalder Moslem Uddin @ Moslehuddin and Capt. Abdul Mazed is accepted confirming the Death Sentence and accordingly, Criminal Appeal No.2616 filed by accused Lt. Col. Syed Farooque Rahman, Criminal Appeal No.2604 of 1998 filed by accused Lt. Col. Sultan Shahriar Rashid Khan, Criminal Appeal No.2613 of 1998 filed by accused Major Md. Bazlul Huda and Criminal Appeal No.2617 of 1998 filed by Lt. Col. Mohiuddin Ahmed (Artillery) are dismissed but Death Reference No.30/98 so far as it relates to accused Capt. Kismat Hashem, Major Ahmed Shariful Hossain @ Shariful Islam and Cap. Nazmul Hossain Ansar is rejected and the conviction and sentence of these accused are accordingly set aside and thereby acquitting them of the charges leveled against them in this case."

Learned counsels for the appellants argued with circumlocution that since the learned Judges of the Division Bench of the High Court Division delivered dissenting judgments, the third learned Judge ought to have heard the entire death reference in respect of all the convicts but the learned Judge heard the reference in respect of 6(six) convicts only, and thus the matter should be remanded to the High Court Division for hearing of the reference by the third learned Judge afresh in accordance with section 378 of the Code of Criminal Procedure (the Code). Mr.Khan Saifur Rahman appearing for appellant Lt. Col. Syed Farooque Rahman and Lt. col. Mohiuddin Ahmed (artillery) argued that there is no judgment of the Division Bench of the High Court Division in the eye of law since the learned Judges expressed their opinions separately and signed their respective opinion in violation of section 377 of the Code. Learned counsel further argued that since the confirmation of the sentence and the appeals preferred by the

convicts were heard analogously, Sections 378 and 429 of the Code are applicable in the case, which required that when the Judges are equally devided in opinion, the case with their opinions thereon, shall be laid before the third Judge, and such Judge after such hearing shall deliver his opinion and the judgment and order shall follow such opinion. Learned counsel further argued that in view of the difference of opinion, the learned Chief Justice referred to the third learned Judge to dispose of the entire death reference by order dated 15th January 2001, but the third learned Judge without comprehending the purport of the order and the law heard the reference in piecemeal basis- the reference was not finally disposed of in the eye of law. The learned counsel stressed that in no way the opinion of the learned Judges of the Division Bench could be taken as concurrent opinion in respect of the appellants Lt. Col. Syed Farooque Rahman, Lt. Cot. Sultan Shahriar Rashid Khan, Maj. A.K.M.Mohiuddin Ahmed and Major Bazlul Huda. In this connection learned counsel drew our attention to the confessional statements of Lt. Col. Syed Farooque Rahman and Maj. A.K.M. Mohiuddin Ahmed and contended that their confessional statements were disbelieved by the first learned Judge as not voluntary and though the second learned Judge believed them as voluntary, the third learned Judge did not consider their confessional statements on the reasoning that he was not hearing their case on merit and thus, it could be said that on an important point they concurred their opinions. According to the learned counsel, if their confessional statements were not believed by one of the learned Judges of the Division Bench as voluntary, then how their opinions would have been concurrent?

It was contended on behalf of the appellant Lt.Col. Shahriar Rashid Khan that there was no confirmation of sentence in the eye of law since there was no consensus confirmation of the sentence. Learned Counsel contended that the opinion of the learned Judges of the High Court Division were not judgments' in accordance with law since the confirmation of the sentence of the accused persons were not made, passed and signed by at least two Judges of the High Court Division. In this contention, the learned counsel drew our attention as to the meaning of "judgment' by referring Osborn's Concise Law Dictionary, Aiyer's Judicial Dictionary, Law Lexicon, Stroud's Law Dictionary, and

some decisions. Learned counsel finally contended that in case of difference in opinion of the Judges of the Division Bench while confirming the sentence, the opinion of the third Judge would prevail. Mr. Abdullah-Al-Mamun endorsed the above submissions. The learned counsels have referred the cases of Muhammad Shafi Vs. Crown 6 DLR (WP) 104 (FB), Abdur Raziq Vs. The State, 16 DLR (WP) 73, Hethubha V. The State of Gujarat AIR 1970 S.C.1266, Union of India and another V. B.N.Ananti Padmanabiah, 1971 S.C.C.(Cri)535(AIR 1971 SC 1836), Sajjan Singh and others V. The State of M.P. 1999 S.C.C.(cri) 44 and Mahim Mondal vs. State 15 DLR 615 in support of their contentions.

Mr.Anisul Huq, appearing for the state, on the other hand, contended that the third learned Judge is perfectly justified in repelling the objection of the convicts in not hearing the entire death reference and hearing of the case in respect of the six accused convicts in respect of whom the Judges of the Division Bench were equally divided in their opinions, which was in accordance with section 378 of the Code. Mr. Huq has taken us to sections 377, 378, and 429 of the Code and contended that section 377 relates to the procedure for the confirmation of the sentence in respect of a reference made under section 374 of the Code. According to Mr. Huq, the expressions “as he thinks fit” and “the judgment or order shall follow such opinion” used in Sections 378 and 429, are very significant. A close reading of these expressions, Mr. Huq argues, suggest that a wide discretion has been given to the third Judge by the legislature to decide in the facts of a given case when the opinion of the two Judges are placed before him whether or not he would hear the case in respect of whom the Judges are not equally divided. Mr. Huq further argued that this being the exclusive discretion of the third Judge, if such Judge exercised his discretion judicially on consideration of the materials on record, no exception could be taken against such opinion. Mr. Huq further argued that the opinion of the third Judge after hearing the case either in respect of whom there is no difference of opinion or in respect of whom there is difference of opinion, and the judgment and order shall follow such opinion. In this connection the learned counsel drew drawn our attention to the order dated 6th February 2001 of the third learned Judge and contended that the third learned

Judge upon hearing the learned counsels of both sides was of the opinion that "the case of above 9 condemned prisoners over whom the learned Judges not being divided in opinion are not contemplated to be heard both under the provision(s) of section (s) 378 and 429 of the Code of Criminal Procedure. But only the case of accused Abdul Mazed over whom there is difference as regard the conviction under the two separate sections of the Penal Code and the cases of those five other condemned prisoners over which the learned Judges are equally divided in opinion....." Mr.Huq contended that the third learned Judge had rightly exercised his discretion in not hearing the case in respect of 9(nine) convicts in respect of whom the learned Judges were not equally divided, rather concurred with their opinions as regards the conviction and sentence of the nine convicts and none of the accused took any exception against such opinion. In support of his contention, the learned counsel has referred the cases of Babu V. State of UP AIR 1965 SC 1467, Tanviben Pankaj Kumar Divetia V. State of Gujarat (1997)7 SCC 156, Sarat Candra Mitra v Emperor ILR 38 Cal 202, Ahmed Sher v Emperor AIR 1931 Lah 513, Subedar Singh V. Emperor AIR 1943 Allahabad 272, Nemai Mondal V. State of West Bengal AIR 1966 Calcutta 194, State of U.P. V. Dan Singh (1997) 3 SCC 747, Granade Venkata V. The Corporation of Calcutta 22 CWN 745, State V. Abul Khair and others 44 DLR 284.

The learned Attorney General and Mr. Ajmalul Hossain while endorsing the submissions of Mr. Huq added some points and also cited some decisions. Learned Attorney General contended that when a Bench of two Judges agreed upon a decision, both of them required to sign the judgment in respect of them but when a Bench comprising of more Judges, the decision of the majority would be the decision in the case, and in such case it was not necessary to sign the judgment by at least two of them for confirmation. Mr. Ajmalul Hossain contends that there is fundamental difference in Sections 378 and 429, inasmuch as, while in Section 378 the expressions "a bench of Judges" have been used, in Section 429 the expressions "the Judges composing the court of Appeal" have been used. Again, in Section 429 the expressions "of the same Court" have not been used in the other Section. According to the learned counsel, the object of sending a reference to the High Court Division is that unless the sentence is confirmed by

two or more Judges, the sentence could not be executed. Learned counsel added that a reference is required to be heard by at least two Judges and the expressions "bench of Judges" used in Section 378 means the sentence required to have confirmed and signed by at least two Judges for the execution. In that view of the matter, the learned counsel concluded that a close reading of Sections 374- 378 would infer that the question of opinion of the third Judge arose when there was difference of opinion of a Bench of Judges, and in a case where there was no difference of opinion in respect of a particular accused, the third Judge was left with no business to deal with his case and to give his opinion.

Let us first consider the relevant provisions of law which are reproduced below:

"376 Power of High Court Division to confirm sentence or annul conviction. In any case submitted under section 374, the High Court Division –

(d) may confirm the sentence, or pass any other sentence warranted by law, or

(e) may annul conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(f) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

"377. In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court Division shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them."

"378.When any such case is heard before a bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such

hearing as he thinks fit shall deliver his opinion, and the judgment or other shall follow such opinion."

"429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon shall be laid before another Judge of the same Court, and such Judge after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

Section 429 corresponds to section 392 of the Code of 1973 (India) which reads as follows:

"392. Procedure where Judges of court of appeal are equally divided- When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion;

Provided that if one of the Judges constituting the Bench, or where the appeal is laid before another Judge under this section, that Judge, so requires , the appeal shall be reheard and decided by a larger Bench of Judges."

The provision of section 392 was first introduced in the Code of 1872 and prior to introduction of this provision such cases were governed by the Letters Patent. There was provision for further appeal under clause 36 of the Letters Patent from the opinion of the third Judge. The procedure laid down by this section is not a right of any party, but only a matter of procedure to be adopted by the Court suo moto where there is a difference of opinion between the Judges. The third Judge did not constitute a Division Bench within the meaning of the rules of the Calcutta High Court and thus, it was not open to him to refer the point to a Full Bench, and therefore, there was proposal for addition of a proviso in section 378 in the Code of 1898 in the Original Bill as under:

> "Provided that, if any Judge being a member of such a Bench so desire, such case shall be re-heard before them and another Judge or, if the Chief Justice or Judicial commissioner so direct, before three other Judges, and the Judgment or order shall follow the opinion of the majority of Judges so re-hearing such case."

This proviso was dropped on the recommendation of the select committee on the following reasons:

> "This amendment of S.378 has been condemned by a majority of the Judges who have expressed an opinion on the Bill. In view of the fact that the difficulty which the amendment is intended to meet is probably of rare occurrence, and that the second portion of the proviso will be inapplicable in the case of Judicial Commissioners Courts which do not at present consist of five Judges, we prefer to leave the law as it is, and we have deleted this clause."

The proposed amendment to section 378 manifestly suggested that the legislature did not intend to give finality of the opinion of the third Judge. It was proposed that if there was difference in opinion between the Judges of the Division Bench the case would be heard by a three member Bench and the judgment and order shall follow the opinion of the majority of Judges so rehearing such case. The proposed amendment was dropped on the reasonings that there was probability of difference of opinion in rare cases and that the Judicial Commissioners' Courts did not possess sufficient number of Judges for the constitution of larger Bench. In order to speeding up the disposal of the cases, the third Judge has been given the power to give his own opinion and it will be according to such opinion that judgment will follow in the Code of 1898. In the Indian new Code of 1973, almost similar provision has been re-enacted by adding a proviso. The addition of a proviso authorises one of the Judges constituting the Division Bench or the third Judge if so desires, can refer the reference to a larger Bench for rehearing and decision by such Bench of Judges, even if the third Judge agreeing with one of the two Judges. The intention of the legislature to re-introduce the provision contained in the Code of 1872 is

obvious. If the third Judge is not bound by any opinion of the Division Bench where there is no difference of opinion, there was no necessity for the legislature to re-introduction of the provision contained in the Code of 1872 in section 392 of the Code of 1973 as quoted above.

Previous legislation may be relevant to the interpretation of later statutes in two ways. In the first place, the course taken by legislation on a particular point indicates how the present Act can be interpreted. Secondly, reference to a specific phrase in an earlier Act may throw light on the meaning of that phrase in a subsequent statute dealing with the same subject matter. Subsequent Acts may also be used as aids to interpretation. This is known as "parliamentary exposition" that is to say, the legislature either deliberately sets out in the later Act the exposition of the earlier for the purpose of explaining it, or does so by implication i.e. by giving a definite meaning to the same or a similar expression unexplained in the earlier Act.

Whenever a sentence of death is imposed or passed by a Court of Sessions the proceedings of the case shall be submitted to the High Court Division for the confirmation of sentence under section 374 of the Code. The power of the High Court Division to confirm the sentence is provided in Section 376. In dealing with a submission of the proceedings under section 374 the High Court Division itself acting on its appellate side power irrespective of whether the accused who is sentenced to death prefers an appeal, it is bound to consider the evidence and arrive at an independent conclusion as to the guilt or innocence of the accused. A duty is imposed upon the High Court Division to satisfy itself that the conviction of the accused is justified on the evidence and that the sentence of death in the circumstances of the case is appropriate one. There is no statutory limit to the power of the High Court Division in this connection. The High Court Division considers the evidence carefully and records its conclusions nearly after dealing with all the points urged before it by the counsel for the condemned prisoner. In dealing with confirmation cases, it is utmost importance that no room should be left for any legitimate claim by the defence that important points were argued before the High Court Division that were not considered by it.

The language used in sections 378 and 429 of the Code is almost identical. It is said that in hearing a reference or an appeal if the Judges are equally divided in opinion thereon, the case with their opinions shall be laid before a third Judge for hearing, and the third Judge after hearing 'as he thinks fit' would deliver his opinion, and the judgment and order would follow such opinion. The expressions "as he thinks fit" used in both the sections are significant. It is the third Judge to decide on what points or in respect of whom he shall hear arguments. This postulates that the third Judge is completely free in resolving the difference as he thinks fit. If he does not think to hear the arguments in respect of any accused of whom the Judges are not divided in their opinions, he may decline to do so. The use of the words "equally divided" in both the sections means the Judges differ in their opinions, in respect of complicity of an accused or on the charge framed against him or them or on any particular point it can be inferred that they are equally divided but in a case where the Judges concur each other in respect of a particular accused and in respect of the offence charged, it can not be said that Judges are equally divided in respect of the accused charged with.

The earlier uniform views of different High Courts on construction of Sections 378 and 429 are that what is laid before another Judge is the "case" and secondly, the judgment or order shall follow the opinion given by such Judge. The opinion of the third Judge will be regarded as the final Judgment. In a case two accused persons were convicted, on appeal with regard to one of whom the Judges composing the Court of appeal are agreed in their opinions, while as regards the other Judges were divided in opinion, in such a contingency it is quite possible to maintain the view upon a reasonable interpretation of the term 'case' what has to be laid before another Judge is the case of the accused in respect of whom the Judges are equally divided in their opinions. The Courts are concerned only with the contingency in which the Judges of the High Court Division are equally divided in their opinions upon the question of the guilt of one accused person, though upon certain aspects of the case they may be agreed in their views. In such a contingency, what is laid before the third Judge, is, not the point or points upon which the Judges are equally divided in their opinions but the 'case'. This obviously means that, so

far as the particular accused is concerned the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case. The judgment or order shall follow such opinion which need not necessarily be the opinion of the majority of the three Judges. The case laid before a third Judge is the complete case in so far as the two Judges who first heard the appeal have differed as regards particular appellant or appellants but not the case of the other appellants as to whom they did not differ. These views have been expressed in Sarat Chandra Mitra V. Emperor ILR 38 cal 202, as follows:

> "I am not now concerned with the question of the trial of two petitioners with regards to one of whom the Judges composing the Court of Appeal may be agreed in their opinion, while as regards the others the Judges may be equally divided in opinion. In such a contingency it is quite possible to maintain the view that, upon a reasonable interpretation of the term "case" , what has to be laid before another Judge is the case of the prisoner as to whom the Judges are equally divided in opinion. I am now concerned only with the contingency in which the Judges of the Court of Appeal are already divided in opinion upon the question of the guilt of one accused person, though upon certain aspects of the case they may be agreed in their view. In such a contingency, what is laid before another Judge, is, not the point or points upon which the Judges are equally divided in opinion, but the "case". These obviously mean that, so far as the particular accused is concerned, the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case."

These views have been followed in Ahmed Sher V. Emperor AIR 1931(Lah) 513, Subeder Singh V. Emperor, AIR 1943 All 272, Nemai Mandal and others v. State of West Bengal, AIR 1966 cal 194. The views of the Supreme Court of India on the point are not uniform. One view is that the third Judge is required to examine the whole case independently and that he is not bound by the two opinions of the two Judges comprising

the Division Bench even if there is no difference in respect of any one of the accused persons. The other view is that it is the discretion of the third Judge to decide on what points he shall hear the arguments, if any, and he is completely free in resolving the difference.

Some times the Judges of the Division Bench may differ in their opinions on any point but if they agree with the ultimate conclusions reached by the Court of Sessions and confirm the sentence, it can not be said that the Judges are equally divided in their opinions. Section 377 provides that in every case so submitted, the confirmation of sentence or any new sentence or order passed by the High Court Division, shall, when such Court consists of two or more Judges, be made, passed, and signed by at least two of them. This section deals with the procedure as to the manner of signing the confirmation of sentence of death where the Court consists of two or more Judges the order of confirmation of sentence of death should be singed by at least both of them. If the sentence of death is confirmed by one of them, the sentence of death is not validly confirmed within the meaning of Section 377, which enacts that any order made on a reference shall be by a Bench consisting of at least two Judges. When the Judges consisting the Division Bench are equally divided in their opinions the case shall be decided in the manner provided by Section 378 read with Section 429 of the Code, i.e. the case with their opinions shall be laid before the third Judge. The expression difference of opinion as used in the Sections may be either as regards the guilt or innocence of the accused or as to the proper sentence to be passed. In either of these cases the sections require the reference to be made to another Judge. The Judge before whom the case is laid for his opinion is entitled to pass any order he thinks proper including an order directing retrial of the accused. While confirming the sentence one Judge may not accept a piece of evidence but accepts the conviction and sentence in respect of an accused person that does not mean that there is difference of opinion as regards conviction and sentence. Therefore, the moot question is whether the Judges of the Division Bench have confirmed the conviction and sentence within the meaning of section 377 of the Code.

In the case of Babu V State of U.P., AIR 1965 SC 1467, five members Constitutional Bench of the Supreme Court of India considered the true purport and power of the third Judge. In that case the Division Bench differed in their opinions in respect of the conviction of three accused persons and delivered two separate opinions. The case was laid to Takru, J. who agreed with Mathur, J. in accepting the prosecution case. The appeals of the convicts were accordingly dismissed. On the application for certificate of fitness the two Judges who heard the appeals, again deferred. Mathur, J. was in favour of refusing certificate while Gyanendra Kumar, J. was for granting it. He was of the opinion that the main point of difference earlier was over the authenticity of the FIR, and Takru,J. had merely stated that if it was necessary for him to decide the point he would have agreed with Mathur, J. and could have accepted the FIR as genuine. Gyanendra, J. was of the opinion that this matter which was fully argued before Takru, J. was not discussed by him in detail. The matter was again laid before Boome, J. who agreed with Gyanendra, J. on the point that Takru, J. had not gone into the authenticity of the FIR. He was in favour of granting certificate. Before the Supreme Court the competency of the appeal was raised, it was observed as follows:

> "The Section (S.429) contemplates that it is for the third Judge to decide on what points he shall hear the arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit. In our judgment, it was sufficient for Takru, J. to have said on the question of the First Information Report that he did not consider it necessary to decide the point but if it was necessary he was in agreement with all that Mathur, J. had said. There was, therefore, a proper decision by Takru, J. and the certificate could not be based upon the omission to discuss the First Information Report and the doubts about it."

In the case of Hethubha, AIR 1970 SC. 1266, three accused persons were charged for murder and other offences. The trial Court acquitted all the accused persons of the charge under section 302/34 of the Penal Code; it however convicted all the accused under section 304 Part II read with Section 34 of the Penal Code. Two accused persons

were also convicted under section 323 and another under section 323/34 of the Penal Code. Accused persons preferred appeal from the aforesaid conviction and sentence. A Division Bench of the Gujrat High Court heard the appeal. One Judge Divan,J. found accused no.1 guilty under section 302 of the Penal Code and the other two accused guilty under section 324/34 of the Penal Code. Another Judge Shelat,J. acquitted all the accused persons of the charges. The matter was referred to a third Judge, Mehta,J. who heard the appeal found the accused no.1 guilty under section 302 and other two accused guilty under section 302/34 of the Penal Code. He also maintained the conviction of first two accused under section 323 of the Penal Code and the third accused under section 323/34 of the Penal Code. The convicts went to the Supreme Court of India. It was contended on behalf of the convicts that the third Judge erred in law in disposing of the whole case in violation of section 429 of the Code. The Supreme Court of India approved the views taken in the case of Babu (Supra) and observed as follows:

> "This Court in Babu V. State of Uttar Pradesh, (1965) 2 SCR 771= (AIR 1965 SC 1467) held that it was for the third learned Judge to decide on what points the arguments would be heard and therefore he was free to resolve the differences as he thought fit. Mehta,J., here dealt with the whole case. Section 429 of the Criminal Procedure Code states "that when the Judges comprising the Court of Appeal are equally divided in opinion, the case of their opinion thereon, shall be laid before another Judge of the same Court and such Judge, after such hearing, if any, as he thinks fit, shall deliver his opinion, and the Judgment and order shall follow such opinion". Two things are noticeable; first, that the case shall be laid before another Judge, and, secondly, the Judgment and order will follow the opinion of the third learned Judge. It is, therefore, manifest that the third learned Judge can or will deal with the whole case."

In Tanviben Pankaj Kumar Divetia V. State of Gujrat, AIR 1997 S.C. 2193, (1997(7) SCC 156) the views taken in AIR 1965 S.C. 1467have been approved and observed thus:

> "The plain reading of Section 392(our S.429) clearly indicates that it is for the third Judge to decide on what points he shall hear arguments, if any, and in necessarily postulates that the third Judge is free to decide the appeal by resolving the difference in the manner, he thinks proper."

In State of U.P.V. Dan Singh, (1997) 3 S.C.C.747, thirty two accused persons were tried for various offences including under sections 302/149 I.P.C. The trial Court acquitted all the accused. On an appeal filed by the State, there was difference of opinion between two Judges comprising the Division Bench. B.N.Katju, J. convicted two accused under Section 325/34 IPC. and acquitted other accused. Rajeswar Singh,J. convicted six accused on all counts. Both the Judges agreed in respect of 22 accused and there was difference of opinion with regard to 6 other accused and 4 women accused. The third Judge Mathur, J. who agreed with the opinion of Katju, J. The State of U.P. obtained leave against all accused except the four women accused on the ground that the appeal against the accused, qua whom state's appeal was dismissed by the Division Bench had become final and no appeal has been filled against the final order of the third Judge. It was contended on behalf of the accused-respondents, the appeal against the 22 accused whose the state's appeal was dismissed by the Division Bench on 15th April, 1987 had become final, that the appeal was filed against the final opinion dated 19th April, 1988 of the third Judge, that this order pertains to the four women accused and six other, the special leave having not granted against acquittal of four women, the appeal should be confined to six accused only in respect of which there was difference of opinion which was referred to the third Judge. The Supreme Court repelled the contention observing that as there was difference of opinion of the Division Bench, the opinion of the third Judge would prevail. Two members Bench of the Supreme Court observed as follows:

> "When the appeal as a whole is heard by the third Judge, he not only has an option of delivering his opinion but, under the proviso to Section 392 of the Code of Criminal Procedure he may require the appeal to be reheard and decided by a larger Bench of Judges. This was an option which, under the provision, was also open for any one of the two Judges, namely,

> B.N.Katju and Rajeshwar Singh, J.J. to exercise, but they chose not to do so. What is clearly evident is that the appeal is finally disposed of by the judgment and order which follows the opinion of the third Judge. This being so special leave petition could only have been filed after the appeal was disposed of by the High Court vide its final order dated 19.5.1988. Even though the said order purports to be related only to ten out of thirty-two accused the said order has to be read along with the earlier order of 15.4.1987 and, in law, the effect would be that the order dated 19.5.1988 will be regarded as the final order whereby the appeal of the State was partly allowed, with only two of the thirty-two accused being convicted under Section 325 read with Section 34 IPC, while all the other accused were acquitted."

In Sajjan Singh (1999 S.C.C. 44), 11 accused persons faced trial before the Sessions Judge, of them, the Sessions Judge convicted 10 accused persons under section 404 of the Penal Code. The convicts preferred one appeal and the State also preferred one appeal against the order of acquittal. The Division Bench of Madhya Pradesh High Court dismissed the appeal preferred by the State. As regards the other appeal of 10 convicts, the Judges were equally divided in their opinions. One Judge gave his opinion that the conviction of all the accused should be upheld and the other Judge held that the conviction of 3 accused should be upheld and the rest be acquitted. The matter was referred to a third Judge under section 392 of the Code who upheld the conviction of 6 persons and acquitted the other 4 accused. The third Judge did not consider the case of 3 convicts as the Division Bench was not equally divided in respect of their conviction. A Division Bench of the Supreme Court ignoring the views taken in AIR 1965 SC 1467 and AIR 1970 SC 1266 did not approve the opinion taken by the third Judge and observed as follows:

> "Statement of law is now quite explicit. It is the third Judge whose opinion matters; against the judgment that follows there from that an appeal lies to this Court by way of special leave petition under Article 136 of the

> Constitution or under Article 134 of the Constitution or under Section 379 of the Code. The third Judge is, therefore, required to examine whole of the case independently and it cannot be said that he is bound by that part of the two opinions of the two Judges comprising the Division Bench where there is no difference. As a matter of fact the third Judge is not bound by any such opinion of the Division Bench. He is not hearing the matter as if he is sitting in a three Judge Bench where the opinion of majority would prevail. We are thus of the opinion that Prasad, J. was not right in his approach and his hands were not tied as far as the three appellants, namely, Gajraj Singh, Meharban Singh and Baboo Singh before him were concerned in respect of whom both Judges of the Division Bench opined that they were guilty and their conviction and sentences were to be upheld."

Despite such observations, the Court did not interfere with the opinion of the third Judge on the reasonings that "Since we have heard the matter in respect of all the three appellants at length we do not think it is desirable now at this stage to remand the matter when only some of the appellants could be said to have been prejudiced because of the approach adopted by Prasad, J." .The Supreme Court thereupon heard the appeal on merit and dismissed the appeal. The cases of Dhan Singh and Sajjan Singh have been decided in the light of the provision of section 392 of the Code of 1973.

In the case of B.N.Anantapadmanabiah (AIR 1971 S.C.1836), 3 accused persons were charged under section 120B of the Penal Code read with Sections 5(II), 5(1)(c) and 5(1)(d) of the Prevention of Corruption Act and Sections 467 and 471 of the Penal Code in two cases. The accused persons filed separate revision petitions in the High Court challenging the jurisdiction mainly on the points that the Special Judge of Gauhati has no jurisdiction to try the cases investigated by the Delhi Special Police Establishment, that no the consent of the Government of Assam was taken, and that the investigation carried by the investigating agency under an order of the Magistrate at Delhi was not in accordance with section 196A of the Code. The Division Bench of the High Court of

Assam and Nagaland unanimously rejected the first two contentions but were divided in their opinions on the points as to whether the Magistrate applied his mind to allow the investigating agency to investigate the cases and whether sanction under section 196A was necessary. The matter was then laid before a third Judge. The third Judge held that the Magistrate acted without jurisdiction in allowing the investigating agency to investigate into the matter and accordingly he quashed the proceedings. The question in dispute was whether a new point as to the competency of the Magistrate at Delhi to sanction investigation could have been raised before the third Judge since the said point had not been raised before the Division Bench. A.N.Ray, J. approved the views taken in AIR 1970 SC 1266 wherein it was observed that "the third learned Judge could deal with the whole case." There is no dispute in the statement of law. It is in the discretion of the third to deal with the case and in deciding the case if any point is found necessary, he can decide the said point as well.

In Muhammad Shafi Vs. Crown, 6 DLR(WP)104(FB), Muhammad Shafi was sentenced to death under section 302 of the Penal Code. The case came before a Bench of the Sindh High Court Division by way of appeal and confirmation. The learned Judges having disagreed on the point whether the provisions of Section 342 of the Code has been complied with and, if not, whether the trial is vitiated. The matter was referred to a Full Bench. The Full Bench decided by majority that the provisions of Section 342 had not been complied with and that the trial was not vitiated by reason of this defect as it is curable. Since the matter was referred to a Full Bench, on behalf of the State it was argued that the case should be sent back to a third Judge for giving opinion under Section 378 of the Code. In this context of the matter the learned Judges agreed with the contention that "the third Judge was exercising the authority of a Bench of Judges and that, therefore, he should consider for the purposes of Section 12 of the Sind Courts Act not as a single Judge, but as a Bench". This case has no manner of application in this case.

In Akdur Raziq Vs. The State 16 DLR (WP) 73, it was observed "There is nowhere laid down in Sections 378 and 429 of the Criminal Procedure Code, that the

third Judge should follow or may follow the opinion of the Judge who has given his opinion favouring the accused." There is no dispute in this proposition that the third Judge should lean towards the Judge of the Division Bench favouring the acquittal of the accused for, if this proposition is accepted, there was no necessity in using the expressions "such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion" in Section 378 of the Code.

From the above conspectus of the decisions, we find that there are conflicting views in the Supreme Court of India on the point as to the power of the third Judge to decide a case on which the Judges of the Division Bench are equally devided in opinion. It is worthy to note here that the learned counsels for the appellants have failed to satisfy us that the Supreme Court of India overruled the views taken in Babu (AIR 1965 S.C.1467), which in my opinion holds the filed on the point till now. The said decision has been given by five member Judges and the views taken therein have been followed in later cases. There is of course a contrary opinion in some cases constituting with two member Judges Bench but while taking such view, the learned Judges totally ignored the views taken by the five member constitution Bench. I find no cogent ground to depart from those views as they are based on correct construction of the provisions of law, to which, I respectfully agree. Even if it is assumed that the third learned Judge ought to have hard the reference in respect of all the convicts, the appellants could not be said to have been prejudiced as we have heard the appeals of the appellants at length on merit.

This opinion of the third learned Judge is absolutely in accordance with sections 378 and 429 of the Code. This section contemplated that it was for the third Judge to decide on which points and in respect of whom he should hear arguments. He is completely free in resolving the difference as he thinks fit. The third learned Judge in exercise of discretionary power declined to hear the cases of the 9 convicts in respect of whom there is no difference of opinion as regards their conviction and sentence and he did not consider it necessary to decide their case, but if it was necessary to decide the case of 9 accused the third learned Judge was in agreement with the learned Judges of the Division Bench and could have accepted the conviction in respect of them. The operating

portion of the opinion of the third learned Judge is regarded as the final judgment of the High Court Division. Therefore, I repel the objection raised by the learned counsels for the appellants.

Delay

The next point raised by the learned counsels is that there is inordinate delay in lodging the FIR and this unreasonable delay of 21 years enabled the prosecution to introduce concocted story of implicating the appellants falsely by collecting manipulated evidence which caused prejudice to the appellants and that the High Court Division acted illegally in failing to consider this aspect of the matter. It has further been contended that even if it is assumed that this delay has been caused due to the promulgation of the Indemnity Ordinance, 1975, there is no explanation for about three months from 14th November, 1996, the date of repeal of the Indemnity (Repeal) Act, 1996 to the date of lodging the FIR on 2nd October, 1996.

Mr.Anisul Huq, learned counsel and the learned Attorney General on the other hand, submitted that the prosecution not only had explained the reasons but also demonstrated cogent evidence to substantiate the cause for delay in lodging the FIR. According to them, the inability to lodge the FIR after the occurrence was due to the fact that the successive Governments expressly as well as impliedly prevented to institute the case against the accused persons by promulgating Indemnity Ordinance, 1975; and that the accused persons under the shelter of the then governments held influential and powerful positions after the incident and from their conducts the informant feeling insecurity of his life did not lodge the FIR. It was contended that Lt. Col. Khondker Abdur Rashid along with Lt. Col. Syed Farooque Rahman floated a political party under the name “Freedom Party” and Major Bazlul Huda was the Secretary of the party; that after General Zia assumed power rewarded most of the accused persons by appointing them in Foreign Missions even after they declared themselves as killers of the then President. It was further contended that this being an exceptional case in which the then successive Governments sheltered and protected the accused persons, the informant was apprehensive of his life by taking the risk of filing any case till the Bangladesh Awami

League came into power in 1996 and that as the President of the said party did not take any step, he was compelled to lodge the FIR. In this connection they have referred the cases of State V. Fazal, 39 DLR (AD) 166, Md. Shamsuddin @ Lambu and others Vs. State , 40 DLR (AD)69, Tara Singh and others V. State of Punjab 1991 Supp(1) SCC 536, Jamna and others V. State of U.P. 1994 Supp(1) SCC 185 and State of H.P. V. Shreekanta Shekari (2004) 8 SCC 153.

There is no denial of the fact that this case has been instituted after 21 years of the date of incident. There is an explanation about the delay and the learned Judges have believed the explanation and observed that the prosecution has been able to explain the delay by assigning cogent reason. In this regard the first learned Judge observed as follows:

> "In the present case delay in lodging the FIR has sufficiently been explained and in view of the matter the contention that FIR has been lodged after lapse of several years change of manipulation and false implication can all together to be not ruled out merits no consideration."

The second learned Judge, on the other hand, on consideration of the evidence of P.W.44 and other witnesses observed as follows:

> "the most accused persons used to stay in Banga Bhaban since 15th August, 1975 and in the name of an unwritten command council used to govern the country till they were made to leave on the 4th November, 1975. Still though they were not without influence. The accused Major Syed Farooque Rahman tried to force a mutiny at Savar and Bogra Cantonments and the accused Major Khondker Abdur Rashid tried unsuccessfully to take over the command of 2nd Field Artillery Regiment in 1976. Again in 1980 they made another attempt to overthrow the Government but still no Government took any punitive action against any of them; rather they were all given their arrear salaries. The accused Major Syed Faruque Rahman even contested the Presidential election in 1986 (P.W.44). So the apprehension of the informant about his life and limb can

> not be said to be unreasonable. Under such circumstances, the delay in lodging the FIR can not vitiate the trial, after all it is always for the prosecution to prove its case on evidence, as such, and the contention of the learned counsel on behalf of the appellants about the delay in lodging the FIR has got no substance."

It seems to me, the learned Judges on assigning reasons have believed the explanation of delay as reasonable. This being a finding of fact based on evidence on record can not be interfered with by this Court in the absence of any mistake in the reading of the evidence or by ignoring material evidence on the point argued. It is true that a first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the first information report can be looked into from the stand point of the accused. Delay in lodging this report some times resulting embellishment by creature of after thought. On account of delay not only the report gets bereft of the advantage of spontaneity, danger creeps of the introduction of coloured version, exonerated account, concocted story as a result of consultation. Even a long delay can be condoned if the witnesses have no motive for implicating the accused.

The principle of law on the point of delay is not disputed one. The consistent views of the Superior Courts are that mere delay in lodging a case is not a ground for disbelieving a prosecution case, for there are various circumstances in which lodging any case as to the commission of offence may be delayed. It was observed in Shreekanta Shekari (supra):

> "Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment of exaggeration in the prosecution version on account of

such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case."

In Ramjag V. State of U.P., AIR 1974 SC 606; it has been observed as follows:

"It is true that witnesses can not be called upon to explain every hours delay and a commonsense view has to be taken in ascertaining whether the first information report was lodged after undue delay so as to afford enough scope for manipulating evidence. Whether the delay is so long as to through a cloud of suspicion on the seeds of the prosecution must depend upon a variety of factors which would vary from case to case. Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies have no motive for implicating the accused."

The informant has implicated only 14 accused persons in the F.I.R, of them, he made specific allegation of overt act against the appellant Major Bazlul Huda and identified 3 other accused persons including appellant Lt. Col. Farooque Rahman, and implicated rest of the accused persons from the informations collected from other sources. If he had ill motive to implicate and/or embellish facts against the accused persons, he could have vividly mentioned therein the role played by each accused persons, but he did not resort to that path. This facts show that this FIR is not tainted by embellishment or a creature of after thought, rather it is the true version what the informant has seen at the place of occurrence. What ever incriminating evidence that have been collected against the appellants and other accused persons regarding their complicity in the occurrence are by the investigating agency in course of the investigation of the case.

There is another factor which should not be ignored in considering the delay in lodging the FIR. After the incident Khondker Mostaque Ahmed usurped the power and proclaimed Martial Law on 20th August, 1975 and assumed the office of the President of Bangladesh with retrospective effect from 15th August, 1975. Thereafter he promulgated

the Indemnity Ordinance, 1975 on 26th September, 1975. This Ordinance was promulgated putting restriction on taking of any legal or other proceedings against persons in respect of certain acts; things, committed by those persons in connection with, or in preparation or execution of any plan for, or necessary steps towards the change of the Government of Bangladesh and the Proclamation of Martial Law of 15th August, 1975. Whether or not an F.I.R could have been lodged even after the promulgation of the said Ordinance was a matter of interpretation of law but one would think for the second time to file any case on the face of promulgation of such Ordinance giving protection to the accused from the state level. It has got psychological impact, which is evidenced from the testimony Col. Shafayat Jamil (P.W.44).He stated that the conspirators of 15th August and the killer officers Major Farooque Rahman and Rashid always stayed in the Bangabhaban; their accomplice officers stayed in the Radio Station and used to maintain contact among them by constituting an unwritten Revolutionary Command Council and ruled the country under the leadership of Khondker Mostaque Ahmed. He further stated that it was not possible for taking legal action against the killers of 15th August as the killers were being given protection by the Governments in power after the incident till 1996. This statement cannot be said to be exaggerated. Admittedly, the then President and all other members of his family found in the house were brutally killed. It was a bounden duty for Governments in power to institute a case for ascertaining the cause for the death if they had not supported the perpetrators and brought them to justice but in this particular case, the process of law was not allowed to take its own course, rather by promulgating Indemnity Ordinance, they wanted to protect the perpetrators. Initially they reinstated the removed army officers and then absorbed almost all of them in the Foreign Ministry and appointed them in the Foreign Missions. The successive Governments in power not only exposed themselves that they had tacit support to the carnage but also showed blatant disrespect to the rule of law.

Bangabandhu Sheikh Mojibor Rahman was not only the President of the country, he is the father of the nation but the people of the country waited 21 years for instituting a case against the perpetrators because the governments in power during that period gave

protection to the perpetrators. This fact justified the explanation given by the informant that for fear of reprisal he dared to institute a case. Under the Constitution the President and the Prime Minister take oath on the following amongst other terms:

> "That I will preserve, protect, and defend the constitution and that I will do right to all manner of people according to law, without fear and favour, affection or ill-will."

Every word and expression in the oath of a President or Prime Minister is potent with a message. The message has to be demystified by reading between the lines and looking beyond what meets the eyes. The Chief Executive of the state must bear faith and allegiance to the Constitution. It demands not only belief in constitutional principles but a loyalty and devotion akin to complete surrender to the constitutional beliefs. This solemn affirmation was ignored by them whenever they were required to take legal actions against the perpetrators of the then President of the country. They were duty bound under the oath to protect and defend the Constitution and to perform their responsibilities "according to law". But those Governments utterly failed to perform their responsibilities 'according to law.' An offence of murder is a cognizable offence and for such offence the officer-in-charge of a local Police Station is under an obligation to lodge an F.I.R. and to hold investigation into the offence without an order of a Magistrate and to submit his report under section 173 of the Code. Even in cases of suicide or suspected killing of any person, if the officer-in-charge of a police station has received an information shall immediately give an intimation thereof to the nearest Magistrate empowered to hold inquest , and unless otherwise directed by the Government shall proceed to the place where the body of the deceased present found, in presence of two or more responsible inhabitants of the neighbourhood and shall make an investigation, and draw up a report of the apparent cause of death as per provisions of Section 174 of the Code. It is also the duty of the police officer to submit the inquest report forthwith to the Magistrate. In this case these procedures have been totally ignored by the police officer, which speaks volume about the motive of the then Government. If no case was instituted against the killers of the elected President of the country by anyone on his behalf, the Government

was under obligation to institute a case, and as they failed to perform the constitutional responsibility, they had certainly violated their oaths that they affirmed. Secondly, the conducts of the succeeding governments in not allowing the law to take its own course even after killing of the elected President of the country along with family members proved that they had no respect to the rule of law. The assailants of the then President not only committed an offence of murder, they had committed crime against humanity by killing a child and three innocent women.

Learned Attorney General and Mr.Ajmalul Hossain vehemently criticized the conducts of the Governments in power. Mr.Hossain contends that the justice delivery system has failed in all respects during the relevant time which can not be exonerated. This failure of the justice delivery system has colossal and catastrophe affect in the country which should not be allowed to recur for the interest of the people. This, according to him, is a part of history that can not be erased- the entire administration from the top to the bottom failed to perform their responsibilities, and this will be termed as a scandalous chapter in our history, and this sort of practice should be stopped forever- it should not be allowed to repeat again. I fully agree with the views of the learned counsel. Whenever a criminal offence is committed, then irrespective of whether it also involves a civil injury, the offender becomes liable to punishment by the state, not for the purpose of affording compensation or restitution of anyone who may have been injured but as a penalty for the offence and in order to deter the commission of similar offences and, in some cases, for the reform of the offender. Here the matter is one of public law, proceedings against the offenders may be instituted by the State without the consent of any person who has been injured.

While endorsing the above arguments, Mr.Tawfique Nawaz, learned State Counsel submits that there is an onerous duty upon this Court to address the Constitutional issues arising in these appeals and not to make them by reference to merely to statutory laws, competing statutory laws or precedents of foreign jurisdictions, in disregard of , or without adequately considering the provisions of the Constitution,

espicially, since the victim of the murder is also a person created under the Constitution as President and the father of the nation.

What is justice? How is justice related to law? According to Lucas (1980: 3), justice "differs from benevolence, generosity, gratitude, friendship, and compassion". It is not something for which we should feel grateful, but rather, something upon which we have a right to insist. According to Plato, Justice consists of maintaining the societal status quo. Justice is one of four civic virtues, the others being wisdom, temperance, and courage. In an ordered state, everyone performs his or her role and, does not interfere with others. Each person's role is the one for which the individual is best fitted by nature; thus, natural law is upheld. Aristotle believed that Justice exists in the law and that the law is "the unwritten custom of all or the majority of men which draws a distinction between what is honourable and what is base". The concept of impartiality is at the core of our system of criminal justice.

A Government not of men but of laws' is how the American founding fathers envisaged their new state. The earliest official document in which the phrase appears, in the form a Government of laws and not of men. A system of Government in which executive, legislature and judiciary are each in separate hands with each essentially limited to its own sphere of activity was regarded by the American founding fathers as the best safeguard of liberty. When law ends tyranny begins. These words emblazoned over the justice Department Building in Washington D.C. The underlying assumption in both is that law is the very antithesis of arbitrary power. The United States was self-consciously modeled in opposition to the absolute monarchies of eighteenth-century Europe. The tyranny of an autocratic ruler was what particularly exercised the minds of the framers of the American Constitution.

When Bangladesh attained independence, our founding fathers wanted to establish a democratic welfare state, which would allow equal opportunity to one and all, irrespective of caste, colour, sex and any other form of discrimination. We adopted democracy as the form of Government since this is the best and most acceptable form evolved through centuries of experience among the people who are concerned about the

dignity, rights, and person of human race. The chapter of Fundamental Rights was designed to ensure not only freedom and liberty but also equality, and most important, equal opportunity. In order to ensure that the democratic set up that we had adopted did not convert itself into an anarchic state, the constituent Assembly framed the Constitution with certain basic concepts, most important of which is the concept of rule of law.

The rule of law depends upon definite principles and binding precedent, which together make for certainty, uniformity, and predictability, which in turn provide the foundation of fairness and justice. The term 'rule of law' is closely associated with the name of Albert Venn Dicey, whose introduction to the study of the Law of the Constitution, is probably the best known and most influential book on the British Constitution ever written. The rule of law is defined by Dicey as comprising at least three distinct though kindred conceptions, in the following terms:

> "(1) We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.
>
> "(2) We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."
>
> "(3) There remains yet a third and a different sense in which the 'rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the Constitution is pervaded by the rule of law on the ground that the general principles of the Constitution (as for example the right to personal liberty, or the right of public meeting) are with us as the result of judicial decisions determining

> the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the Constitution."

The preamble of our Constitution states 'rule of law' is one of the objectives to be attained. Mahmudul Islam in his 'Constitutional Law of Bangladesh, second Edition, in paragraph 1.84 argued "The rule of law is a basic feature of the Constitution of Bangladesh. What the meaning of 'rule of law' is as envisaged in the Constitution? It can be seen from the preamble that fundamental human rights and freedom, equality and justice, political, economic and social have been mentioned after, 'rule of law' as if these concepts are not included in 'rule of law'. From this one may argue that 'rule of law' as contemplated in the Constitution concerns the certainty and publicity of law and its uniform enforceability and has no reference to the quality of the law; the Constitution deals with substantive justice separately from 'rule of law'. This argument is merely academic. As there is difference of opinion as to the actual meaning of 'rule of law', the framers of the Constitution, after mentioning 'rule of law' in the preamble, took care to mention the other concepts touching on the qualitative aspects of 'law', thereby showing their adherence to the concept of rule of law as propounded by the latter viewers. If the relevant paragraph of the preamble is read as a whole in its proper context, there remains no doubt that the framers of the Constitution intended to achieve 'rule of law' as advocated by the latter viewers. To attain this fundamental aim of the State, the Constitution has made substantive provisions for the establishment of a polity where every functionary of the State must justify his action with reference to law."

Among different types of felonies, an offence of murder or an order to commit murder is obviously illegal and immoral. Murder, rape, and torture were as unlawful in Germany-even under the Nazis-as anywhere else. That is why the Nazis never tried to legalize genocide; the orders to kill the concentration camp inmates were always couched in veiled terms. For even the Nazis recognized that such conduct could never be justified in terms of any system of law. Not only we ignored the concept of 'rule of law' argued by

Dicey as back as in 1885, but also tried to legalize a crime against humanity and rewarded the perpetrators of that crime in the manner the Nazi's regime turned a blind eye to the perpetrators of such crime. This would be marked as a dark chapter to the history of this nation. The concept of rule of law is recognized all over the world, and our founding fathers of the Constitution also adopted that principle, but we failed to apply the same in the case of the killing of our father of the nation.

The basic elements of a criminal justice system are an impartial fact-finding process and a fair and equitable resolution. The ethical and moral duties of those who work within the system are typically consistent with the concept of justice. The criminal justice system in a country is designed to protect the citizens of the country from the onslaught of criminal activities of a section of people who indulges in such acts. The state as a guardian of fundamental rights of its citizens is duty bound to ensure the administration of justice and the rule of law. It is in the interest of the people that the guilt of the offender who has indulged in criminal activity is determined as quickly as possible. But, unfortunately this concept has been ignored in case of the carnage of the then President and his family members. In order to have a strong socio-economic system, it is important that each and every offender involves in crime should be put to justice and his trial should move at reasonably fast pace. The challenges before the criminal justice system are to balance the rights of the citizen as well as of the accused while dispensing speedy and effective justice in order to ensure a welfare state for its citizens. Rule of law is meaningless unless there is access to justice for the common people.

Plea of Mutiny

It was argued that the evidence on record revealed that the killing and the change of power on 15th August, 1975 was a result of mutiny by some army officers and therefore, the trial of the appellants under the provisions of the Code was without jurisdiction. According to the learned counsels, the trial ought to have been held by a Court-Martial under the provisions of Army Act, 1952. In this connection learned counsels have referred to Sections 31(a), 59(3), 92(2), 94 and 95 of the Army Act, Sections 5 and 139 of the Penal Code and Section 594(2) of the Code.

Mr. Khan Saifur Rahman argued that without determination as to whether the alleged incident was a mutiny leading to the murder of Bangabandhu Sheikh Mujibor Rahman and his family members, the conviction of the appellants by a normal criminal Court is without jurisdiction. Learned counsel further argued that the instant incident was originated from the Dhaka cantonment on the night of 14th August from which it was apparent that it was a mutiny simplicitor, not a murder and therefore, the trial of the appellants was vitiated. There was no agreement or criminal conspiracy or premeditated plan or pre-arranged plan, the learned counsel argued, within the meaning of Section 34 or Section 120A of the Penal Code and therefore, the conviction of the appellants under the provisions of the Penal Code was illegal. Learned counsel further argued that when any retired army officer or any other person not subject to Army Act joined in the occurrence on the night following 14th August, 1975 would also constitute a mutiny within the ambit of Section 31 of the Army Act and they ought to have been tried by a Court Martial under the Army Act. The learned counsel finally argued that there is similarity in the killing of Bangabandhu Sheikh Mujibor Rahman and General Ziaur Rahman and in both the cases they were Presidents of the Republic, and they were killed by the army personnel. In case of Bangabandhu Sheikh Mujibor Rahman, the army from artillery and lancer units came out from Dhaka Cantonment and killed him at dawn on 15th August, 1975 at his official residence, where as, in case of General Ziaur Rahman the army came out from Chittagong cantonment and killed him at Circuit House where he was staying on the night following 29th May, 1981. Since both the occurrences committed in the similar manner, the appellants, if they were at all involved in the incident of 15th August, ought to have been tried by a Court-Martial to be convened by the Chief of Army Staff as was done in case of General Ziaur Rahman's killing. In this connection the learned counsel has referred to the case of Jamil Huq Vs. Bangladesh, 34 DLR(AD) 125.

Mr.Anisul Huq and the learned Attorney General, on the other hand, contend that the incident is not a mutiny, rather it is a preplanned murder, and therefore, there is no legal bar for the trial of the appellants under the provisions of the Code. In this

connection they have referred Sections 59, 92, 94 and 95 of the Army Act, Section 35 of the Navy Ordinance 1961 and Section 549 of the Code. Learned Attorney General added that the appellants did not raise this point in the trial Court and raised it in the High Court Division with malafide motive to delay the disposal of the matter. According to the learned Attorney General, the evidence on record do not support a case of mutiny, rather they disclose a case of murder. Learned Attorney General finally contends even if it is assumed that the incident is a 'civil offence' with the meaning of Section 8(2) read with Section 59(2) of the Army Act, in view of Section 94 of the Army Act, the criminal Court has concurrent jurisdiction to try such offence.

Before I meet the contentions of the learned counsels, I would like to mention some admitted facts in this case. I noticed that the defence did not take any plea of mutiny at the trial by cross-examining or giving suggestions to the prosecution witnesses or in their written statements in reply to their examinations under section 342 of the Code or by adducing evidence in accordance with section 340 (3) of the Code. Since the prosecution witnesses did not say anything in support of the plea of mutiny, the defence ought to have made out a case at least by way of suggestion to the witnesses that the army officers involved in the mutiny submitted their charter of demands to the authority in the armed forces and that as their demands were not redressed, they revolted. Secondly, if there was rebellion as claimed the rebellious force would have attacked their commanding officer, and if the commanding officer was involved, they would have attacked the Chief of army staff but they did not attack them, rather killed the President which proved that it was not a mutiny.

It was suggested to Md. Aminur Rahman (P.W.24) on behalf of Lt. Col. Syed Farooque Rahman that at that time (when Major Dalim was broadcasting the news of the killing) he (P.W.24) had knowledge about declaration of Martial Law that Khonkder Mostaque became the Chief Martial Law Administrator. Form this suggestion the defence wanted to make out a case that there was successful coup d'etat by Khonkder Mostaque Ahmed in which the President was killed. This defence plea supports the prosecution case that Khandaker Mostaque and some aberated army officers brutally

killed the President and usurped power. There was provision for removal of the President in the Constitution but the President was not removed in accordance with the said provision. As per Constitution, the Vice-President ought to have assumed the office of President if the vacancy occurred in the office of President or if the President was unable to discharge the functions of his office on any of the grounds mentioned in the Constitution but this time the constitutional provisions were ignored. If there was failure of the army insurrection, the mutinous force should have been brought to justice for mutiny under the Army Act but no such action was taken. On the contrary, it is seen that the perpetrators of the crime were rewarded by the Government and the authority in the armed forces supported their action by expressing allegiance in favour of the change. Md. Reajul Haque (P.W.37) stated in chief that at about 9 A.M. the Chiefs of three services, the B.D.R. chief, the I.G.of Police were brought by Major Dalim at Studio No.2 and their statements of allegiance in favour of the change were recorded and broadcast. On behalf of Lt. Col. Shahriar Rashid it was suggested to Major General Shafiullah (P.W.45) that there was successful military coup in the morning of 15th August, 1975, that in pursuance of such revolt Khonkder Mostaque Ahmed became the President of the country, that all the chiefs of the defence services expressed their allegiance in favour of the change and that he could not take any action against the persons involved in the incident. He stated that Khandaker Mostaque declared the killers as descendants of king Surya of the Surya Dynasty. In reply to a question on behalf of Lt. Col. Syed Farooque Rahman, Col. (Rtd) Shafayet Jamil (P.W.44) stated that it was not possible to take any action against the killers of 15th August, that the persons involved in the killing of 15th August were given protection by the subsequent Governments till 1996, that the conspirators and killers of 15th August used to stay at Bangabhaban and that they run the Mostaque Government by constituting a revolutionary council.

From the above suggestions given to the witnesses, it appeared that the accused persons though termed the incident as the change of power by killing the President but the succeeding Governments acknowledged their act of killing as legal one and rewarded them by declaring them as ‘Surya Santan’ and absorbing them in the Ministry of Foreign

Affairs. They did not try to make out a case of mutiny rather they tried to justify their action as one of successful coup d'etat. They set up a new plea of defence just reverse to what they took at the trial stage in the High Court Division although there is no material in support of the plea. Let us now consider the legal aspects of the point urged by the learned counsels. In the Army Act, 1952, the definition of mutiny has not been given but the punishment for the mutiny has been provided in Section 31. Mutiny has been defined in Section 35 of the Navy Ordinance, 1961, which reads thus:-

> "35. In this Ordinance, mutiny means a combination between two or more persons subject to service law, or between persons two at least of whom are subject to service law-
>
> (d) to overthrow or resist lawful authority in the armed forces of Bangladesh or any forces co-operating therewith or in any part of any of the said forces;
>
> (e) to disobey such authority in such circumstances as to make the disobedience subversive of discipline, or with the object of avoiding any duty or service, or in connection with operations against the enemy; or
>
> (f) to impede the performance of any duty or service in the armed forces of Bangladesh or in any forces co-operating therewith, or in any part of any of the said forces."

There is no dispute that this definition of mutiny is applicable to the Army Act in view of the definition of 'service law' defined in Section 4(xxxiv) in the Navy Ordinance, which provides that "service law" means "this Ordinance, the Army Act, 1952 , the Air Force Act, 1953,and the rules and regulations made there under." Mr.Khan Saifur Rahman submits that the expression 'active service' used in Section 59 of the Army Act is not applicable in this case but he fails to explain why this expression will not be applicable to the appellants. This is apparently a contradictory submission, inasmuch as, the appellants are challenging the jurisdiction of the criminal court relying upon some provisions of the Army Act, but by the same time, they want to ignore a vital

provision in the said Act. Mr. Huq submits that this definition of mutiny should be read along with Section 31 of the Army Act for arriving at a correct conclusion that the acts of the appellants do not come within the mischief of mutiny.

Clause (a) of Section 31 of the Army Act relates to the substantive offence of mutiny and insubordination, while other three sub-clauses (b),(c) and (d) relate to the abetment of the offence of mutiny. In order to bring an offence of mutiny within the ambit of the Act, there must be evidence of overthrowing or resisting lawful authority of the armed forces or disobeying the authority in such circumstances as to make the disobedience subversive of discipline or to impede the performance of any duty or service in the armed forces of Bangladesh. There is nothing on record to show that the appellants and other accused have collectively insubordinated or defied or disregarded the authority in the armed forces or refused to obey authority in order to bring their act within the ambit of mutiny or abetment for mutiny. The evidence on record proved that the accused persons instead of resisting the lawful authority of the armed forces or acting subversive to the discipline or insubordination, usurped the power by killing the President, and set up their accomplice in the office of President which act does cover the offence of mutiny. A person will not be made subject to penalties unless the offence charged is strictly brought within the purview of the statute.

Section 59(1) provides that subject to the provisions of Sub-section (2), any person subject to the Army Act commits a civil offence at any place shall be deemed to be guilty of an offence under the said Act. “Civil offence’ defined in section 8(2) Army Act means “an offence which, if committed in Bangladesh would be triable by a Criminal Court”. Section 59(2) of the Army Act stipulates that a person who is a subject to Army Act commits murder and other offences mentioned therein against any person not subject to the said Act shall not be liable to prosecution under the said Act unless he commits the offence while on ‘active service’. The term ‘active service’ has been defined in Section 8(1) as under:

> “active service”, as applied to a person subject to this Act, means the time during which such person is attached to, or forms part of a force which is

> engaged in operations against an enemy, or is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or is attached to or forms part of a force which is in military occupation of a foreign country;

The killing of the then President and the members of his family was not committed by the accused persons while they were engaged in operations against enemy, or in military operations in or are on the line of march to a country wholly or partly occupied by the enemy in order to bring the offence within the ambit of 'active service'. In view of the above, the learned counsel frankly conceded that the appellants were not on active service at the time of occurrence. If the appellants while on 'active service' committed a 'civil offence' they would be deemed to be guilty against the Army Act, but on the contrary, while committing the offence they were not on active service both the Court-Martial and the ordinary criminal Court would have concurrent jurisdiction subject to the conditions provided in section 92 of the Army Act. Section 92 provides that where an offence has been committed by any person while subject to the Army Act, and he has ceased to be so subject, he may be tried for such offence if his trial commences within six months after he had ceased to be so subject. A combined reading of Sections 8(1), 8(2), 59 and 92 suggest that if a person subject to the Army Act commits any civil offence of murder against a person not subject to the said Act, while on active service, he may be tried by a Court-Martial under the Army Act if such trial commences within six months after he had ceased to be so subject. The limitation of six months after the appellants' cessation of the subject of the Army Act expired long before the trial of the case commenced. Even if the limitation for such trial had not been expired, their trial by the criminal Court had not been ousted since the ordinary criminal Court had concurrent jurisdiction to try 'civil offence' as per provisions of sections 94 and 95 of the said Act.

For trial of civil offence by an ordinary criminal Court Sections 94 and 95 have been included in Chapter IX of the Army Act. Section 94 presupposes that both a criminal Court and Court-Martial have jurisdiction concurrently in respect of an act or omission punishable both under the Army Act as well as under any law in force. It may

also arise in case of an offence deemed to be an offence under the Army Act. Under the scheme of those two provisions, in the first instance, it is left to the discretion of the prescribed officer to decide before which court the proceedings shall be instituted and, if the officer decides that the case should be instituted before a Court Martial, the offender is to be detained in military custody. However, if a criminal Court is of opinion that the said offence shall be tried before the said Court, he may issue notice under Section 95 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Government. Upon receipt of the requisition the prescribed officer may either deliver over the offender to the said court or refer the question to the Government for determination as to whose order shall be final.

The next question is whether in view of Section 139 of the Penal Code and Section 549 of the Code, the trial of the appellants by a criminal Court is barred. Section 139 of the Penal Code is included in Chapter VII which contains Sections 131-140. Section 131 provides for abetting mutiny or attempting to seduce a shoulder, sailor or airman from his duty, Section 132 provides for abetment of mutiny, if mutiny is committed in consequence thereof, and other sections are relating to abetment of other offences. Section 139 prohibits punishment of any person who is subject to the Army Act, 1952, the Navy Ordinance, 1961, the Air Force Act 1953 under the provisions of Penal Code for any of the offences mentioned above, i.e. for the abetment of those offences mentioned in section 131 to 138. Thus section 139 of the Penal Code has no application in this case in view of the fact that the appellants have been tried and convicted not for committing an offence of abetment for mutiny but for a substantive offence of murder. Section 549 of the Code is of a special nature and has the result of taking away the jurisdiction of criminal Court with respect to persons subject to military, naval and air force law. The expressions “is liable, to be tried either by a court to which the Code applies or by a Court-Martial” used in the Section implies that the offence for which the offender is to be tried should be an offence of which cognizance can be taken by a Criminal Court as well as a Court-Martial. The phrase is intended to refer to the initial jurisdiction of the two Courts to take cognizance of the offence and not to their

jurisdiction to decide it on merits. In respect of offences which could be tried by both the Criminal Court as well as a Court-Martial, Section 94 and 95 of the Army Act have made suitable provisions to avoid a conflict of jurisdiction between those two Courts over which I have discussed above.

In Joginder Singh V. The State of Himachal Pradesh, AIR 1971 SC 500, the appellant Joginder Singh was convicted under section 376 of the Penal Code by the learned Assistant Sessions Judge while on active service and governed by the Army Act, 1950 (India). He challenged the legality of his trial and conviction on the ground that the provisions of the Army Act read with Criminal Court and Court Martial Rules, 1952 framed by the Government under section 549 of the Code were not complied with by the trial Court. It may be mentioned here that Sections 125 and 126 of the Army Act 1950 applicable to India and Sections 94 and 95 of the Army Act 1952 are in verbatim language. His conviction was upheld by the appellate Court and his objection was over ruled by the Supreme Court on the following observations:

> "It is further clear that in respect of an offence which could be tried both by a criminal Court as well as a Court-Martial, Sections 125, 126 and the Rules have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal courts and the Court-Martial. But it is to be noted that in the first instance, discretion is left to the officer mentioned in Section 125 to decide before which court the proceedings should be instituted. Hence the officer commanding the army, army corps, division, or independent brigade in which the accused person is serving or such other officer as may be prescribed will have to exercise his discretion and decide under Section 125 in which court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceeding should be instituted before a court martial, that the provisions of Section 126(1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in

> the way of a criminal Court exercising its ordinary jurisdiction in the manner provided by law."

In Balbir Singh and another V. State of Punjab (1995) 1 SCC 90, similar views have been expressed as under:

> "When a criminal court and court-martial each have jurisdiction in respect of the trial of the offence, it shall be in the discretion of the officer commanding the group, wing or station in which the accused is serving or such other officer as may be prescribed, in the first instance, to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a "court-martial", to direct that the accused persons shall be detained in Air Force custody. Thus, the option to try a person subject to the Air Force Act who commits an offence while on "active service" is in the first instance with the Air Force Authorities. The criminal court, when such an accused is brought before it shall not proceed to try such a person or to inquire with a view to his commitment for trial and shall give a notice to the Commanding Officer of the accused, to decide whether they would like to try the accused by a court-martial or allow the criminal court to proceed with the trial. In case, the Air Force Authorities decide either not to try such a person by a court-martial or fail to exercise the option when intimated by a criminal court within the period prescribed by Rule 4 of the 1952 Rules, the accused can be tried by the ordinary criminal court in accordance with the Code of Criminal Procedure."

In Major E.G.Barsay V. State of Bombay, AIR 1961 S.C. 1762 Major E.G.Barsay while on active service along with 5 other civilians conspired and dishonestly misappropriated military stores, and by abuse of their power by illegal means as public servants conspired to obtain military stores and committed theft. All of them were charged with the offences under the Prevention of Corruption Act, 1947 and Sections 381, 411 read with Section 34 of the Penal Code. The Special Judge found Major

E.G.Barsay guilty of the charges and sentenced him. He unsuccessfully moved an appeal before the Bombay High Court and then in the Supreme Court of India. He challenged the jurisdiction of the Special Judge to try him and also raised other points. It was observed by Subba Rao, J. as follows:

> `"The scheme of the Act therefore is self-evident. It applies to offences committed by army personnel described in S.2 of the Act; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by a fiction to be treated as offence under the Act; it provides satisfactory machinery for resolving the conflict of jurisdiction. Further it enables, subject to certain conditions an accused to be tried successively both by court-martial and by a criminal court. It does not expressly bar the jurisdiction of criminal courts in respect of acts or omissions punishable under the Act, if they are also punishable under any other law in force in India; nor is it possible to infer any prohibition by necessary implication. Sections 125, 126 and 127 exclude any such inference, for they in express terms provide not only for resolving conflict of jurisdiction between a criminal court and a court-martial in respect of a same offence, but also provide for successive trials of an accused in respect of the same offence."

In the case of Jamil Huq, the writ petitioners were tried and convicted by the Court Martial under the Army Act, 1952 for the offence of mutiny that took place in the night following 29th March, 1981 which resulted in the death of Ziaur Rahman, then President of Bangladesh. They filed writ petitions challenging the decision of the Court-Martial constituted under the Army Act. The High Court Division summarily rejected the writ petitions on the ground of lack of jurisdiction. The Appellate Division in the facts of the given case observed "if the Court-Martial is constituted properly and the offence committed is cognizable by it then the rest is a question of fact based on evidence which is held by all the authorities that the writ jurisdiction is not available to interfere. This Court is only concerned to examine the question whether the jurisdiction under Article

102 has been conferred and once it comes to the conclusion that the jurisdiction has not been conferred there is the end of the matter."

This case has no manner of application in the facts of this case.

On behalf of the appellants the learned Counsels have also referred the case of R.V. Grant, Davis Riley and Topley, (1957) 2 All E.R. 694. In that reported case, the appellants were convicted by a General Court- Martial held at Nicosia in Cyprus of the offences of mutiny. On the night of the incident a noisy outbreak took place in the barracks- the appellants held a meeting on the roof of the hotel at which they were stationed and then came down and acted riotous conduct and demolished the bar's shop as their grievances made to the authority were not redressed. They received an order from a Warrant Officer to disperse but they did not disperse. The House of Lords refused to interfere with their conviction on the reasonings as under:

> "I have not thought it necessary to take up time by going through the evidence in detail. The court is quite satisfied that there was evidence on which the court martial could find on a proper direction that there was a mutiny, and it is not for us to criticize the finding provided there was evidence on which they could come to the decision they did. For the reasons which I have endeavored to state as shortly as I can, the court is of opinion that there was no misdirection; that, although perhaps criticism could be made of the words the Judge-Advocate used when he made his interlocutory observation, there was a perfectly fair direction and nothing was said by the Judge-Advocate which could have misled the court martial. Therefore, on all these grounds the appeals should, we think, be dismissed."

This case is quite distinguishable in view of the observations made above that there is no legal evidence to show that the accused persons committed mutiny under the Army Act and they were also not tried and convicted for mutiny. In the above case, there are legal evidence in support of the charge of mutiny relying upon which the Court-Martial found those officers guilty of mutiny. In this case the accused persons were not on 'active

service' and they did not commit a 'civil offence' within the meaning of section 8(2) of the Army Act and therefore, the criminal Court had acted no excess of jurisdiction in convicting them. Even then, in order to avoid controversy, the learned Sessions Judge has accorded sanction from the prescribed authority for trial of the appellants and other accused persons, although their act does not come within the ambit of the Army Act. Therefore, I find no substance in the objection raised by the learned counsels for the appellants.

Criminal conspiracy

Now turning to the point of criminal conspiracy, it is contended by the learned counsels for the appellants that the prosecution has failed to prove the charge of criminal conspiracy for committing murder by adducing reliable evidence, but on the contrary, the evidence on record disclose a case of conspiracy to commit mutiny to change the Government of Sheikh Mujibor Rahman. Learned counsels argued that there is absolutely no evidence in support of the charge of criminal conspiracy for killing Bangabandhu Sheikh Mujibor Rahman and his family members, rather the evidence of Lt. Col. Abul Basher B.A. (P.W 7), Lt. Col. (Rtd) Abdul Hamid, (P.W.9), A.L.D. Sirajul Haq, (P.W.12), Habilder Md.Aminur Rahman(Rtd), (P.W.24), Naik Md. Yeasin (Rtd) (P.W.25), Md. Reajul Haque, (P.W.37), Hon. Lieutenant (Rtd) Syed Ahmed, (P.W.40), Col. (Rtd) Shafayet Jamil (P.W.44), Major General (Rtd) Shafiullah, (P.W.45), Major General (Rtd) Khalilur Rahman, (P.W.47), Air Vice- Martial (Rtd) A.K.Khandaker (P.W.48), and Rear Admiral (Rtd) M.H.Khan (P.W.49), clearly suggested about past transaction and in view of the findings of the learned Judges of the High Court Division that Section 10 of the Evidence Act had no application in the case, the existence of criminal conspiracy is absent in this case, but the learned Judges illegally maintained the conviction of the appellants under section 120B of the Penal Code. In this connection the learned counsels have referred the case of Kehar Singh V. State, AIR 1988 SC 1883.

On the other hand, it is contended on behalf of the State that there are sufficient evidence on record in support of the charge of criminal conspiracy to commit the murder of Bangabandhu Sheikh Mujibor Rahman and the members of his family. It is further

contended that the defence having admitted that there was criminal conspiracy to commit mutiny, but failed to substantiate its plea, the appellants could not escape from the charge of criminal conspiracy to commit murder. It is further contended that in view of the admission of the appellants that they have conspired to commit an offence, and the evidence of L.D.Bashir Ahmed (P.W.11), A.L.D. Sirajul Haq (Suspen) (P.W.12), Dafadar Shafiuddin Sarder (Rtd.) (P.W.13), Dafader Abdul Jabbar Mridha (Rtd.) (P.W.14), Resalder Abdul Alim Mollah (P.W.23), Habilder Md. Aminur Rahman (Rtd.) (P.W.24) Naik Md. Yeasin (Rtd.)(P.W.25), Subader Major (Rtd.) Anisul Haque Chowdhury (P.W.35), Resalder Munsur Ahmed (P.W.39), Hon. Lieutenant (Rtd.) Syed Ahmed (P.W.40), Col. (Rtd.) Shafayet Jamil (P.W.44) and Syed Siddiqur Rahman, curator (P.W.53), the learned Judges of the High Court Division have committed no miscarriage of justice in maintaining the charge of criminal conspiracy to commit murder of Bangabandhu and other members of his family.

A conspiracy is a matter of inference deduced from certain criminal acts of the parties accused done in pursuance of an apparent criminal purpose common between them. A criminal conspiracy consist not merely intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. When two agree to carry it into effect the very plot of act itself, and the act of each of the parties capable of being enforced, if lawful, possible if for a criminal object or for the use of criminal means. The elements of criminal conspiracy are (a) an agreement between two or more persons, (b) to do an illegal act, or (c) to do a legal act by illegal means, and (d) an overt act done in pursuance of the conspiracy. In order to prove a charge of criminal conspiracy for an offence under section 120B of the Penal Code, the prosecution need not prove that the perpetrators expressly agree to do or caused to be done the illegal act; the agreement may be proved by necessary implication. In a conspiracy, persons are often required to do various acts at various stages; even if for the first time they come into conspiracy, at a latter stage they are members of the conspiracy provided their act is calculated to promote the object of the conspiracy. It is no doubt true that the offence is complete as soon as an agreement is made between the conspirators; they would be

punishable under section 120B. The section is intended to be treated as a continuous offence and whoever is a party to conspiracy during the period for which he is charged is liable under section 120B.

The essence of the offence is the combination of agreement express or implied, the actus reus in a conspiracy is the agreement to commit an offence, not execution of it. It is enough if it is shown a meeting of minds, a consensus to affect an unlawful purpose. It can be established by direct or circumstantial evidence. Privacy and secrecy are more characteristic of a conspiracy, than of a loud discussion in an elevated place open to public view. It is not always possible to give direct evidence about the date, place and time of the formation of the conspiracy, about the persons that took part in the formation, about the objects which they set before themselves as the object of conspiracy and about the manner in which the object of conspiracy is to be carried out- all these are matters of inference that can be drawn from the facts of the case.

A conspirator is an agent of his associates in carrying out the object of the conspiracy. His acts and declarations are therefore, admissible against other conspirators on the same principle as the acts and declarations of an agent are receivable against his principal. The rule of evidence to prove an offence of criminal conspiracy is provided in Section 10 of the Evidence Act. This section is an exception to the general rule that acts, statements, or writings of a person are admissible only against himself and not against others. The acts, statements, or writings of a conspirator may therefore be given in evidence against an accused if it is shown that there are reasonable grounds to believe that the accused and the persons whose acts, statements, or writings are intended to be given in evidence were members of a conspiracy. Strict proof of “conspiracy” is not necessary; what is required by the section is that there should be “reasonable grounds” to believe that the accused and the persons whose acts, statements, or things are sought to be given in evidence have conspired to commit an offence.

Under the common law conspiracy consists in an agreement between two or more persons to achieve an unlawful object- unlawful being used in a special sense here. The offence consists in the combining. So long as such a design rests in intention only, it is

not indictable. When two agree to carry it into effect, the very plot is an act in itself. The offence is, therefore, complete though no further act is done in pursuance of the agreement and, provided that the stage of negotiations has been passed, it will be a conspiracy even "where the parties had not settled the means to be employed." Even if the stage of negotiations has not been passed, a conviction for attempted conspiracy may be possible.

There does not have to be direct communication between the alleged conspirators. If A communicates with B and C, or A communicates with B who himself communicates with C, all three may be convicted as co-conspirators. This rule is particularly important in the light of the special rules of evidence which apply to conspiracy (below). It is not necessary that a person charged with conspiracy should also be an accomplice. In the words of Dr. Glanville Williams;

> "Mere knowledge of and mental consent to a crime about to be committed by another does not make a man a conspirator, but quite a slight participation in the plan will be sufficient."

Indeed, if A incites B to commit a crime and B agrees to do so, A and B will, semble, be guilty of conspiracy. A will, of course, also be guilty of incitement.

The object of the rule is to ensure that one person shall not be responsible for the acts or deeds of another until some bond in the nature of an agency has been established between them. It is necessary to prove the existence of a conspiracy and to connect the accused with it in the first incident whether the witness seeks to give any evidence against him, the act, or declaration of co-conspirator. It is not necessary that it should be established by direct evidence that the accused and other conspirators whose acts, statements or writings are sought to be given in evidence against him entered into a formal consultation of agreement to commit an offence. As in cases of conspiracy direct evidence is rarely available, a conspiracy may be proved by the surrounding circumstances or by antecedent or subsequent conduct of the accused. A conspiracy need not be established by prove which actually brings the parties together. It may be shown like any other fact by circumstantial evidence. As observed above, in order to prove the

criminal conspiracy to commit the particular offence it is necessary to show that there are reasonable grounds to believe that the accused and other persons whose acts, statements or writings are intended to be given in evidence were members of the criminal conspiracy and if primafacie evidence of the existence of a criminal conspiracy is given and accepted the evidence of statement, act or deed made by one conspirator in reference to the common intention becomes admissible against all.

Anwarul Huq, J. speaking for the majority of the Supreme Court of Pakistan in Zulkikar Ali Bhutto V. Sstate PLD 1979 S.C 53 observed as follows:

> "In criminal law a party is not generally responsible for the acts and declarations of others unless they have been expressly directed, or assented to by him; "nemo reus est nisi mens sit rea". This section, however, is based on the concept of agency in cases of conspiracy. Conspiracy connotes a partnership in crime or actionable wrong. A conspirator is considered to be an agent of his associates in carrying out the objects of the conspiracy and anything said, done or written by him, during the continuance of the conspiracy, in reference to the common intention of the conspirators, is a relevant fact against each one of his associates, for the purpose of proving the conspiracy as well as for showing that he was a party to it. Each is an agent of the other in carrying out the object of the conspiracy and in doing anything in furtherance of the common design."

The expressions "in reference to their common intention" used in section 10 of the Evidence Act implies that the act intended is in the future and the section makes relevant statements made by a conspirator with reference to the future. This expression means in reference to what, at the time of statement, was intended in the future. Narratives coming from the conspirators as to their past acts can not be said to have a reference to their common intention. It is thus clear that after the common intention of conspiracy was no longer operating and had ceased to exist, is admissible against other party. Section 10 of the Evidence Act will come in to play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there

should be a primafacie evidence that a person was a party to be conspiracy before his act can be used against his conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said act is limited by two circumstances, namely, that the act shall be in reference to their common intention and in respect of a period after such period was entertained by any one of them.

The word 'intention' implies that the act intended is in the future, and the action makes the relevant statements made up by a conspirator with reference to the future. Anything said, done or written' by any of the conspirators is admissible under this section, if it is in reference of their common intention, even though it is not in furtherance of their common design. Accordingly anything said, done or written by a conspirator after the conspiracy was formed will be evidence against other conspirators whether it was said, done, or written before, during or after the other conspirators participated in the conspiracy. When specific acts done by each of the accused have been established showing their conviction with their common intention, they are also admissible against other accused.

Section 10 has a reference to Section 120A of the Penal Code which provides: "when two or more persons agree to do, or cause to be done, (a) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy." A proviso has been added which provides that no agreement except an agreement to commit offence shall amount to conspiracy. Therefore, it is apparent that a primafacie case of conspiracy has to be established for the application of Section 10 of the Evidence Act. There must be reasonable ground to believe that two or more persons have conspired together in the light of the language of Section 120A of the Penal Code.

In Bhagwan Swarup V. State of Maharashtra, AIR 1965 SC 682 the scope and tenor of Section 10 of the Evidence Act has been elicitated that as the opening words of this section indicate, will come into play only when the Court is satisfied that there is

reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a primafacie evidence that a person was a party to the conspiracy before his acts can be used against his conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the other, not only for the purpose of proving the existence of conspiracy but also for proving that the other person was a party to it. Anything so said, done or written is a relevant fact only "as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. Subba Rao, J. of the Supreme Court argued for the Supreme Court as under:

> "It can only be used for the purpose of proving the existence of the conspiracy or that the other party or for the purpose of showing that such a person was not a party to the conspiracy. In short, the section case be analyzed as follows: (I) there shall be a prima facie evidence affording a reasonable ground for the Court to believe that two or more persons are members of the conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour."

Similar views have been taken in Shivanarayan Laxminarayan Joshi and others Vs. State of Maharashtra and others, AIR 1980 SC 439 as follows:

> "In these circumstances, therefore, we are unable to accept the contention put forward by appellant No. 24. We may point out that under the

> principle contained in Section 10 of the Evidence Act, once a conspiracy to commit an illegal act is proved; act of one conspirator becomes the act of the other. This principle clearly applies to appellant No.24 once the knowledge of the conspiracy is proved."

The views taken by Subba Rao, J in Bhagwan Swarup (Supra) have been approved by Oza, J. in Kehar Singh V. State, AIR 1988 SC.1883 . It was said that Section 10 of the Evidence Act mainly could be divided into two parts: the first part talks of where there is reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong, and it is only when this condition precedent is satisfied that the subsequent part of the section comes into operation and it is material to note that this part of the Section talks of reasonable grounds to believe that two or more persons have conspired together and this evidently has reference to S. 120-A where it is provided "When two or more persons agree to do, or cause to be done". This further has been safeguarded by providing a proviso that no agreement except an agreement to commit an offence shall amount to criminal conspiracy. It will be therefore necessary that a prima facie case of conspiracy has to be established for application of S.10. The second part of Section talks of anything said, done or written by any one of such persons in reference to the common intention after the time when such intention was first entertained by any one of them is relevant fact against each of the persons believed to be so conspiring as well for the purpose for proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. Oza,J. while concurring with the views of Subba Rao,J. observed as under:

> "It is clear that this second part permits the use of evidence which otherwise could not be used against the accused person. It is well settled that act or action of one of the accused could not be used as evidence against the other. But an exception has been carved out in S.10 in cases of conspiracy. The second part operates only when the first part of the Section is clearly established i.e. there must be reasonable ground to

> believe that two or more persons have conspired together in the light of the language of S.120-A. It is only then the evidence of action or statements made by one of the accused, could be used as evidence against the other."

It is not correct to say that the learned Judges of the High Court Division observed that section 10 of the Evidence Act would not apply in this case for proving the charge of Criminal Conspiracy. The learned Judges were of the view that the confessional statements could not be used as substantive evidence in view of section 10 of the Evidence Act. Let us examine whether there is reliable evidence in support of the charge of criminal conspiracy. According to the prosecution, the accused appellants along with other accused persons hatched up a conspiracy for the killing the then President Sheikh Mujibor Rahman and the members of his family with a view to mitigate their personal vengeance and also to fulfill their ambition, and with that end in view, they arranged a night parade on 14th August, 1975, and at the night parade the appellant Lt. Col. Syed Farooque Rahman and other co-accused incited the jawans attended there by giving different speeches which they believed as false with malafide motive to secure their support for the fulfillment of the criminal object, that the accused officers compelled the troops to take arms and ammunition from the kote although it was strictly prohibited as per rules, that despite that there was no provision for amalgation of two units of army in the parade, the accused ignoring the rules with a view to fulfill their criminal object, amalgamated the troops of lancer and artillery units, that there was no convention or rule to continue the night parade beyond 11 p.m. but the officers ignoring the convention compelled the troops to continue the parade till the early hours of 15th August, that in course of continuation of the parade the accused officers secretly discussed amongst themselves and that thereafter they along with the troops marched towards the city, took control of the key points such as, Mintu Road, Radio Station, Rakshibahini and BDR head quarters and Dhanmondi Road No.32, and then they killed the President and other members of the family in a planned manner. The defence plea is that the night parade was a normal part of yearly army exercise which had no nexus with the killing of

Bangabandhu Sheikh Mujibor Rahman and his family members, that there was army revolt and as a consequence of mutiny Bangabandhu and his family members were killed. Now let us consider how far the prosecution has been able to prove the charge.

P.W.11 stated that on reaching at the parade ground he noticed that the parade was conducted disorderly, that at the parade Major Farooque Rahman came along with Major Ahmed Hossain, and then Major Farooque Rahman, Major Mohiuddin (lancer) and other officers went into the office of Major Mohiuddin (lancer), that he noticed some persons in white dress in the office of Major Mohiuddin, that he guessed them as officers, that at about 12 at mid-night, he came out of his room and noticed that the white dressed persons were coming out from the office of Major Mohiuddin, followed by Major Mohiuddin and thereafter, Mohiuddin called Huda to come nearer to him, that at that time Major Huda told Major Dalim to wait for some time and then he approached towards Major Mohiuddin, when Major Mohiuddin arranged uniform for them. The statements of this witness sufficiently proved that besides the army personnel, some officers in civil dress came and joined them, who were subsequently detected as army officers as Major Dalim and Major Huda. He further stated that the parade continued beyond the schedule time. It also appeared from the statement of this witness; Major Mohiuddin (lancer) took Major Farooque, Major Ahmed Shariful Hossain, Major Nurul Huq, Lt. Kismot Hashem and others into his office from the parade ground in the mid-night and had confidential discussions when the removed army officers also attended with them. This witness further stated that the parade was directed to fall-in again at about 3.30 A.M. and thereafter he took arms from the kote and then the Jawans were divided into groups and at that time, Major Mohiuddin briefed the Jawans for marching. This witness further stated that they marched and reached at road no.32 at 4.30 a.m. where Bangabandhu Sheikh Mujibor Rahman was residing. The defence did not cross-examine this witness as regards his statement that the parade was conducted disorderly, that he found Major Mohiuddin (lancer) and Major Farooque in the parade along with other officers in civil dress, that Major Mohiuddin and those officers in civil dress went into his office and discussed till 12 at night, that thereafter he arranged dress for those officers and that

thereafter, in the early hours on 15th August they marched to Bangabandhu's house with arms.

P.W.12 stated that at the parade ground, he found Major Farooque Rahman, Major Mohiuddin (lancer) and some other accused persons, that the parade continued till 3.30 A.M. and thereafter, they were asked to fall- in, that at the parade ground he noticed that Syed Farooque Rahman, Major Mohiuddin(lancer), Major Shariful Ahmed Hossain, Lt. Nazmul Hossain Ansar were secretly talking with J.C.O's by the side of the parade ground and thereafter, they came in front of them. He further stated that he noticed three unknown officers with uniform, that Major Farooque Rahman introduced them as Major Dalim, Captain Bazlul Huda but he could not recollect the name of other person, that Major Farooque Rahman briefed them that on 15th August a meeting would be held at University wherein Sheikh Mujibor Rahman would declare monarchy, that they did not support monarchy and that they would have to follow the directions to be given by him and other officers. He further stated that thereafter Major Frooque Rahman directed them to take arms from the kote and as per such direction; they took arms from the kote. He further stated that Major Mohiuddin (lancer) thereupon directed them to board into the vehicle and as per his direction; they boarded in four trucks and noticed that two other trucks with jawans were also present there and subsequently he came to know that they were jawans of artillery unit, who would participate with them. He further stated that they jointly marched via Balurghat, Mohakhali Road- Farm gate and reached at the meeting point of road no. 32 and that Mohiuddin directed them not to allow any persons to move through the road no.32 and that Mohiuddin told them that if they heard any sounds of firing they would not be frightened as they were theirs own people. The testimony of this witness clearly proved about criminal conspiracy, inasmuch as, the parade continued till 3.30 a.m , that there was confidential talks between the officers including the appellants Farooque Ahmed and Mohiuddin(lancer), that there was also amalgamation of jawans of two units, that Lt. Col. Syed Farooque Rahman incited them and that after taking ammunition they marched towards the road no.32 in the early hours of 15th August.

P.W.13 is a member of lancer unit and he also attended the night parade. He stated that at the night parade Major Farooque Rahman and Major Mohiuddin (lancer) were present, that the parade continued till 3.30 A.M. and at that time Major Khondker Rashid (artillery) came to their unit and then Moslemuddin and other army officers came there and boarded on a truck and then they directed them to follow them. He further stated that their vehicle stopped at Mohakhali where he noticed the jawans of artillery unit were standing there, that at that time one officer from artillery unit boarded in their vehicle, that thereafter they approached towards Indria Road- Mirpur Road-Satmosjit Road and then their vehicle stopped at the meeting point of road no.32 on the Mirpur Road. From the testimony of this witness it is proved that the night parade continued till late night and then the troops with officers marched towards Mohakhali where they found presence of the forces of artillery unit there, that Major Rashid came to their unit at mid-night and that their vehicle stopped at the meeting point of road no.32 in the early hours of 15th August.

P.W.14 stated that he was a member of lancer unit. He also attended the night parade which continued till the late hours of 14th August. He found Major Farooque, Major Mohiuddin (lancer), Major Ahmed Shariful Hossain, Lt. Kismot and Lt. Nazmul Hossain Ansar and some other persons in civil dress. He also noticed some officers of artillery unit with Major Rashid. He stated that Major Farooque directed them to fall-in and told them that for an emergency task they were directed to fall-in and then he introduced the persons in civil dress as Major Dalim and Major Shahriar. He further stated that Major Farooque told them that these two officers would work with them and that they were required to follow their directions and reminded them that in case of any negligence of duty, they would be dealt with severely. He further stated that at about 4 A.M., Major Farooque directed for moving of the tanks and Farooque commanded one tank, that the tanks started approaching at the same time and some tanks came at Radio Station-via Balurghat-Cantonment-Mahakhali and after reaching there, Major Shahrier, Major Dalim, Major Shariful Hossain talked for some time and then they entered into the Radio Station and some times thereafter, Major Farooque and Major Khondker Rashid

entered into the Radio Station. The statement of this witness that the parade continued till the late night, that some army officers attended in civil dress, that two units of army jointly marched with tanks towards the Radio Station and some of the accused persons entered into the Radio Station with tanks proved their acts as part of criminal conspiracy.

P.W.17 stated that he was a member of artillery unit during the relevant time and Major Mohiuddin (artillery) was commander of Papa Battery. He further stated that he attended the night parade and it continued till 12 at night and thereafter, as per direction of Habilder of cannon unit no.1, they took cannon-balls. He further stated that he noticed that the regiment officers were talking behind the cannons at the time of night parade. He recognized amongst the officers talking there were Major Khondker Abdur Rashid, Major Mohiuddin (artillery), Captain Mostafa and Captain Jahangir and two others. He further stated that some times thereafter Major Mohiuddin approached there and gave some instructions to Subedar Hashem and thereafter Hashem directed the force to board into the trucks and thereafter Hashem hooked six cannons in six trucks. Thereafter the trucks loaded with cannon started moving at 3.30/4-00 A.M. He was in the vehicle with Major Mohiuddin (artillery). Their truck stopped beside the Dhanmondi Lake at 4 A.M. and then Mohiuddin directed them to install the cannons aiming the Road No.32 and Rakshibahani Head Quarter and as per his direction, the cannons were fixed aiming Road No.32. He further stated that Mohiuddin directed them to fire cannon-balls when ever he would direct them to do so. Some times thereafter, they heard sounds of firing from the house of Bangabandhu and at that time, as per direction of Mohiuddin they fired 4 rounds of cannon-balls. The defence did not challenge the testimony of this witness and therefore, his testimony that as per direction of Mohiuddin, they installed cannon and fired of cannon-balls remain uncontroverted. The evidence of this witness proved that the appellants carried heavy artillery with them and that there were confidential talks between the officers.

P.W.18 stated that he was a gunner of artillery unit in which Khondker Abdur Rashid was commanding officer and Major Mohiuddin (artillery) was battery commander. He attended at the night parade. He further started that in their Papa battery

they had six cannons with them. He further stated that as per direction of Major Mohiuddin, they moved towards Balurghat –via New Air Port with cannons. They continued their night training till 12.30/1-00 A.M. He further stated that in course of training Khondker Abdur Rashid and Major Mohiuddin(artillery) inspected the parade. He further stated that at about 3.30/4-00 A.M. Abul Kalam directed their guns to amalgamate and to hook them with the vehicle. He further stated that after they were made fell-in, Captain Jahangir in presence of Major Mohiuddin told them that they had to perform an emergency work and it was to check Rakshibahini and directed them to follow their vehicle. He then narrated about the manner of marching of their unit towards Rakshibahini Head Quarter. This witness also proved that the parade continued till the early hours of 15th August and that they carried heavy arms with them on a false premise to check Rakhibahini.

P.W.21 stated that he was a jawan of artillery unit in which Khonkder Rashid was commanding officer and Major Mohiuddin was commander of Papa Battery. He also attended the night parade. He stated that at about 2 A.M. Major Rashid, Major Mohiuddin, Captain Bazlul Huda and some other officers came at the Air Port run way where they were taking rest. At that time Major Rashid told them to get ready with arms and ammunition as they were required to move for an emergency duty. As per his direction, they took ammunition and thereafter Captain Bazlul Huda directed them to board into the trucks and then the trucks started towards Dhanmondi. He further stated that at about 4/4.30 A.M some of them were directed to get down from the truck at Road No. 32 and directed them not to allow any person to move through the Road No. 32. He also proved that the appellants carried heavy arms and ammunition with them and marched to the Road No.32 from the parade ground, where Bangabandhu had been living.

P.W.22 stated that he was a jawan of artillery unit and he attended the night parade on the fateful night. He stated that the parade continued till 12 at night and after taking some rest at about 2/2.30 A.M, Khonkder Abdur Rashid came there with Major Mohiuddin, Captain Mostafa, Captain Bazlul Huda and some other unknown officers. At

that time Major Abdur Rashid enquired about their arms and they showed their arms and then he told them that they would be taken to an emergency work and that in case of necessity, they would use their arms, and that they took ammunition in their truck. He further stated that B.H.M. divided them in groups and directed them to board into the trucks. He further stated that their truck moved towards the Road No. 32 and at the time of Fazar Ajan, some of them were directed to get down from the truck at Road No. 32. They were directed not to allow anybody to enter into Road No. 32. The defence did not challenge the incriminating portion of his testimony. This witness proved marching of the jawans under the supervision of the appellants with heavy arms from the parade ground towards Dhanmondi and then the jawans got down from the vehicle at Road No.32 in the early hours on 15th August.

P.W.23 stated that he was a jawan of lancer unit and he attended the night parade on 14th August. He also stated that Major Farooque came in front of the tank and talked for some time with Lt. Kismot and thereafter Lt. Kismot directed Resalder Shamsul Hoque to make the squadron fell-in. Thereafter Major Farooque, Lt. Kismot and Resalder Shamsul Huq came there when Major Farooque directed for the movement of the tanks out side and queried to the Jawans amongst them who could operate tanks. Thereafter as per his direction six drivers of the tanks and some other jawans were picked up from amongst them and then he distributed the jawans for boarding in six tanks and also divided the duties of the officers. He further stated that at about 3/3-30 A.M, Major Farooque Rahman again came and as per his direction, the officers and the jawans boarded into the tanks and then the tanks were removed from the garage and kept them in queue position at the signal gate. Thereafter Major Farooque boarded in a tank and directed the other officers to board on the other tanks and as per his direction, the tanks moved towards south. This witness proved the movement of the tanks from the cantonment as per direction of Farooque Rahman in the early hours of 15th August.

P.W.24 stated that he was a jawan of artillery unit during the relevant time, that he attended the night parade as per direction of Major Khondker Abdur Rashid, and that they marched to Air Port as per his direction. He further stated that before their marching

they were directed to take arms with them. He further stated that Major Rashid told them that they would have to move at different places for emergency works and thereafter their battery commander took them to lancer unit. He found the jawans of lancer unit in fell-in condition. The commanding officer of lancer unit Syed Farooque Rahman amalgamated both the units together and briefed them. At that time he noticed the presence some officers of artillery unit. He also noticed some removed army officers there. Khondker Rashid and Syed Farooque introduced those officers as Major Dalim, Major Rashed Chowdhury, Major Shahrier and Captain Majed. Thereafter Khondker Abdur Rashid and Major Dalim delivered speeches stating that they liberated the country at the cost of blood-the present Government failed to protect the modesty of the women folk-the people are dying for starvation- thus the Government should be toppled. Thereafter Major Syed Farooque Rahman and Major Abdur Rashid directed them to take ammunition and as per their direction they took ammunition from the armoury. Thereafter they marched towards the city.

The evidence of this witness proved that the parade continued till late-night in which some dismissed army officers also attended, who were not supposed to remain present there that they took arms before they marched towards the town as per direction of Major Farooque and Major Rashid, that Major Dalim and Major Rashid incited the jawans that they would topple the Government by giving speeches which they believed to be false, and that two units of army were amalgamated before the troops marched towards the town. The defence did not challenge the testimony of this witness so far as it related to amalgamation of two units of lancer and artillery by Major Farooque; Major Farooque's briefing to the units and the presence of Major Abdur Rashid there. In course of cross-examination, this witness stated that there was no provision for joint parade of different units in the night parade. He reaffirmed his statements in chief that as per direction of Major Farooque, their unit was amalgamated with lancer unit. There is also no denial that as per direction of Major Farooque and Major Rashid they took ammunition with them.

P.W.25 is a jawan of artillery unit during the relevant time. He also attended the night parade and stated that at about 3/3.30 a.m, they were made to fall-in as per direction of Captain Mostafa and then they marched at an open space of tank unit and noticed the presence of jawans of tank unit. He further stated that they were divided into six groups. Major Khondker Abdur Rashid, their commanding officer and Major Farooque Rahman, the commending officer of the tank briefed them. Major Rashid, Captain Mostafa, Major Dalim, Captain Majed and other officers were present there. Major Dalim gave a speech there followed by Major Farooque and Rashid. They stated that they liberated the country in exchange of many lives – the Government failed to protect the modesty of mothers and sisters- people were dying for starvation- the Government should be toppled. Thereafter they directed them to take ammunition and then as per their order, they marched towards the house of Minister Abdur Rob Serniabat. Thereafter he narrated the incident of killing of the family members of Serniabat. In course of cross-examination by Lt. Col. Mohiuddin, this witness stated that the ammunition was piled up in front of lancer ammunition store and as per order of Major Farooque Rahman they took ammunition. The testimony of this witness revealed that the jawans of artillery unit were amalgamated with tank unit jawans and that Major Farooque, Major Rashid and Major Dalim delivered speeches for toppling the Government and as per their direction, they took ammunition with them. The testimony of this witness was not challenged by the defence in any manner.

P.W.26 stated that he was jawan of artillery unit during the relevant time in which Major Mohiuddin (artillery) was commander of Papa Battery. He stated that Major Khondker Abdur Rashid directed him to keep the key of ammunition store with him. He further stated that at about 11/11.30 A.M. Major Khondker Abdur Rashid and Captain Jahangir came in front of ammunition store with 10/12 jawans of artillery and lancer units. As per direction of Rashid he unlocked the ammunition store and then as per his direction the jawans took ammunition of cannon, rifle, stangun, S.M.G, Pistol etc. The testimony of this witness has not been challenged by the defence and therefore, his testimony remains uncontroverted.

P.W.27 stated that he was a jawan of field artillery during the relevant time, that he attended the night parade and then from the parade ground they marched towards new air port road, that at about 3/3.30 a.m. Major Mohiuddin(artillery) came there and directed them to fall-in and also directed some jawans to board into the vehicle with Major Mohiuddin. Major Mohiuddin told them that the Rakshibahani would attack army and they should prepare for such eventuality. He saw one cannon was hooked with the vehicle, four other cannons were also hooked in other vehicles. Thereafter they marched towards Mohakhali- Farm Gate- Green Road- Elephant Road- Mirpur Road and then came to Kalabagan area near the lake and they were directed to get down from the vehicle. Major Mohiuddin (artillery) directed them not to allow anybody to move through this road. The testimony of this witness has not been challenged by the defence. He proved that the officers incited the jawans by delivering false speeches that Rakhibahini would attack them and by making them believe to the false pretext, they were compelled to carry heavy artillery with them in order to fulfill their object.

P.W.32 stated that he was a jawan of artillery unit, in which, Major Mohiuddin was their commander. He attended the night parade and at the parade he recognized Major Khondker Abdur Rashid, Major Mohiuddin, (artillery), Major Zubair Siddique, Captain Mostafa and Lt. Hasan. He stated that the parade continued till 3/3.30 A.M, when Habilder Mozaffar made them to fall-in. At that time those officers including Major Dalim were also present there. As per direction of Rashid, Habilder Mostafa directed them to board in 3 / 4 trucks and thereafter kote N.C.O. Shamsul Islam gave them ammunition. The testimony of this witness has not been challenged by the defence and the same remain uncontroverted. He then stated that they proceeded for sometime and then they were directed to get down on the road beside Tejgaon air port. He further stated that they were directed not to permit any body to move through the road.

P.W.34 stated that he was a jawan of artillery unit, in which, Major Mohiuddin (artillery) was Battery Commander. He also attended the parade. He stated that after the parade they marched to the new air port with six tanks. At about 10 P.M, he heard sound of Major Mohiuddin’s gun firing and at that time he was talking with gunners. He further

stated that at about 2.30 a.m. they were made to fall-in and directed them to board in a vehicle. They marched towards Mirpur road via- Farm gate towards the eastern side of the lake and then they took their position there. The guns were set in there. At that time Major Mohiuddin (artillery) stood behind the gun and directed them not to allow any person to move through the road. The defence also did not challenge his statement.

P.W.39 stated that he was a driver of lancer unit during the relevant time and in his unit Major Farooque was the commanding officer-in-charge. He also attended the night parade. He found Major Mohiuddin (lancer), Major Shariful Islam and other accused persons were present at the parade. He stated that Major Farooque told them that for an emergency purpose the tanks would be moved out side and directed them to get ready. Thereafter he told the jawans and officers to resume to their duties. At that time, he stated, Major Dalim and another officer came to their unit. Major Dalim wanted uniform and he was supplied him the uniform. He further stated that the tank unit marched via Air Port towards Bangabhaban. The evidence of this witness revealed that though there was no provision for taking tank out side the cantonment, on the fateful night the tanks were moved towards the town and that the removed army officers in civil dress attended the parade.

P.W.40 stated that he was a Lieutenant of lancer unit during the relevant time. He claimed that he attended the night parade in which Major Farooque was their commander. He handed over the parade to Major Mohiuddin (lancer) who then handed over the parade to Major Farooque. He stated that the parade continued till 2/3.00 a.m. although it was supposed to close up at 12 at night. He further stated that Major Farooque told him to take care about the regiment and to close down the gate. In reply to his query, Major Farooque told him that they were going to remove the autocratic Government. The defence did not challenge the testimony of this witness although this witness specifically stated that Major Farooque and other persons were moving to topple the Government.

P.W.44 stated that after the arrival of repatriated army officers from Pakistan, dissatisfaction amongst the officers cropped up over their promotion, salary and other benefits, that by the same time propagandas were circulated within the army over the

allocation of budget of the Rakhibahini, that at that time Major Dalim harassed some political workers on the plea of recovery of arms for mitigating previous grudge, that Major Dalim was removed from the service for disorderly acts, that in consequence thereof Major Noor Chowdhury attacked the Government by using slang language, that there was no provision for joint night training of two units of army, that there was also no provision for taking live ammunition at the night training and that at about 6 a.m. of 15th August, he woke up on hearing the sounds kicking on the door and on opening the door he saw that Major along with two other officers with heavy arms infront of the door who declared that they had captured power under Khandaker Mostaque - Sheikh was killed and warned him not to take any action against them. From his evidence it is found the seeds of conspiracy were sown after the creation of Rakhibahini by the accused persons. He proved that there was prohibition for joint night training of two units of army with ammunition. The defence did not challenge the incriminating part of his testimony.

P.W.53 stated that he was a Subedar Major of artillery unit in which Major Mohiuddin(artillery) was Papa Battery Commander. He further stated that Major Syed Farooque Rahman used to visit the office of their commanding officer Major Abdur Rashid and talked with him many times in the month of August, 1975. He further stated that Major Rashid arranged the night training programme in August and as per programme, he arranged the 14th August night for the purpose. He further stated that Major Mohiuddin took over parade from Captain Jahangir and then he handed over the parade to Major Rashid. He further stated that at about 10 P.M. Major Rashid and Major Farooque came to the varendha of his office and some times thereafter, they jointly left the place with a jeep.

These are the evidence in support of the charge of criminal conspiracy to implement the object of killing Bangabandhu Sheikh Mujibor Rahman and his family members. From these evidence, it is proved that Lt. Col. Rashid arranged the joint night parade on 14th night with a view to fulfill their premeditated plan of conspiracy. As a part of conspiracy, the parade was dragged on till the early hours of 15th August, and in the said parade removed army officers also attended. The officers talked secretly in the

office of Mohiuddin (lancer) and then by the side of the parade ground, they incited the jawans by giving false speeches that Rakhibahini would attack them and it was also pointed out that unless the President was removed, he would declare monarchy in the country on 15th August. They in fact concealed their plan to the jawans that they were going to kill the President lest their plan was frustrated and told them to topple the Government. They took heavy arms and ammunition like tank, cannon etc. which could only be used during the war time. They amalgamated two units of army violating the established army rules and moved with heavy artillery outside cantonment, and deployed armed troops with officers at key points before they moved to the house of Bangabandhu.

From the above evidence it has been proved that P.Ws. 11, 12, 13, 14, 23, 24, 25, 35, 39 and 40 have recognized Lt Col. Farooque Rahman, P.Ws. 11,12,14 and 39 have recognised Major A.K.M. Mohiuddin Ahmed, P.Ws. 17,18,21,22,26,27,32,34 and 53 have recognised Lt. Col. Mohiuddin Ahmed (artillery), P.Ws.14 and 24 recognised Lt. Col. Sultan Shahrior Rashid Khan, and P.Ws. 11,12,21 and 22 recognised Major Bazlul Huda at the night parade ground where they made their preparation of the criminal conspiracy to kill the President and others. The defence did not challenge the incriminating part of the evidence of these witnesses about their complicity in the criminal conspiracy.

According to the prevailing criminal jurisprudence being followed over a century in our Courts, the prosecution is required to prove its case beyond all reasonable doubt and the defence need not prove its case. If from the lips of the witnesses in course of their cross-examination or from the suggestions given to the witnesses the defence has been able to bring out something which is favourable to them, it will get the benefit of doubt. Though the defence need not require to prove anything, if the defence raises a special plea in support of its case, the burden to prove the existence of that fact lies upon the defence in view of Section 105 of the Evidence Act. If the defence admits a fact in course of taking its defence but fails to substantiate its claim, then certainly the said fact will go against it. In this case the defence has admitted that the acts of the appellants and other

accused are criminal conspiracy to commit mutiny, but it has utterly failed to substantiate its claim.

If the accused sets up a plea that he is protected by one of the exceptions, general or special, in the Penal Code, or any other law defining the offence, the burden of proving the exception undoubtedly lies upon him. But this burden is only undertaken by the accused, if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged. If the prosecution does not establish affirmatively that the accused had done any act which rendered him liable for the offence but the accused raises a plea amounting to a confession of guilt, the Court can convict him relying upon that plea, but if the plea amounts to admission of facts and raises a plea of justification, the Court cannot proceed to deal with the case as if the admission of facts which were not part of the prosecution case was true. Since the defence has admitted the prosecution case of criminal conspiracy but fails to substantiate its plea the reasonable conclusion that can be inferred is that they have participated in the incident other than that has been taken in their defence.

The circumstantial evidence such as the meetings of the accused persons at the night parade on 14th August, the communications and the transmission of thoughts sharing the unlawful design which are difficult to prove but relevant in the case, their approach to the place of occurrence and other key points with heavy arms and ammunition from the night parade in the early hours of 15th August, the deployment of troops with heavy arms at key points and in consequence of such conspiracy, their subsequent act are sufficient to come to the conclusion that the appellants along with other co-accused hatched up criminal conspiracy to kill the then President and other members of his family. The High Court Division, in the premises, is justified in finding the appellants guilty of the charge of criminal conspiracy.

Confession

It was contended on behalf of the appellants that the confessional statements of Lt. Col. Syed Farooque Rahman, Lt. Col.Sultan Shahriar Rashid Khan and Lt. Col. Mohiuddin Ahmed (artillery) were procured by torture and coercion by the police after

keeping them on police remand for a long time and therefore, the confessions not being voluntary could not be the basis for the conviction. It was further contended that the confessions of these accused were not voluntary would be apparent from the reasonings and findings given by first learned Judge and therefore, the conviction of the appellants relying upon them is illegal. It was further urged that since the learned Judges of the Division Bench were equally divided in their opinions as regards the confessional statements of Lt. Col. Sultan Shahriar Rashid Khan and Lt. Col. Syed Farooque Rahman, it was obligatory on the part of the third learned Judge to consider their confessional statements, but the third learned Judge having not considered them, the conviction of the appellants relying upon these confessions is illegal and without jurisdiction.

Mr. Anisul Huq and Mr. Mahbube Alam, on the other hand, contended that the first learned Judge while disbelieving the confessions not only misread of the materials on record, but also on a misconception of law disbelieved the confessions. In refuting the claim of the learned counsels for the defence, it was contended that in no case the confessing accused were kept on police custody before recording their statements beyond the statutory period provided in section 167(2) of the Code. In this connection the learned Attorney General drew our attention to the statements of P.W.61 and submitted that the appellant Farooque Rahman was taken on police remand for 13 days on two occasions in Lalbagh P.S. Case No.11(11)75 before the institution of the instant case on 2nd October 1996, and that Ltd. Col. Sultan Shahrior Rashid Khan was also taken for 15 days remand on three occasions in the said case before he was shown arrested in this case on 3rd October 1996, but the first learned Judge without considering those facts illegally disbelieved their confessions on the reasonings that they were continuously kept on police custody beyond the prescribed period. In view of the above, the learned Attorney General contended that the findings of the first learned Judge that the confessions of Lt. Col. Farooque Rahman, Lt. Col. Mohiuddin Ahmed (artillery) and Lt. Col. Shahrior Rashid khan were not voluntary had no basis at all.

Lt. Col. Sultan Shahriar Rashid Khan was shown arrested in this case on 3rd October, 1996 and he was taken on police remand for 7 days on 30th November, 1996 and

thereafter he was taken on remand for 5 days more on 7th December, 1996 and then his confession was recorded on 11th December, 1996. The English rendering his confession has been meticulously reproduced by the learned Judges. In his confession he narrated regarding his joining in the army, his participation in the liberation war, his posting at different stations and then he stated that he consented to the proposal of co-accused Major Dalim that the misdeeds of Sheikh Mujib were required to be redressed. He further narrated about the initial discussions at his business establishment at 'Shery Enterprise' with some accused and then with Major Noor, Major Aziz Pasha, Captain Bazlul Huda, at different places with co-accused and Khandaker Mostaque Ahmed at his residence, and the finalisation of their plan on 15th August 1975 at 10 P.M. at his residence, and about his participation at the night parade for implementing the premeditated plan to fulfill their object of killing, the distribution of their duties and responsibilities at different key points such as, at Minto road, Radio Station, Bangabandhu,s house in the early hours of 15th August, the killing of Abdur Rob Sherniabat and his wife and the killing of Bangabandhu, the manner of taking control of Radio Station and the preparation of speech for Khondker Mostaque Ahmed by Taheruddin Thakur, and the recording of the declarations of allegiance of Chiefs of three forces for broadcasting, the presence of General Ziaur Rahman and other high ranking officers at the Radio Station and his presence at the oath taking ceremony of Khondker Mostaque Ahmed as President of the country and the cabinet. He has implicated all the appellants in the incident. The statement appears to me as inculpatory in nature. P.W.51 proved his statement.

As regards the confessional statement of Lt. Col. Syed Farooque Rahman, it appeared that he was shown arrested on 3rd October, 1996 in this case. Thereafter he was taken on police remand for 7 days on 12th December, 1996 and then his confessional statement was recorded on 19th December, 1996. His confession was also extensively reproduced in the judgments of the learned Judges. He has narrated about his joining in the army, his deputation at different sectors, his meeting with Col. Osmani at Calcutta during the war of liberation and then his absorption in the Bangladesh Army in the Bengal Lancer Unit. He then narrated regarding some incidents that occurred at

Munshigonj and Narshingdi at the time of recovery of illegal arms and another incident relating to Major Dalim's wife with Gazi Golam Mostafa's son at Ladies Club, the removal of Major Dalim, Major Noor and some other army personnel from the services of army for vandalizing the house of Gazi Golam Mostafa, his discussion with Major Rashid after the creation of BAKSHAL for a change in the country, the discussion between Major Abdur Rashid and Khandaker Mostaque Ahmed over political situation, his contact and discussion with Ziaur Rahman over the issue of topling Sheikh Mujib Government, his discussion with Lt. Col. Abdur Rashid on 12th August 1975, the finalisation of the plan on 14th August at night parade for implementing their object in the morning of 15th August, and his disclosure for implementing their plan to some accused and then he narrated his briefings to the officers to implement their object. He also admitted that as part of conspiracy the took ammunition from the armoury and the marching of the troops from the night parade with tanks towards the key points and the killing of Bangabandhu Sheikh Mujibor Rahman and his family members, Sheikh Fazlul Hoque Moni and his wife. Then he narrated about the subsequent events. His statement is inculpatory in nature and P.W.51 proved his statement.

In respect of Lt. Col. Mohiuddin Ahmed (artillery), it appeared from the record that he was taken on police remand for 7 days on 19th November, 1996 and thereafter he made his confessional statement on 27th November, 1996. His statement was also extensively narrated by the learned Judges of the High Court Division. He disclosed regarding the dissatisfaction in the ranks of Jawans over their salary, ration and uniform, creation of Rakkhibahini, BAKSHAL and the appointment of Governors. He then narrated about his contact with Major Khondker Abdur Rashid and their discussions some times in middle of May, 1975 at Ramna Park, and showing him the locations of Kalabagan, Lake Circus Playing ground and Bangabandhu's house by Rashid and then he narrated about his presence at the night training at Balurghat, the speech of Major Farooque Rahman about the manner of implementing their plan; the distribution of responsibilities among the officers to implement their plan; the marching of troops with arms from the training ground towards Road No.32 , Minto road, Radio Station, B.D.R.

head quarter and the Rakkhibahini Head Quarter, the manner of setting up cannon at Kalabagan play ground aiming Bangabandhu's house, and the subsequent conducts of all the accused persons after the killing of the President and the constitution of command council to run the country under Khondker Mostaque Ahmed. He admitted his participation in the incident from Kalabagan play ground. His statement is inculpatory in nature. His statement has been proved by P.W.52.

P.W.51 stated that he recorded the confession of Sultan Shahrier Rashid Khan after compliance of formalities required under section 364 of the Code that he explained to the accused about the contents of his statement and that after recording statement he issued a certificate as to the correctness of the statement. This appellant did not challenge his statement that he did record his statement in accordance with Section 364. He admitted that he did not make comment in column no.8 of the form. He gave an explanation that as the accused did not complain to him any ill treatment he did not fill up the column. He denied the defence suggestion that he recorded the statement of the accused under duress and torture after he was kept in wrongful police custody or that the statement was not read over to him and that it was not voluntary. This witness also stated that he recorded the statement of Col. Syed Farooque Rahman after compliance of the formalities required under section 364 of the Code, that after recording his confession the accused was returned back to the Court of Chief Metropolitan Magistrate, that on the same day the C.M.M. acknowledged the receipt of the accused and that he issued a certificate. The confessing accused Syed Farooque Rahman did not challenge his claim of recording statement in accordance with the provisions required by law. He denied the defence suggestion that at the time of recording his statement an A.S.P. of C.I.D., the investigating officer and other police officers were present in his room. He admitted that he did not fill up columns 3,4,8 and 10 of the confessional statement form. He however, denied the defence suggestion that the accused reported to him about police torture after he was produced before him.

Md. Habibur Rahman (P.W.52) stated that at the time of recording confession of Lt. Col. Mohiuddin Ahmed (artillery), he followed the procedures provided by section

364 of the Code, that after recording he issued a certificate and that the accused was sent to jail custody. This confessing accused also did not challenge the claim of this witness that his statement was recorded in accordance with the procedure required by law. He admitted that the column no.1 of the form was kept blank. He denied the defence suggestion that the accused did not make any confession to him or that he signed a statement after being prepared by the investigating officer or that the signature of the accused was obtained by force in presence of the police and that the statement was not true or voluntary.

In column no.1 of the form of the statement of Lt. Col. Mohiuddin Ahmed, it was mentioned by P.W.52 that the accused was produced at 11 A.M. on 27th November, 1996 and his statement was recorded at 2 P.M. Therefore, it is not correct that P.W.52 did not mention the date and time of producing the accused and the time of recording his statement. Column nos. 3 and 4 of the form are the instructions and guide lines given by the High Court Division for following by the Magistrates while recording confessional statements. Column no.3 relates to the explanation to be given to the confessing accused each of the matters mentioned in column 5 and to caution him to reflect carefully before making the statement. The queries required to confront the accused in column 5 had been confronted in column 6. P.W.51 has duly filled up the columns and thus the accused should not have any grievance in this regard. In course of cross-examination this witness denied the defence suggestion that at the time of recording statement any police officer was present in his room. Column 8 relates to the brief statement of Magistrate's reasoning regarding his satisfaction of the voluntary nature of the statement. P.W.51 stated that it was recorded in accordance with law and that the accused on being satisfied of the correctness of the statement put his signature. Column 10 contains the time of forwarding the accused after recording confession. P.W.51 stated that after recording statement he forwarded the accused to the Chief Metropolitan Magistrate on the same day with the record.

The object of putting questions to an accused who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or

promise having reference to the charge against him as mentioned in Section 24 of the Evidence Act. There is hardly any irregularity in the recording of the statements as pointed by the learned counsel. The evidence on record proved that the confessing accused was not kept with police custody beyond the statutory period in this case. The first learned Judge on a superficial consideration of the record and the evidence disbelieved the statements as not voluntary.

Chapter XLV of the Code deals generally with irregular proceedings. There broadly speaking the question is whether the error or irregularities has caused prejudice to the accused or as some of the sections put it, has occasioned a failure of justice. The Code` has carefully classified certain kinds of error and expressly indicates how they have to be dealt with. In every such case the court is bound to give effect to the express commands of the legislature; there is no scope for further speculation. The only class of case in which the courts are free to reach a decision is that for which no express provision is made.

In this particular case we are concerned with section 533 of the Code. The first learned Judge has wrongly noticed section 537 of the Code in considering any error or omission or irregularities that occurs while recording confessional statement by a Magistrate. Section 533 reads as follows:

> "533. Non-compliance with provisions of section 164 or 364.(1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.
>
> (2) The provisions of this section apply to Courts of Appeal, Reference and Revision."

This section provides a mode for the rectification of an error arising from non-compliance with any of the provisions of section 164 or section 364. The object is to prevent justice being frustrated by reason of such non-compliance. If any of the provisions of this section have not been complied with by a Magistrate, the document may be admitted under this section upon taking evidence that the statement recorded was duly made, if non-compliance has not injured the accused to his defence on the merit. If the record of the confession or the statement is inadmissible owing to the failure to comply with any of the provisions of Section 164 or Section 364, intrinsic evidence notwithstanding anything in Section 91 of the Evidence Act may be given to show that the accused person duly made the statement and the statement, when so proved may be admitted and used as evidence of the case, if non-compliance has not injured the accused. The non-compliance with the provisions is cured only when there is no injury caused to the accused as to his defence on merit. Similar views have been expressed in Mohammad Ali and others V. Emperor, 35 Cr.L.J. 385(F.B.) as follows:

> "In view of the provisions of the sections of the Code of Criminal Procedure, particularly those contained in s. 533, Criminal Procedure Code, it is difficult to say that the omission to record questions and answers is a fatal defect, and that it is only by recording such questions and answers that a confession can furnish data which enable the court to arrive at the conclusion as to the voluntary nature of the confession. It is equally difficult to hold that when supplying these data or materials it would always be "impossible" for the trial Court to form an estimate as to the voluntary nature of such confession. The defect no doubt is a gross irregularity and it may in certain special cases injure the accused in his defence on the merits, but barring such cases such a defect is completely cured by the provisions of s. 533 of the Code of Criminal Procedure. It is open to a court to come to a conclusion from the internal evidence furnished by the statement itself or from other evidence that the statement had been voluntarily made, and the mere fact that there was an omission to

record questions and answers would not debar the court from coming to that conclusion. Nor can it be said that without these data or materials it is "impossible" for a court to arrive at the conclusion that the confession had been made voluntarily. Where, of course, the defect is not merely one of recording it in due form and in accordance with law but there is a defect that the statement was not duly made at all, the position would be different."

In the Kehar Singh's case (AIR 1988 SC 1883) a question arose about the defect in the procedure in recording the confession of Kehar Singh. B.C. Ray, J. on consideration of Nazir Ahmed's case (AIR 1936 P.C.253) and the provisions of Section 533 observed as follows:

"On a consideration of the above decisions it is manifest that if the provisions of S. 164(2) which require that the Magistrate before recording confession shall explain to the person making confession that he is not bound to make a confession and if he does so it may be used as evidence against him and upon questioning the person if the Magistrate has reasons to believe that it is being made voluntarily then the confession will be recorded by the Magistrate. The compliance of the sub-sec.(2) of S. 164 is therefore, mandatory and imperative and non-compliance of it renders the confession inadmissible in evidence. Section 463 (old Section 533) of the Code of Criminal Procedure provides that where the questions and answers regarding the confession have not been recorded evidence can be adduced to prove that in fact the requirements of sub- sec. (2) of S. 164 read with S. 281(old Section 364) have been complied with. If the Court comes to a finding that such a compliance had in fact been made the mere omission to record the same in the proper form will not render it inadmissible evidence and the defect is cured under S. 463 but when there is no-compliance of the mandatory requirement of S. 164(2) Criminal Procedure Code and it comes out in evidence that no such explanation as envisaged in the

aforesaid sub-section has been given to the accused by the Magistrate, this substantial defect cannot be cured under S. 463 Criminal Procedure Code."

Similar views have been expressed in Nalini's case (1999) 5 SCC 253.

"Even if there is an error committed by the Magistrate while recording a statement of the confessing accused if it is mere an irregularity and if such error or defect or non-compliance has not prejudiced the accused in taking his defence, it is curable under section 533 Cr.P.C. and by this irregularity under no stress of imagination it can be said that the accused is likely to be prejudiced in his defence on the merits on account of such omission and irregularity".

What section 533 therefore, does is to permit oral evidence to be given to prove that the procedures laid down in Section 164 had in fact been followed when the Court finds that the record produced before it does not show that was so. If the oral evidence established that the procedure had been followed, then only can be record to be admitted. The Section permits oral evidence to prove the procedure had actually been followed for certain cases where the record which ought to show that does not on the face of it do so. In this case P.Ws. 51 and 52 have explained the defects and the confessing accused have been able to cross-examine them on those points. There is, therefore, hardly any grievance on the part of the accused that they have been injured by reason of such defects.

It appeared from the record, Lt. Col Sultan Shahrier Rashid Khan retracted his confession on 5th February, 1997 after 52 days of his confession; Lt. Col. Syed Farooque Rahman retracted his confession on 1st March, 1993 after 43 days of his confession and Lt.Col. Mohiuddin Ahmed (artillery) also retracted his confession after more than 30 days of his confession. There is no explanation on the side of defence about the delay in filing the applications for retraction. Therefore, it can be inferred that these petitions for retractions are after thought devices for nullifying the admissions made in the statements. Section 80 of the Evidence Act gives sanction to the *maxim, Omnia Praesumuntur rite et solemniter esse acta,* with regard to documents taken in course of a judicial proceeding. It does not render admissible any particular kinds of evidence, but only dispenses with the

necessity of formal proof in the case of certain documents taken in accordance with law. The section applies to classes of documents,

(a) purporting to be the record of the evidence of a witness given in a judicial proceeding and ,

(b) purporting to be the record of the statement or confession of a prisoner or an accused person.

The essential requirements for raising the presumption under section 80 of the Evidence Act as to the genuineness of a document purporting to be the confessional statement given by an accused in a proceeding appear to be that the statement should have been taken in accordance with law. The law relating to the mode in which the statement or confession of an accused person has to be taken down is contained in sections 164 and 364 of the Code. The examination of an accused person including every question put to him and every answer given by him shall be recorded in full in the language in which he is examined, or if that is not practicable, in the language of the Court or in English; such record shall be shown or showed to him and, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands. The record shall be signed by the accused and the Magistrate. When such a document is tendered in evidence and it is found that a memorandum required by Section 164(3) has been given, a presumption arises under section 80 of the Evidence Act that all the necessary formalities purporting to have been performed and the documents become admissible in evidence without further proof.

The question is whether in view of such retraction, the confessions can be used against the maker and as corroborative evidence against other co-accused. In Joygun Bibi V. State, 12 DLR (SC) 156, Abdul Majid made a confession implicating him and Joygun Bibi about the murder of Abdus Samad, husband of Joygun. The trial Court relying upon it and the statement of one Zohura, maid servant of Joygun, both Abdul Majid and Joygun Bibi were convicted. The High Court believed the confession of Abdul Majid as voluntary which was corroborated by circumstantial evidence, and maintained the conviction of Abdul Majid despite retraction. As regards Joygun Bibi, the High Court did

not consider the confession of co-accused Majid on the ground that as the confession has been retracted, it has practically no evidentiary value against Joygun Bibi but maintained her conviction relying upon the evidence of Johura and other circumstantial evidence on record. The Supreme Court of Pakistan did not accept the proposition of law argued by the High Court. It was said that retraction of a confession is a circumstance which has no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and on the further question whether it is true. The fact that the maker of the confession later does not adhere to it cannot by itself had any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true, for to withdraw from a self-accusing statement in direct face of the consequence of the accusation, is explicable fully by the proximity of those consequences, and need have no connection whatsoever with either its voluntary nature, or the truth of the facts stated. The High Court was perfectly right in first deciding these two questions, and the answers being in the affirmative, in declaring that the confession by itself was sufficient, taken with the other facts and circumstances, to support Abdul Majid's conviction. Cornelius,C.J. speaking for the Supreme Court argued as follows:

> "The retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true. That being the case, no reason whatsoever can be found for the inability felt by the learned Judges in taking the confession into consideration against the co-accused. It is true that if there were no other evidence against Joygun Bibi except the confession of Abdul Majid, then, the confession by itself being merely a matter to be taken into consideration, and not having the quality of evidence against Joygun Bibi, it could rightly be held in law that her conviction could not be sustained on the confession alone. The grounds for this conclusion would undoubtedly gain weight if the confession were also retracted. But in the present case, Abdul Majid's confession is by no means the only material in the case to be taken into consideration against Joygun Bibi. As will be seen presently, the evidence of the maid-servant

> Zohura furnished a very complete and detailed account of the movements and behaviour of Joygun Bibi on the night in question, and particularly at and after the time of the murder. Joygun Bibi has not offered any explanation in answer to the questions put to her on the basis of Zohura's evidence and Abdul Majid's confession as to her behaviour that night. She has been content to repeat that she is innocent and to suggest that the case has been fabricated against her by her husband's younger brother, Sattar."

Similar views have been expressed in Mohd. Hussain Umar V. K.S. Dalipsinghhi, AIR 1970 S.C. 45, Ram Parkash V. State of Punjab AIR 1959 S.C.1, and State Vs. Fazu Kazi alias Kazi Fazlur Rahman and others 29 DLR (SC) 271. In Fazu Kazi's case the observations made in Joygun Bibi have been reproduced and thereby our Supreme Court followed the statement of law argued therein.

In Ram Parkash's case S.Jafer Imam, J. spoke for the Supreme Court as under:

> "It will be clear from the terms of this section that where more persons than one are being tried jointly for the same offence, a confession made by any one of them affecting himself and any one of his co-accused can be taken into consideration by the court not only against the maker of the confession but also against his co-accused. The Evidence Act nowhere provides that if the confession is retracted, it cannot be taken into consideration against the co-accused or the confessing accused. Accordingly, the provisions of the Evidence Act do not prevent the Court from taking into consideration a retracted confession against the confessing accused and his co-accused. Not a single decision of any of the courts in India was placed before us to show that a retracted confession was not admissible in evidence or that it was irrelevant as against a co-accused."

In Hussain Umar's case, the Supreme Court of India on following the dictum in Bhuboni Sahu's case (AIR 1949 P.C. 257) observed:

> "At the trial he retracted the confession. Under Section 30 the court can take into consideration this retracted confession against Mukherjee. But this confession can be used only in support of other evidence and cannot be made foundation of a conviction."

In State Vs. Minhun alias Gul Hassan, 16 DLR (SC) 598 it has been observed that a retracted confession can form the basis of conviction if the confession is found voluntary. The observations are thus:

> "As for the confessions the High Court, it appears, was duly conscious of the fact that retracted confessions, whether judicial or extra judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. It is now well settled that as against the maker himself his confession, judicial or extrajudicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement. The question, however, as to whether in the facts and circumstances of a given case the Court should act upon such a confession alone is an entirely different question, which relates to the weight and evidentiary value of the confession and not to its admissibility in law."

A confession can be made foundation of a conviction if it is recorded in accordance with law; if it is found true and voluntary; if it is inculpatory in nature and if on examination of the statement as a whole it is found inconformity on comparison with the rest of the prosecution case. What amount of corroboration could be necessary in a case would always be a question of fact to be determined in the light of the circumstances of each case. Sometimes no corroborative evidence are available and the court can act upon the confession whether retracted or not, against the maker, if the confession is found to be true and voluntary and if it was not obtained by torture, coercion or inducement. While considering a confession against a co-accused whether the confession is retracted

or not, if such a confession is found voluntary, such confession can not be made the foundation of a conviction and can only be used in support of other evidence. The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could be based on it. If it is capable of belief independently, then of course, it is not necessary to call the confession in aid. Where the court is not prepared to act on the other evidence, in such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence.

As observed above, the confession of Lt.Col. Sultan Shahriar Rashid Khan was recorded in accordance with law and his statement about his presence at the parade ground and from there his presence at Sherniabat's house and then at the Radio Station is corroborated by other two confessional statements of Lt. Col. Syed Farooque Rahman and Lt. Col. Mohiuddin Ahmed (artillery). His statement as regards his subsequent conduct has been corroborated by P.Ws. 15, 37, 46 and 47. The confessional statement of Lt. Col. Syed Farooque Rahman has been corroborated by the other two confessional statements of Lt. Col. Sultan Shahrier Rashid Khan and Lt. Col. Mohiuddin Ahmed (artillery). P.Ws. 1,4,11,12,15,21,42 and 46 corroborated his statement in material particulars. The confession of Lt. Col. Mohiuddin Ahmed (artillery) is corroborated by other confessing accused in material particulars. His statement has also been corroborated by P.Ws. 17,18, 27 and 34. His statement as regards his presence at the night parade has been corroborated by P.Ws. 11,21,22, 24, 25 , 29 and 35. These confessing accused have also implicated Major A.K.M. Mohiuddin Ahmed (lancer) and Major Bazlul Huda in material particulars. There is no inconsistency regarding participation of the appellants in the night parade on 14th August and their diverse acts at different key points at or about the time of occurrence in these confessions. There are also corroborative evidence of P.Ws 1, 4, 5, 6, 12, 21 and 22 against Bazlul Huda besides the co-accuseds' confession and P.Ws 4, 5, 7, 11, 12, 21 and 22 corroborated about the complicity of Major A.K.M. Mohiuddin Ahmed.

Now the next question is whether these confessions made by the accused-appellants are admissible in evidence against them and co-conspirators to prove the charge of criminal conspiracy after the cessation of the conspiracy under Section 10 of the Evidence Act. Conspiracy means something more than the joint action of two or more persons to commit an offence; if it were otherwise. Section 10 is intended to admit evidence of communications between different conspirators which the conspiracy was going on, with reference to the carrying out of the conspiracy. This point has been answered in Mirja Akbor V. King Emperor, AIR 1940 (P.C) 176. Their Lordships of the Privy Council on consideration of different authorities and Section 10 of the Evidence Act were of the view that a statement made after the conspiracy has been terminated on achieving its objects could not be used as substantive evidence. It was observed as follows:

> "This being the principle, their Lordships think the words of S.10 must be construed in accordance with it and are not capable of being widely construed so as to capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships judgment, the words "common intention" signifies a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships judgment S.10 embodies this principle. That is the construction which has been rightly

applied to S.10 in decisions in India, for instance, in 55 Bom 839 and 38 Cal 169. In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past."

These views have been approved in Zulfikar Ali Bhutto V. The State PLD 1979 SC 53, State V. Nalini (1999) 5 S.C.C. 283, Mohd. Khalid V. State of W.B (2002) 7 SCC 334, Sidharth and others V. State of Bihar (2005) 12 SCC 545, and State V. Navjot Sandhu alias afsan Guru (2005) 11 SCC 600. In Zulfikar Ali Bhutto's case, Anwarul Haq,C.J.speaking majority for the Supreme Court of Pakistan after following all previous decisions of the sub-continent observed as under:

"The methodology employed in the actual application of section 10 of the Evidence Act is fully demonstrated in these cases to the effect that its actual application follows and does not precede the finding that there is reasonable ground to believe that a conspiracy exists and certain persons are conspirators. It merely speaks of the use of evidence in the case, and the section does not control the sequence in which the evidence should be let in. It appears to that these are but only two phases in the exercise of the application of section 10 of the Act, and not two distinct and separate stages lying down the order in which evidence is to be led. In the initial phase and as a condition precedent under this section, the Court has got to find from evidence aliunde on the record that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence or an actionable wrong. After having passed this test, the next phase in the exercise consists in the actual application of the operative part of this section whereby anything said, done or written by any one of such persons in reference to their common intention, during the continuance of the conspiracy, is treated as a relevant fact against each of the persons

> believed to be so conspiring, as well for the purpose of proving the existence of conspiracy as for the purposes of showing that any such person was a party to it. In fact this section deals with the mode of evaluation and the use of the evidence brought on the record. It does not provide that the proof of existence of the conspiracy must necessarily precede any proof of the acts and declarations of the co-conspirators of the accused for use against them."

There are another line of views taken in the Supreme Court of India. It is said normally a conspirator's connection with the conspiracy would get snapped after he is nabbed by the police and kept in their_custody because he would thereby cease to be agent of other conspirators. It may not be possible to lay down a proposition of law that one conspirator's connection with the conspiracy would necessarily be cut off with his arrest. Thus, the confessional statement made by an accused after his arrest, if admissible and reliable, can be used against a confessor as substantive evidence under section 10 of the Evidence Act, but its use against the other accused would be limited only for the purpose of corroboration of other evidence.

In State of Maharashtra Vs. Damu (2000) 6 S.C.C. 269= AIR 2000 SC 1691 co-accused Balu Jashi made a confessional statement wherein he had implicated two other accused persons. The Supreme Court used the confessional statement of co-accused as corroborative evidence since the confessing accused have said in reference to the common interest of the conspirators. It has been observed as follows:

> "In this case there can be no doubt, relying on Ex. 88 that there are reasonable grounds to believe that all the four accused have conspired together to commit the offences of abduction and murders of the children involved in this case. So what these accused have spoken to each other in reference to their common intention as could be gathered from Ex.88 can be regarded as relevant facts falling within the purview of section 10 of the Evidence Act. It is not necessary that a witness should have deposed to the fact so transpired between the conspirators. A dialogue between them

could be proved through any other legally permitted mode. When Ex.88 is legally proved and found admissible in evidence, the same can be used to ascertain what was said, done or written between the conspirators. All the things reported in that confession referring to what A-1 Damu Gopinath and A-3 Mukinda Thorat have said and done in reference to the common intention of the conspirators are thus usable under Section 10 of the Evidence Act as against those two accused as well, in the same manner in which they are usable against A-4 Damu Joshi himself."

Similar views have been taken in Baburao Bajiroa Patil V. State of Maharashtra, (1971)3 SCC 432. It has been observed as follows:

"After having so held the confessional statements of the co-accused, in our opinion, could legitimately be taken into account by the court to receive assurance to its conclusion.

In regard to the appellant's presence at Angar on the morning of December 7, 1961 and in regard to the request by Rangya, Shankar and Kalyan to the appellant to help and protect them, the confessional statements of the co-accused could also be appropriately taken into consideration as provided by Section 30 of the Indian Evidence Act. In a case of conspiracy in which only circumstantial evidence is forth coming, when the broad-features are proved by trustworthy evidence connecting all the links of a complete chain, then on isolated event the confessional statements of the co-accused lending assurance to the conclusions of the court can be considered as relevant material and the principle laid down in the case of Haricharan Kumri (supra) would not vitiate the proceedings".

These views have been approved in Moqbool Hossain Vs. The State, 12 DLR SC 217. The case against Moqbool Hussain rested entirely on what the other two accused were alleged to have stated to Tahsilder at the time of offering the bribe money to the Tahsilder for the purpose of mutating his name in the register. At the trial those two accused repudiated their alleged statements. The question that arose was whether the

statements of two co-accuseds were available to the prosecution against him by virtue of Sections 10 and 30 of the Evidence Act. It was held as follows:

> Section 10 of the Evidence Act declares that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. A plain reading of this section makes it clear that apart from the act or statement of the co-conspirator, some prima facie evidence must exist of the antecedent conspiracy in order to attract section 10 Such evidence of a pre-existing conspiracy between the appellant and the two Revenue Officer is conspicuous by its absence in this case."

With due respect, I am unable to endorse the latter views for, once a reasonable ground exists to believe that two or more persons have conspired together to commit an offence, anything said, done or written by one of the conspirators in reference to the common intention after the common intention was entertained, is relevant against other, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. There can be two objections to the admissibility of evidence under Section 10 of the Evidence Act. Firstly that the conspirator whose evidence is sought to be admitted against the co-conspirator is not confronted in court by the co-conspirator, and secondly the prosecution merely proves the existence of reasonable ground to believe that two or more persons have conspired to commit an offence and that brings into operation the existence of agency relationship to implicate co-conspirator. A statement made after the conspiracy has been terminated on achieving its object or it is adandoned or it is fraustrated or the conspirator leaves the conspiracy in between, is not admissible against the co-conspirator. Fixing the period of conspiracy is

important as the provisions of Section 10 of the Evidence Act would apply only during the existence of the conspiracy.

Whether a particular accused had ceased to be a conspirator is a matter which can be decided on the facts and circumstances of the given case. A conspirator's connection with the conspiracy would get snapped after he is nabbed by the police because he would thereafter cease to be the agent of the other conspirator. There are cases in which a conspirator would continue to confabulate with other conspirators and persist with the conspiracy even after his arrest, and in such cases the confession can be used against the confessing accused along with other accused implicated in the confession. In this case the prosecution has not adduced evidence to show that after the arrest of the three confessing accused, they continued to conspire with other conspirators remaining outside.

Extra Judicial Confession

Even if we disbelieve the confessional statements as not voluntary, the prosecution has been able to prove the extra – judicial confessions of four appellants which can be taken into consideration as legal evidence and their conviction can be maintained relying upon them. In this connection the learned Attorney General has drawn our attention to the statements of P.Ws. 8 and 15. These statements according to the learned Attorney General may be used as the basis of conviction since these statements are reliable, trustworthy and beyond reproach.

P.W.8 was serving in the army in the rank of Captain during the relevant time. As per order of the commanding officers this witness along with two others officers went to Bangabandhu's house for ascertaining the real position prevailing there. Accordingly he visited the Bangabandhu's residence on 15th August at about 8.45 a.m. He stated that Major Noor Chowdhury and Major Bazlul Huda received them and thereupon Major Bazlul Huda took him inside the house, and in course of conversation Bazlul Huda replied to the queries made to him as follows:

"K¨v‡Þb û`v Avgvw`M‡K ewWxi wfZi wbqv †M‡j e½eÜi evoxi wiwmckb i"‡g †Uwj‡dvb

†Uwe‡ji cv‡k †kL Kvgv‡ji jvk ¸wjwe× i³v³ Ae¯nvq †g‡S‡Z †`wL| Avwg ZLb eRjj

û`v‡K wRÁvmv Kwi "†kL Kvgvj‡K †Kb †g‡i‡QbÐ DË‡i eRjj û`v Rvbvq, †kL Kvgvj †dv‡b ewn‡i Lei w`‡ZwQjÐ†mB Rb¨ Zvnv‡K †g‡iwQ|"

H i"‡gi †Uwe‡ji mvg‡b jswM civ Ae¯nvq ¸wjwe× i³v³ Ae¯nvq Av‡iv GKR‡bi jvk †`wL‡Z cvB| K¨v‡Þb û`v‡K wRÁvmv Kwi "†Kb Zv‡K †g‡i‡QbÐ Rev‡e û`v Rvbvq †m cwj‡ki †jvK Zv‡K P‡j †h‡Z ej‡j †m ZK ïi" K‡i †`qÐ†mB Rb¨ Zv‡K Avgiv †g‡iwQ|" Zrci eRjj û`v Avgw`M‡K wmwoi w`‡K wb‡q hvq| wmwoi `w¶b w`‡K ev_i"g †`LvBqv e‡j "GLv‡b †kL bv‡m‡ii jvk Av‡Q|" Avgiv ev_ i"‡g ¸wjwe× i³v³ Ae¯nvq bv‡m‡ii jvk †`wL| û`v‡K wRÁvmv Kwi "Zv‡K †Kb †g‡i‡Qb|" K¨v‡Þb n`v †Kvb Dli †`q bv|

Gici K¨v‡Þb eRjj û`v Avgv‡`i‡K wbqv wmwoi w`‡K D‡V| wmwoi K‡qK avc DwVqv e½eÜ †kL gwRei ingv‡bi jvk †`wLqv Avgiv nZf¤ nBqv hvB| mv`v aca‡c cvÄvex cwiwnZ e‡Ki evg cv‡k, †c‡Ui Wvb w`‡K Wvb nv‡Z A_vr kix‡ii wewfb RvqMvq ¸wjwe× i³v³ Ae¯nvq cv fvR K‡i wPr nBqv wmwoi g‡a¨ e½eÜ †kL gwRei ingvb cwoqv Av‡Q| cv‡k Zvnvi Pkgvl †`wL‡Z cvB| Awg K¨v‡Þb û`v‡K wRÁvmv Kwijvg "Avcbviv †Kb †`‡ki †cwm‡W›U‡K GB fv‡e gvi‡jb|" Dl‡i K¨‡Þb û`v ewj‡jb Awg hLb `jejmn e½eÜ †kL gwRei ingv‡bi Kv‡Q hvB †m ZLb e‡j "†Zvgiv †Kb Avgvi evmvq AwmqvQÐ†K †Zvgv‡`i‡K cvVvBqv‡QÐ kwdW`Bjvn †Kv_vqÐ GB ewjqv Avgv‡K SUKv gv‡iÐ ZLb Awg c‡o hvB|" Bnvi ci Avgiv e½eÜ‡K ¸wj Kwi| Zvici Avgv‡`i‡K wbqv K¨v‡Þb û`v Lvevi N‡ii cv‡k †M‡j Avgiv †mLv‡b (e½eÜi †eW i"‡gi `iRvi) †eMg gwR‡ei ¸jxwe× i³v³ jvk †`wL‡Z cvB| GQvov e½eÜi †eWi"†gi †Wwms †Uwe‡ji mvg‡b ¸jxwe× i³v³ Ae¯nvq Av‡iv PwiwU jvk c‡o _wK‡Z †`wL|

ZLb Awg K¨v‡Þb û`v‡K wRÁvmv Kwi "†Kb G‡`i‡K bksmfv‡e nZ¨v K‡i‡Qb|" Rev‡e K¨v‡Þb û`v ej‡jb "mk¤Î ‰mwbKiv out control nBqv G‡`i‡K nZ¨v Kwiqv jU cvU Kwiqv‡Q Ges †mB Rb¨ †m ‰mwbK‡`i‡K ewn‡i iwLqv‡Q|" K¨‡Þb Av‡iv Rvbvq "K‡Yj Rwgj‡K ewn‡i †g‡i Zvi jvkmn Mvox evoxi wfZ‡i wcQ‡b ivLv nBqv‡Q|"

Major Bazlul Huda admitted to this witness that he killed Sheikh Kamal because he was passing information about the incident out side. He also admitted that they killed one security personnel as he was altercating with them and thereafter, on query about the cause for the killing of Sheikh Naser, Major Huda remained silent. On further query

about the killing of Bangabandhu Sheikh Mujibor Rahman, he replied that as the Bangabandhu queried to him why they came there and wanted to know the whereabouts of Shafiullah and pushed him away they shot him. On further query about the killing of women folk, Major Huda replied that the situation went beyond their control and that the sepoys killed them. This appellant did not challenge the statement of this witness either directly or indirectly about his admission of killing. These are extra judicial confession of Major Bazlul Huda in which he has admitted about his active participation in the killing of Sheikh Kamal by gun shot injury and then the killing of Bangabandhu. The evidence of this witness remain uncontroverted. Apart from the above statement of Bazlul Huda, P.W. 15 also proved the extrajudicial confession of Lt. Col. Syed Farooque Rahman, Lt. Col. Khandaker Abdur Rashid, Lt.Col. Sultan Shahriar Rashid, Major Bazlul Huda, Major A.K.M. Mohiuddin (lancer) and other accused, the relevant portion of the statement reads as follows:

> "‡h‡nZ Avgiv e½ fe‡b KvR Kivi mev‡` AwfÁ wQjvg†mB Kvi‡b g¤Îxcwil‡`i kc_ Ab¨V†bi e¨e¯nv Kivi Rb¨ Avgv‡`i Dci `wqZ†`q| †mB Abhvqx Avgiv D³ `wqZ cvjb Kwi| Gici †gRi ‰mq` dvi"K ingvb,†gRi L›`Kvi Avt iwk`, †gRi mjZvb kvnwiqvi,†gRi kwidj nK Wwjg, †gRi AwRR cvkv, †gRi gwnDwÏb (j¨vÝvi), †gRi eRjj û`v, K¨v‡Þb gv‡R`, wimvj`vi †gvm‡jg DwÏb Gi K_vevZvq Rvb‡Z cwi †h, Zvnviv e½ eÜ †kL gwRei ingvb‡K mÐcwiev‡i A_wr Zvnvi ¯x, Zvnvi wZb †Q‡j, 2 `B ‡Q‡ji eD I fvB †kL bv‡mi Ges K‡bj Rwgj †K e½ eÜi 32 bs †ivW¯n evox‡Z nZ¨v K‡i|"
> ..... "Zvnviv `vc‡Ui mv‡_ ewjZ †`k‡K evPvBevi Rb¨ Avgiv GB nZ¨v KvÛ NUvBqwQ |"

P.W.15 stated, in the Bangabhaban he noticed from the conversation of Major Syed Farooque Rahman, Major Khondker Abdur Rahsid, Major Sultan Shahriar, Major Shariful Hoque Dalim, Major Aziz Pasha, Major Mohiuddin (lancer), Major Bazlul Huda and others that they killed Bangabandhu Sheikh Mujibor Rahman with his family i.e. his wife, his three sons, the wives of two sons, Sheikh Naser and Col. Jamil and that they swaggeringly disclosed that for the interest of the country they killed them. They

have not denied those statements by cross-examining this witness or by giving him any suggestion. Lt. Col. Sultan Shahriar Rashid gave the suggestion to this witness in an evasive manner but he also did not directly challenge this statement of this witness. These are uncontroverted statements and these statements clearly suggest that those four appellants and other co-accused are responsible for the killing. Now, the question is whether these statements can be taken as extra judicial confession since they have not communicated to this witness that they have killed Bangabandhu Sheikh Mujibor Rahman and his family members. Learned counsels contend that these statements cannot be considered at this belated stage since the Court's below have not considered the same. These are uncontroverted reliable evidence on record relating to the occurrence and I find no cogent ground to discard them and decide the case excluding them. The range of facts which may be given in evidence having been defined in part I of the Evidence Act, it proceeds in part II to deal with the manner in which facts receivable in evidence under part I may be given in evidence. It is a fundamental rule that unless there is some presumption as to the existence of a fact, its existence must be proved to the satisfaction of the Court. Therefore, the party who wishes the Court to believe the existence of a fact, must prove it. There are, however, two exceptions – these are (1) a fact which is admitted by the other party need not be proved, and (2) facts of which the Court shall take judicial notice, need not be proved. Here a fact which is relevant for the determination of the charge relating to the incident to which they have faced trial has been admitted by the accused and thus there is no legal bar in considering these evidence.

The appellant Bazlul Huda has admitted to P.W.8 that he has shot to death of Sheik Kamal and Bangabandhu. The other appellants except Lt. Col. Mohiuddin (artillery) in unequivocal terms have disclosed that they have killed Bangabandhu Sheikh Mujibor Rahman and other members of his family including Col. Jamil. It is also fact that these statements have not been communicated to P.W.15 but he has over heard the same while they have been swaggering for their heroic act of killing and change of the Government at a time when the preparation for the oath taking ceremony for the new Government at Bangabhaban was progressing. These statements clearly disclosed the

killing of the President and other members of his family and the persons involved in the killing. Admissions and confessions are dealt with in sections 24-30 of the Evidence Act about its admissibility. These are exceptions to the general rule of evidence and they are placed in the category of "relevant fact" since they are declarations against the maker, the probative value of such admissions or confessions do not depend upon its communication to another and they can be admitted into evidence if they are proved by a witness. A confessional soliloquy is an expression of conflict of emotion, a conscious effort to stifle the pricked conscience; or a joyous perception for the act is a direct piece of evidence. In this case the accused persons expressed joyous perception for being the killers of the President and the remaining members of his family. They did not hide their act of killing and disclosed it in the Bangabhaban where many dignitaries were present on the occasion of oath taking ceremony of the new President. In "A Treatise on the law of Evidence" by Taylor, the author argued the doctrine of confession as follows:

> "What the accused has been over heard muttering to himself, or saying to his wife or to any other person in confidence, will be receivable in evidence."

W.M.Best in "The Principles of Law of Evidence" discussed on the same point as follows:

> "Words addressed to others, and writing, are no doubt the most usual forms; but words uttered in soliloquy seem equally receivable".

Phipson on Evidence, 7th Edition stated the following passage;

> "A statement which the prisoner had been overheard muttering to himself, if otherwise than in his sleep, is admissible against him, if independently proved."

From the above arguments of law of the authors on evidence, I find that a declaration, statement or muttering of an accused if it discloses an offence of guilt can be admitted in evidence against him on proof by the person who heard it.

In Sahoo V. State of Uttar Pradesh, AIR 1966 SC 40 the convict Sahoo developed illicit intimacy with his daughter-in-law Sundar Patti (son's wife). There was quarrel

between them on the previous night of the occurrence and Sundar Patti ran away to the house of one Md. Abdullah, a neighbour. The convict brought her back and passed the night with her in one room of their house. On the morning of the date of occurrence Sundar Patti was found with injuries in the room and the convict was not found present. Sundar Patti was admitted to the hospital in the afternoon and she died after 12/13 days. The convict Sahoo was put on trial for the charge of murder. The evidence produced by the prosecution was an extra judicial confession and circumstantial evidence. The extra judicial confession was proved by 4 witnesses stating that on the fateful morning at 6 a.m. they saw that the convict was going out of his house murmuring that "he had finished Sundar Patti and thereby finished the daily quarrels." The question arose as to whether the mutterings of the accused proved by four witnesses could be taken as extra-judicial confession. Subba Rao, J. speaking for the Supreme Court of India argued as under:

> "But there is a clear distinction between the admissibility of evidence and the weight to be attached to it. A confessional soliloquy is a direct piece of evidence. It may be an expression of conflict of emotion, a conscious effort to stifle the pricked conscience; and argument to find excuse or justification for his act; or a penitent or remorseful act of exaggeration of his part in the crime. The tone may be soft and low; the words may be confused; they may be capable of conflicting interpretations depending on witnesses, whether they are biased or honest, intelligent or ignorant, imaginative or prosaic, as the case may be. Generally they are mutterings of a confused mind. Before such evidence can be accepted, it must be established by cogent evidence what were the exact words used by the accused. Even if so much was established, prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may be used only as a corroborative piece of evidence."

There is difference in the disclosure of extra judicial confession by P.Ws. 8 and 15. Whatever admission made by Major Bazlul Huda to P.W.8 was direct in nature, and

the other one made by 9 accused was heard by P.W.15 is indirect in nature. The evidentiary values of both of them are same. Major Bazlul Huda was confronted with his confession made to P.W.8 in course of his examination under section 342. Except Major A.K.M.Mohiuddin Ahmed (lancer), other three appellants had been confronted with their statements proved by P.W.15 in course of their examination under section 342 of the Code. They did not challenge the said statements by giving any suggestion or by cross-examining him. Thus the said statements may be used against them as legal evidence. These extra-judicial confessions may in law validly form the sole basis of conviction if the Court believes them as true and voluntary against Major Bazlul Huda, Lt. Col. Farooque Rahman, Major Mohiuddin Ahmed (lancer) and Lt. Col. Sulltan Shahriar Rashid Khan as observed in Minhun Ali alias Gul Hassan's case. The learned Judges of the High Court Division have ignored these important pieces of evidence while finding the appellants guilty of the charges.

Mr.Ajmalul Hossain, Q.C. has referred the case of State of U.P. V. M.K.Anthony, AIR 1985 SC 48 on this point of admissibility of extrajudicial confession. In that case the accused killed his wife and two children. The accused was seen sitting in the adjoining room and on seeing him one witness asked him what has been found about the murder. In reply the accused reclaimed to God to excuse him that "he had committed mistake as he had murdered his wife and two children." The learned Sessions Judge reproduced the disclosure of the accused to the witness as follows:

> "Oh God Pardon me, I have done blunder, I have murdered my wife and children."

Now the question is whether this extra judicial confession deposed by the witness can be the sole basis for conviction of the accused. The Supreme Court of India considered case of Sahoo (supra) and other decisions (AIR 1974 SC 1545, (1975) 1 SCR 747, AIR 1975 SC 258, AIR 1966 SC 40 and AIR 1977 SC 2274) Desai, J. and was of the view that there is neither any rule nor of prudence that evidence furnished by extra judicial confession can not be relied upon unless corroborated by some other credible evidence. The Supreme Court observed as follows:

> "It thus appears that extra-judicial confession appears to have been treated as a weak piece of evidence but there is no rule of law nor rule of prudence that it cannot be acted upon unless corroborated. If the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test, on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. In such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trustworthy and beyond reproach the same can be relied upon and a conviction can be founded thereon."

Therefore, I find that there is uniform views of the Supreme Courts of Bangladesh and India that if an extra judicial confession is reliable and `1the evidence of such confession comes from the lip of a witness who is unbiased, the same can be relied upon and a conviction can be founded thereon. In the case in hand I find that P.Ws. 8 and 15 are neutral witnesses and they have proved the admissions of four appellants about their participation in the carnage. The defence failed to bring anything by cross examining them to indicate that they have a motive for attributing unbelievable statements to the accused, rather they have not challenged their statements. The statements disclosed by those witnesses were clear and conveyed that the four appellants and others were the perpetrators of murder. Their statements are corroborated by other evidence on record. These accused appellants can be convicted relying upon these extrajudicial confessions as well.

Charge of murder

Mr. Abdullah-Al-Mamun, learned counsel appearing for the appellant Major Bazlul Huda and Major A.K.M.Mohiuddin (lancer) argues that there is no reliable evidence in support of the prosecution story that these appellants have been recognized by P.Ws 1 and 4 at the place of occurrence and that the allegation that Major Huda shot to death of Sheikh Kamal and Bangabandhu as alleged is also based on contradictory evidence on record and therefore, the learned Judges of the High Court Division erred in law in maintaining his conviction and sentence. The learned counsel has taken us to the evidence on record and argues that the prosecution has withheld vital witnesses such as, Sheikh Yunus Ali, Col. Moshiud Doula and Col. Mahmudul Hasan purposely as they would have been unfavourable to the prosecution and therefore, an adverse inference may be drawn against the prosecution for withholding those vital witnesses. Learned counsel further contends that the allegation that Major Mohiuddin (lancer) has taken Bangabandhu down from the first floor is based on no reliable evidence on record and that his recognition by the witnesses at the place of occurrence is totally absurd and unbelievable story. In this connection learned counsel has drawn our attention to the evidence of P.Ws. 1, 4,5,6,7,8,9,11,12, 15, 22 and 42. Learned counsel has tried to make out a case that there are contradictory evidence on record regarding the presence of Bazlul Huda and Mohiuddin Ahmed at the place of occurrence but the High Court Division has totally ignored this aspect of the matter. The learned counsel has referred the cases of Nurul Islam and others Vs. The State , 43 DLR (AD)6, Hazrat Khan @ Hazrat Ali Vs. the State, 54 DLR 636, Moslemuddin and others Vs. The State, 38 DLR (AD) 311, Safdor Ali Vs. The Crown, 5 DLR(FC)107 and Moyezuddin and another Vs. The state, 31 DLR(AD) 37 in support of his constention.

Mr.Khan Saifur Rahman, learned counsel appearing for the appellants Lt. Col. Syed Farooque Rahman and Lt. Col. Mohiuddin Ahmed (artillery) argues that there is no evidence in support of the charge of murder of Bangabandhu Sheikh Mujibor Rahman and others against them. Learned counsel further argues that P.W.1 is not an eye witness of the occurrence and Lt. Col.Mohiuddin Ahmed (artillery) is not an FIR named accused,

whose inclusion in the case is a product of concoction for which he is entitled to get the benefit of doubt. Learned counsel submitted that the story of hoisting the flag and playing bugle in the house of Bangabandhu just immediate before the occurrence as stated by the witnesses was not believable one since P.Ws. 1-3 stated that the assailants were already in the house of Bangabandhu. There is no reliable evidence on record, learned counsel submits, about Lt. Col. Syed Farooque Rahman's presence in the house of Bangabandhu at the relevant time. In this connection the learned counsel has drawn our attention to certain portions of the evidence of P.Ws. 14 and 23. Learned counsel further contended that in view of withholding of tank crews, an adverse presumption may be drawn against the prosecution that if they were produced they would not have supported the prosecution case. Learned counsel further contended that in view of the evidence as revealed from the lips of the prosecution witnesses that the real planner of the incident was Jobaida Rashid, it was evident that the appellants had no common intention or preconcert mind of their being involved in the incident and therefore, the conviction of the appellants under section 302/34 was illegal. Learned counsel further argued that the presence of Lt. Col. Mohiuddin Ahmed (artillery) with cannon at kalabagan play ground had not been substantiated by adducing reliable evidence.

Mr. Abdur Rezzaque Khan, learned counsel appearing for Lt. Col. Shahriar Rashid Khan argued that there is no reliable evidence about Shahriar Rashid's complicity in the murder of Bangabandhu Sheikh Mujibor Rahman and other members of his family. Learned counsel submitted that the learned Judges of the High Court Division erred in law in relying upon the testimony of P.W. 14 about his presence at the night parade at Balurghat in the absence of any other corroborating evidence and thus, his conviction for the charge of murder was illegal. Learned counsel further contends that if the evidence of P.W.14 is disbelieved, the only evidence against Shahriar Rashid is about his presence at the Radio Station at about 6 A.M. on 15th August and this fact has no nexus with the murder of Bangabandhu Sheikh Mujibor Rahman since he was reemployed with effect from 15th August, 1975, his presence at the Radio Station was a part of his official duty which he had carried out as per direction of his commanding officer. In view of the

above, the learned counsel concluded that the learned Judges of the High Court Division erred in law in maintaining his conviction and sentence.

The common points canvassed by the learned counsels are that the learned Judges of the High Court Division upon superficial consideration of the evidence on record have confirmed the death sentence of the appellants in failing to consider that there is no legal evidence on record in support of the charges. It was also contended that the appellants attended the night parade as a part of their routine works and that their presence at the parade could not be connected with the murder of Bangabandhu Sheikh Mujibor Rahman and his family members. According to the learned counsels, the killing was the consequence of a revolt of the army to overthrow the Government of Bangabandhu Sheikh Mujibor Rahman in which, the appellants were not involved. In that view of the matter, it is argued that the conviction of the appellants is based on conjectures and surmises, and the learned Judges of the High Court Division erred in law in maintaining their conviction and sentence.

Before we deal with the contentions of the learned counsels, it will be necessary to keep in view the limited scope in these appeals against the judgments and orders of conviction and sentence as rendered by the High Court Division as well as the trial Court against the appellants. Article 103(3) of the Constitution does not confer a right of appeal on any party from a judgment and order passed by the High Court Division, it merely clothes this Court with discretionary power to scrutinize and go into evidence in special circumstances in order to satisfy itself that substantial and grave injustice has been done to the accused. Though the expression “discretionary” has not been used in this clause of the Article as has been used in the corresponding Indian provision, (Article 136) but in view of the powers given to this Court to exercise the jurisdiction, if it grants leave from the judgment, order or sentence manifestly suggest that this power is discretionary one. Article 103(3) is couched in the verbatim language of Article 136 of the Constitution of India. The Supreme Court of India in Hargun Sundar Das V. State of Maharastha, AIR 1970 SC 1514, considered the scope of its jurisdiction to assess the evidence in an appeal against conviction, and observed as follows:

> "We may appropriately repeat what often been pointed out by this Court under Article 136 of the Constitution, this Court does not normally proceed to review the evidence in criminal cases unless the trial vitiated by some illegality or material irregularity of procedure or the trial is held in violation of rules of natural justice resulting in unfairness to the accused or the judgment or order under appeal has resulted in grave miscarriage of justice. This article reserves to this Court a special discretionary power to interfere in suitable cases when for special reasons it considers that interference is called for in the larger interest of justice."

Similar views have been expressed in the cases of Metro. V. State of U.P. AIR 1971 SC 1050, Subeder V. State of U.P. AIR 1971 SC 125, and Ram Sanjiwan Singh V. State of Bihar, AIR 1996 SC 3265.

The appellants have not raised in these appeals as to whether the trial of the appellants have been vitiated by some illegality or that it has been held in violation of the rules of natural justice or that by reason of misreading of the evidence a grave miscarriage has resulted in maintaining the conviction by the High Court Division. Despite that we have afforded the learned counsels to argue the appeals on the basis of the evidence on record taking into consideration that the appellants have been sentenced to death for ends of justice. In support of the charges leveled against the appellant Major Bazlul Huda, the prosecution has examined A.F.M.Mohitul Islam (P.W.1), Habilder (Rtd.) Md. Quddus Sikder (P.W.4), Nk.Subedar (Rtd) Abdul Gani (P.W.5), Habilder Ganner (Rtd) Sohrab Ali (P.W.6), A.L.D. Sirajul Huq (P.W.12), Lt.Naik Abdul Khalek (P.W.21), Habilder Abdul Aziz (P.W.22). The learned Judges of the High Court Division have exhaustively discussed their evidence on record. I would refer only the glimpses of their statements.

P.W.1 is the informant and claimed as an eye witness. He was the resident P.A. of Bangabandhu Sheikh Mujibor Rahman deputed at house no. 677 of Road No. 32, Dhanmondi during the relevant time where the President was staying. He stated that on the day of occurrence at about 4.30 /5-00 A.M., he woke up on the call of the telephone

mechanic Abdul Motin that the President wanted to talk with him over telephone. Soon thereafter he took the receiver when the President directed him to connect the Police Control Room stating that the miscreants attacked Sherniabat's house. He failed to connect the police control room as well as the Ganabhaban. In the mean time Bangabandhu came down into the office room and wanted to talk himself by taking the receiver from him. At that time showers of bullet hit the wall of the room breaking the window glass asunder. They have lain down beside the table. There was a break of firing when Sheikh Kamal got down and stood on the verandah. The security staff accompanied him and at that time 3 / 4 army personnel in khaki and black dress with arms in their hands stood in front of them, the appellant Major Bazlul Huda shot on the leg of Sheikh Kamal, who rolled down beside his leg when he told P.W.1 to make the assailant known that he was the son of Sheikh Mujib. P.W.1 told the assailant about the identity of Sheikh Kamal and soon thereafter, he brush fired aiming Sheikh Kamal. One bullet hit his leg and another hit P.W. 50's leg. Sheikh Kamal died on the spot. At one stage P.W.50 wanted to take out P.W.1 and Sheikh Kamal through the back side door and when they came nearer to the door, Major Bazlul Huda pulled him back by catching his hair. There were other armed army personnel with him. Major Bazlul Huda lined up P.W.1 and others in front of the main gate. Some times thereafter he heard shouting noise of Bangabandhu and indiscriminate firing and screaming of women. He also narrated how Sheikh Naser was shot to death and the uttering of Bazlul Huda on query made by Major Farooque that "all are finished". On hearing the uttering of Bazlul Huda, he understood that the President and his family members were brutally killed. This witness made positive statement that Major Bazlul Huda shot Sheikh Kamal to death on the spot. The defence did not challenge his statement in course of cross-examination and therefore, his statement that the appellant shot to death of Sheikh Kamal remain uncontroverted.

P.W.4 is another eye witness and an army jawan posted in the field artillery regiment during the relevant time, and he was deputed as security staff of Sheikh Mujibor Rahman along with some other army personnel of his company. He stated that Captain Bazlul Huda and 3 other army personnel were also in the field artillery unit, that on 15th

August, 1975 at about 5 A.M. he along with other security staff noticed that Subedar Major Abdul Wahab Joarder was getting down from the jeep in front of the house on Road No.31 where he along with other security personnel were staying using it as temporary barrack for guarding the President's house. Thereafter he along with other guards came to Bangabandhu's house and after reaching there they hoisted flag upon playing bugle. At that time he noticed indiscriminate firing towards Bangabandhu's house from the southern side of the lake. At that time black and khaki dressed army personnel entered into the house by shouting 'hands up', of them, he identified Captain Bazlul Huda, Major Mohiuddin (lancer) and another who were then at the gate. Kamal was standing on the verandah, and on seeing him Captain Bazlul Huda shot at him with stan gun in his hands. Sheikh Kamal fell down inside the reception room. Captain Bazlul Huda again shot at Kamal and killed him. Thereafter Major Mohiuddin (lancer) with his force proceeded towards the first floor by opening fire. Thereafter Bazlul Huda and Noor with their force followed him. As per their direction, they also followed them. He saw that Major Mohiuddin and his force were taking Bangabandhu down to the ground floor. At that time Bangabandhu queried them what they were intending to do and soon thereafter, Huda and Noor shot at Bangabandhu with their stan guns, who died on the spot. The statement of this witness that he saw Bazlul Huda and Mohiuddin (lancer) at the gate, that Bazlul Huda, Major Noor and his force approached towards the first floor and that Huda and Noor shot at Bangabandhu on the stair had not been denied by Captain Bazlul Huda in course of cross-examination or by giving suggestion to him. The incriminating part of the statement of this witness remains uncontroverted. Appellant Major Mohiuddin also did not challenge the testimony of this witness as regards his recognition at the gate of Bangabandhu's house and the statement of this witness that he saw Mohiuddin and his force bringing Bangabandhu down to the ground floor.

P.W.5 was also jawan of artillery unit and he was deputed at Bangabandhu's house as security guard. He was present at Bangabandhu's house at the time of occurrence at about 5 a.m. He stated that after hoisting the flag he noticed indiscriminate firing towards the Bangabandhu's house, when he took shelter in the guard room, that 5/7

minutes thereafter the firing was stopped and at that time, he saw Captain Bazlul Huda, Major Noor and other jawans in khaki and black dress got down from a vehicle in front of Bangabandhu's house, that Bazlul Huda queried to him and then he talked with another over wireless, that soon thereafter Mohiuddin(lancer) and his force came from eastern side by saying 'hands up' and entered into Bangabandhu's house by opening fire and that he along with other guards was kept confined into the guard room. The defence did not challenge his statement that he recognised Captain Bazlul Huda and Major Mohiuddin(lancer) while they were entering into Bangabandhu's house by firing at the time of occurrence.

P.W.6 was also a member of the security team deputed at Bangabandhu's house. He is another eye witness of the occurrence. He stated that on 15th August at about 4.30 a.m. Habilder Gani made all the security staff to fall-in infront of guard room and sometimes thereafter 2 /3 trucks with force in black dress stopped towards the western side of Bangabandhu's house , and there was firing towards Bangabandhu's house from the lake side. In corroboration with the testimonies of P.Ws. 1 and 4, he stated that when Kamal called the security team to follow him, Captain Bazlul Huda, another officer of Lancer unit with black dress, and some jawans of artillery unit entered into Bangabandhu's house. Soon thereafter Captain Huda and another shot at Sheikh Kamal who rolled down inside the reception room on sustaining gun shot injury. Captain Huda again shot at him. Thereafter Captain Huda and another officer proceeded towards the first floor. Some times thereafter he heard sounds of firing and screaming of women. Bazlul Huda did not challenge the incriminating part of the statement of this witness and therefore, the statement that P.W.6 saw Bazlul Huda while he shot to death of Sheikh Kamal remain uncontroverted.

P.W.11 attended the night parade on 14th August which was arranged infront of his store. He identified Captain Huda, Major A.K.M.Mohiuddin(lancer) and Major Farooque Rahman there. He stated that at about 4 a.m. the troops on a vehicle approached towards the house of Bangabandhu Sheikh Mujibor Rahman and they were asked to get down from the vehicle about 80 yards west of Bangabandhu's residence at about 4.30

a.m., when Resalder Sarwar told him to follow the order of Major Mohiuddin. Major Mohiuddin directed them not to allow movement of people infront of the house of Bangabandhu and to disarm the police on duty. He heard sounds of firing inside the house of Bangabandhu and then heard the order saying 'hands up', that Resalder Sarwar directed him not to allow anybody to enter into Bangabandhu's house and at that time Major Mohiuddin , Major Noor, Captain Bazlul Huda and others entered into Bangabandhu's house, that he heard sounds of firing from the house of Bangabandhu and screaming of women, that Major Mohiuddin, Major Noor, Captain Bazlul Huda came out and at that time Noor directed Subedar Major to go inside and to ascertain whether all were finished, that Captain Huda directed him through Sarwar to disperse the persons standing beside the lake, that thereafter he heard the sound of movement of tanks and one tank came in front of Bangabandhu's house, that Major Farooque got down from the tank when Major Mohiuddin, Major Noor, Captain Huda and others came nearer to him and talked with him for sometimes , and thereafter Major Farooque left with the tank. This statement of this witness about the complicity of the appellant Bazlul Huda in the incident has not been challenged directly or indirectly. Therefore, this statement remains uncontroverted.

During the relevant time P.W.12 was serving in the first Bengal lancer unit in which Major Farooque Rahman was their commanding officer. He also stated that in the parade ground he saw the appellant Bazlul Huda and other accused persons including Syed Farooque Rahman and Major Mohiuddin Ahmed (lancer). He further stated that in the second phase of parade which started after 3.30 A.M., he found the appellant Bazlul Huda along with other officers including Syed Farooque Rahman, Major Mohiuddin (lancer). Major Farooque Rahman introduced Major Dalim, Captain Bazlul Huda and another to them. Thereafter Major Farooque directed them to bring ammunition from the kote. As per direction, they brought ammunition and came to the parade ground. Major Mohiuddin (lancer) directed them to board into the vehicle. The army personnel boarded on 3 trucks and the others boarded on another truck. At about 4.30 A.M. they approached via Balurghat Cantonment-Rail crossing- Firm gate and from Firm gate they approached

towards Dhanmondi Road no.32 through the Mirpur Road and at the meeting point of Road No.32, Mohiuddin(lancer) directed them to get down from the truck and thereafter he briefed them not to be frightened on hearing sounds of firing as they were theirs' and Major Dalim's people and that he directed them not to allow anybody to enter into Road No.32. Thereafter he narrated the other incidents that happened after killing of the President and the members of his family. The appellant did not challenge the incriminating part of the evidence in chief of this witness as regards his recognition of Bazlul Huda, Mohiuddin (lancer), Dalim and Farooque at the parade ground and the marching of the troops towards the house of the then President.

P.W.21 was deployed in the two field artillery of papa battery during the relevant time. He stated that he attended the night parade and thereafter he along with other soldiers was kept towards the southern side of Air Port run way. At about 2 A.M. their commending officer Major Khondker Abdur Rashid along with Major Mohiuddin, (lancer), Captain Bazlul Huda and other officers came there. Major Khondker Abdur Rashid told them to make themselves prepared with arms and ammunition as they would be taken to an emergency duty. At about 4.30 a.m. their truck came to road no. 32 and directed them to get down from the truck. The commanding officer directed them not to allow anybody to move through the road no.32. He stated that after ajan he heard sounds of firing towards the eastern side and thereafter he came to know that the appellant and other accused persons killed Bangabandhu and the members of his family.

P.W.22 was a sepoy of two field artillery during the relevant time. He stated that he was present at the night parade on 14th night till 12 at night. At about 2.30 a.m. the commending officer Khonkder Abdur Rashid along with the appellant Bazlul Huda and some other officers came there. Major Rashid told them to get ready for special duty and if necessary they were required to open fire. He corroborated the testimony of P.W.21 about their coming to road no.32 from the nigh parade with arms and his recognition of the appellant. The appellant declined to cross examine him.

On an analysis of the evidence, I find that the prosecution has been able to prove by unimpeachable evidence about the presence of the appellant at the night parade on the

14th August and from there the appellant along with co-accused came to the place of occurrence, that he shot to death of Sheikh Kamal and Bangabandhu and that he was seen while he was approaching towards the first floor of Bangabandhu's house where upon the other inmates of the Bangabandhu's house were brutally killed.

In respect of the appellant Major A.K.M.Mohiuddin (lancer), the prosecution has examined P.Ws. 4,5,7,11,12,21,22 to prove the charge leveled against him. P.W.4 stated that he recognized this appellant along with appellant Bazlul Huda at the gate of Bangabandhu's house. He also stated that this appellant along with the force of his unit proceeded towards the first floor of Bangabandhu's house by firing and thereafter they brought Bangabandhu down and when they were on the stair Captain Bazlul Huda and Major Noor shot him to death. He further stated that after killing of Bangabandhu this appellant and others got down and left towards south. In course of cross-examination this appellant did not challenge the statements of P.W.4 regarding the incriminating part of his involvement in the incident and therefore, the evidence that the appellant along with his force entered with into the house of Bangabandhu by firing and brought Bangabandhu down on the point of arms for facilitating the killing remain uncontroverted.

P.W.5 corroborated the statement of P.W.4 that this appellant along with his force entered into the house by firing. The appellant has not challenged the testimony of this witness in that regard. Therefore, the identification of the appellant at the place of occurrence and his direct participation in the carnage deposed by this witness remain uncontroverted.

P.W.11 had identified this appellant at the parade. He saw two persons in civilian dress who came out of this appellant's office at about 12 at night on 14th August and at that time, the appellant called Huda to come towards him. He also stated that this appellant arranged army dress for those two persons who were in civil dress. While discussing the evidence of this witness about the complicity of Huda, I discussed the complicity of this appellant as well.

P.W.12 also identified this appellant at the parade ground on 14th August. He stated that this appellant directed the army personnel who were at the parade to board into the vehicle, that at about 4.30 A.M. they came to the meeting point of Dhanmondi Road no.32 by six trucks via Balurghat Cantonment-Rail crossing - Mohakhali Road and Firm gate, that he was with the appellant in the same truck, that this appellant directed all of them to get down from the truck at the meeting point of Road No.32 and then he briefed them that they should not be frightened on hearing the sounds of firing as theirs' and those of Major Dalim's persons were inside and thereafter, this appellant along with some force entered into Road No.32. In course of cross-examination, this appellant did not challenge the incriminating part of his complicity and that he entered into Road No.32 with his force just immediate before the occurrence. I have narrated his evidence while considering the complicity of appellant Bazlul Huda and therefore, in order to avoid repetition, I have refrained from reiterating his evidence. In cross-examination, this witness has reconfirmed his statement in chief about this appellant's presence at the parade ground and his entering through the Road No.32 with his force just immediate prior to the occurrence.

P.W.22 made statements in corroboration with the statements of P.W.21, whose evidence had been discussed while considering the complicity of Major Bazlul Huda. He further stated that he along with P.W.21 and other army personnel were dropped at Road No.32 by the side of a canal, that the commander directed them to see that no outsider is entered into Road No.32, that thereafter he heard sounds of firing and that he along with Naik Nazrul, Sepoy Khalek and others proceeded towards east and there he found army personnel of artillery unit and lancer unit were standing in front of a house and on query he came to know that the house belonged to Bangabandhu Sheikh Mujibor Rahman. Thereafter he along with the guards, commander Nazrul, Khalek and others entered into the house of Bangabandhu and saw the dead bodies and on coming out of the house after talking with the army personnel standing at the gate , he learnt that Major Mohiuddin (lancer) and other officers killed Bangabandhu and his family members. This appellant

did not challenge those incriminating part of the evidence of this witness in course of cross-examination. Therefore, his evidence remain uncontroverted.

In respect of Lt. Col. Farooque Rahman, the prosecution examined P.Ws. 1,4,11 and 12 to prove the charge against him. P.W.1 stated that at the time of occurrence he saw Major Farooque Rahman at the gate of Bangabandhu's house and on his query, Major Bazlul Huda told him that "all are finished." The recognition of the appellant by this witness has not been challenged in course of cross-examination.

P.W.4 stated that at or about the time of occurrence, Major Farooque came in front of Bangabandhu's main gate with a tank and at that time Major Noor, Major Aziz Pasha, Major Mohiuddin, Captain Bazlul Huda and others came there and talked with him for some time. He identified Major Farooque in the dock. He further stated that some times thereafter Major Farooque called Captain Bazlul Huda and Subedar Major Abdul Wahab and decorated Captain Bazlul Huda with a badge of Major and Subedor Abdul Wahab Joarder with a badge of Lieutenant and then he addressed them as Major Huda and Lt. Joarder respectively. The presence of this appellant at the gate of Bangabandhu Sheikh Mujibor Rahman's house at or about the time of occurrence as deposed by the witness has not been denied by him.

P.W.11 deposed that in the night parade on 14th August 1975 he saw two I.C. Major Farooque and at that time Resalder Moslehuddin saluted him. This witness then narrated about the marching of the troops towards the house of Bangabandhu Shiekh Mujibor Rahman. He then narrated the incident vividly. He further stated that Major Farooque came with a tank at the gate of Bangabandhu's house when Major Mohiuddin, Major Noor, Captain Huda, Resalder Sarwar and other army personnel of artillery unit came nearer to him, that they talked with him for some time and thereafter Major Farooque left with the tank. He identified Major Farooque in the dock. He did not challenge the statements made by this witness about his identification in the parade ground and at the gate of Bangabandhu's house with tank at or about the time of occurrence.

P.W.12 made statements in corroboration with P.W.11 and stated that he saw Major Farooque Rahman and other accused persons at the parade on 14th August night. He further stated that Major Farooque Rahman inspected the parade and directed to follow R.D.M. night class. Thereafter this witness narrated about marching of the troops towards the Road No.32 from the parade ground. He also narrated the manner of hearing sounds of firing after reaching to the place of occurrence. He further stated he saw the appellant with a tank at about 7.14 a.m. while he came to Mirpur road from road no.32.

As regards the appellant Lt. Col. Sultan Shahriar Rashid Khan, the prosecution has examined P.W.14 who proved his presence at the night parade at Balurght. P.W.14 stated that he was present at the night parade on 14th August at Balurghat which ended at 2/ 2.30 a.m., that at that time they were directed to fall-in, that after coming to the parade ground he saw Major Faorrque, Major Mohiuddin and other accused persons and two other persons in civil dress. Along with them, he also saw Major Rashid with some officers of artillery unit. Major Farooque directed them to by mark fall-in and reminded them that they were made to fall-in for executing an important task, that thereafter he introduced two persons in civil dress as Major Dalim and the other as Major Shahriar, this appellant, that he told that they would work with them and that the troops were required to obey their directions. Thereafter, he narrated about the movement of the tanks and the other incidents. The defence did not challenge the statement of this witness that this appellant came at the night parade at Balurghat at 2- 2.30 in civil dress or that Major Farooque introduced the Jowans while on fell in condition about the identity of the appellant. The evidence of this witness so far as it relates to the incriminating portion about his participation in the night parade and his identification remain uncontroverted.

Admittedly this appellant was a dismissed / released officer from the army and he was not supposed to remain present at the army's night parade at mid night on 14th August 1975. The learned counsel contended that there is no corroborating evidence of P.W. 14 that he was present at Balurghat. Not only that he did not deny the statements of P.W.14 about his presence at Balurghat, he also did not give any explanation in his written explanation in reply to his examination under Section 342 of the Code despite the

fact that he was confronted with the statement of P.W.14. P.W.24 also corroborated P.W.14 about this appellant's identification at the night parade on 14th August. Besides the statements of P.Ws.14 and 24, he also admitted about his presence in the night parade in his confessional statement over which I discussed earlier. He also admitted in his extrajudicial confession about his complicity in the murder. His subsequent conducts proved by P.Ws.20, 37, 42, 46, 47 over which I would discuss lateron, which can be used as corroborating evidence, sufficiently proved his involvement in the occurrence. There is no rule of law that the uncorroborated testimony of one witness can not be accepted. As a general rule, a Court may act on the testimony of a single witness, though uncorroborated. Unless corroboration is insisted upon by statute the court should not insist on corroboration, except in cases where the nature of the testimony of the single witness itself requires that corroboration should be insisted upon, and that the question, whether corroboration of the testimony of a single witness was or was not necessary, must depend upon the facts and circumstances of each case.

In respect of Lt. Col. Mohiuddin Ahmed (artillery), the prosecution has examined P.Ws. 17,18,21,22,24,25,27,29,32,34 and 35 in support of the charge leveled against him.

P.W.17 was a Nayek of two field artillery regiment at the relevant time in which the appellant was a commander of Papa Battery. He deposed regarding the presence of the appellant at the night parade at Balurghat on 14th August 1975. This witness has narrated about the parade in detail. This witness stated that after the parade Major Mohiuddin stood behind the Papa Battery cannon and gave some directions by calling Subedor Hashem. There upon Hashem called the Jawans and reminided them about the direction and then he directed them to board on the truck and called 4/5 gunners including this witness from the qubek battery and thereafter Hashem hooked 6 cannons in trucks after examining them and thereafter the trucks loaded with cannons started moving around 3.30/4.00 A.M. He was with Major Mohiuddin in the same vehicle. The trucks reached Kalabagan area at 4 .A.M. and as per direction of Major Mohiuddin, the cannons were set up aiming Bangabandhu's house at Road No.32 and Rakshibahini head quarter. He further stated that as per order of Major Mohiuddin, they fired 4 rounds of

cannon-balls and some times thereafter, when the morning light was visible as per order of Major Mohiuddin they closed the cannons and hooked with the truck and then they returned to their barrack. This appellant did not challenge the statement of this witness relating to the incriminating portion in course of cross-examination.

P.W.18 is other army personnel of two field artillery regiment. He stated that Major Mohiuddin (artillery) was their battery commander. He narrated about the parade on 14th August night, in which, this appellant and other accused persons were present. He further stated that the night training continued till 12.30 to 1.00 A.M. and this appellant inspected the parade. He made statements corroborating with P.W.17 and stated that at about 3.30/4.00 a.m, Abul Kalam made them to fall-in and at that time Captain Jahangir and Major Mohiuddin came there. Captain Jahangir told them that they had to perform an important task of checking Rakshibahini and directed them to board into the vehicle. He then narrated about the approaching of their vehicle towards Dhanmondi, when he heard 4 rounds of firing and some times thereafter, Major Mohiuddin told them to assemble the cannons and as per his direction, they proceeded towards Ganabhaban. After reaching Ganabhaban Major Mohiuddin got down from the vehicle and after one hour he came back and directed them to go to the Radio Station via New Market.

P.W.21 was a sepoy of two field artillery papa battery. He stated that Major Mohiuddin (artillery) was commander of papa battery. He narrated about the night parade in which Major Mohiuddin and other accused persons were present. He further stated that at about 4/4.30 A.M. their truck with arms approached towards Road No.32 and after stopping at Road No.32, some of the army personnel were asked to get down from the vehicle and directed them not to allow anybody to move through the Road No.32. The defence did not challenge the statements of this witness in any manner.

P.Ws. 22,24 and 25 narrated about the night parade on 14th August of two field artillery unit of papa battery at the airport area in which they stated that their commander Mohiuddin (artillery) was present. This statement has not been denied by this appellant. P.W.25 further stated that after the parade Major Farooque Rahman briefed them.

P.W.27 was also a sepoy of two field artillery of papa battery under Major Mohiuddin (artillery) during the relevant time. He also narrated about the night parade on 14th August as per direction of Major Mohiuddin and thereafter as per his order, he boarded on a vehicle and that the vehicle came to Balurghat, when Major Mohiuddin told them that Rakhibahini might attack army. Thereafter he saw a cannon was hooked with a vehicle. The other vehicles were also hooked with cannons and thereafter they approached towards the Kalabagan via Mohakhali-Firmgate-Green Road- Elephant Road. Some of them were directed to get down from the vehicle near Kalabagan and Major Mohiuddin told them not to allow any body to move on the road. He further stated that when the sun rose one army vehicle took them to Ganobhaban and there he heard the voice of Major Dalim over radio that Bangabandhu was killed. This appellant did not challenge the testimony of this witness regarding the incriminating part of his complicity in the incident.

P.W.29 was another sepoy of two field artillery papa battery unit. He also stated that Major Mohiuddin (artillery) was the commander of papa battery. He also narrated about the night parade and stated that at about 3.30 A.M. the parade was closed and thereafter they were taken to Balurghat and found that the army personnel were loading arms in the vehicles. They were directed to load arms and thereafter they started towards the town.

P.W.32. stated that he was a sepoy of two field artillery under the command of Major Mohiuddin (artillery) and that he attended the parade on 14th night. He further stated that their unit was made to fall-in when this appellant and other officers were present. He further stated that they were made to fall-in for the second time at 3/3.30 a.m. when Major Rashid and other accused were present, that as per order of Major Rashid they boarded into the truck and at that time Naik Shamsul Islam gave him ammunition. He further stated that their truck started before Fazar Ajan and when they reached by the side of Tejgaon Airport, Lt. Hasan directed them not to allow movement of any vehicle on the road. He further stated that thereafter he came to know that Major Mohiuddin and

other co-accused were involved in the incident. The appellant did not challenge the statement of this witness in any manner.

P.W.34 stated that he was Subedor of two field artillery of papa battery in which Major Mohiuddin (artillery) was the commander. He stated that on 14th night training he was present and that their unit moved with six guns to new airport via Chairman bari and at about 10 p.m. he heard sounds of Major Mohiuddin's gun firing near the gun area. He further stated that at about 2.30 A.M. they were made to fall-in again and thereafter they boarded in a vehicle and proceeded towards the Science Laboratory via Mohakhali and from there their vehicle turned towards northern side and approached through the Mirpur Road and thereafter, the vehicle stopped in front of a lake and at that time Major Mohiuddin was standing behind the gun. The troops were directed not to allow anybody to move on the road. The defence did not challenge the statement of this witness.

P.W.35 made statements in corroboration with P.W.34 and claimed that he was Subedor Major of two field artillery of papa bttery, in which Major Mohiuddin (artillery) was commander. He also narrated regarding the night training on 14th August and stated that Captain Jahangir handed over the parade to Major Mohiuddin. He further stated that after the incident he queried to the force about the cause for killing Sheikh Mujibor Rahman and came to know that Major Mohiuddin and other accused persons were involved in the killing of Bangabandhu and his family members. The defence did not challenge the statement of this witness.

On an analysis of the evidence on record it is seen that there are uncontroverted evidence on record against the appellant Major Bazlul Huda's shooting to death of Sheikh Kamal and Bangabandhu on 15th August. P.Ws. 1,4 and 6 are the eye witness of the occurrence and they have stated that Major Bazlul Huda shot to death of Sheik Kamal. P.W.4 further stated that Major Bazlul Huda along with Major Noor shot to death of Bangabandhu Sheikh Mujibor Rahman. P.Ws. 5 and 7 also recognized him at the time of occurrence at Bangabandhu's house besides these three witnesses. This appellant was also seen by P.Ws. 11, 21 and 22, at the night parade, wherefrom he alongwith others came to Bangabandhu's house and killed Sheikh Kamal and Bangabandhu. Therefore, I

find that there are uncontroverted evidence against this appellant of shooting to death of Sheikh Kamal and Bangabandhu on 15th August, 1975. P.Ws 8 and 15 also proved his extra judicial confessions regarding his complicity in the occurrence of killing. The learned Judges of the High Court are therefore, perfectly justified in finding him guilty of the charge of murder.

As regards Lt. Col Syed Faruoque Rahman, P.Ws. 11 and 12 recognized him at the night parade wherefrom he along with his force marched towards Dhanmondi and thereafter he was seen by P.Ws 1, 4, 11 at the gate of Bangabandhu's house at or about the time of occurrence with a tank and talked with Major Huda, Major Mohiuddin (lancer), Major Noor and others, and when he was confirmed about the death of Bangabandhu and other members of his family, he left the place of occurrence. P.W.12 also saw him at about 7.15 a.m. at Mirpur road while he was coming out from the road No.32 with a tank. Besides these oral statements, P.W. 15 proved the extra judicial confession of this appellant and P.W. 51 proved his confession. The evidence of these witnesses and the confessions sufficiently proved that he was also involved in the occurrence and the learned Judges of the High Court Division are perfectly justified in finding his complicity in the murder.

As regards Lt. Col. A.K.M.Mohiuddin (lancer), it is seen that P.Ws.4 and 5 saw him while he was entering into the house of Bangabandhu by firing. P.W.4 further stated that he saw while this appellant was taking Bangabandhu down at the stair and thereafter Major Bazlul Huda and Major Noor shot him to death. Besides these two witnesses, P.W.11 saw him at the gate of Bangabandhu's house at or about the time of occurrence and P.W.12 saw him while he was getting down from the truck at the entry point of Road No.32 just before the occurrence. Besides these witnesses, P.Ws. 21 and 22 saw him while they were dropped at the meeting point of Road No.32. He was implicated by the three confessing accused and those confessions were corroborated by the oral evidence on record. P.W.15 also proved his extra-judicial confession. Therefore, I find that the learned Judges of the High Court Division have rightly found his complicity in the incident of 15th August, 1975.

As regards Lt. Col. Sultan Shahriar Rashid Khan P.Ws.14 and 24 proved his presence at the night parade on 14th August at Balurghat and I have observed earlier about his complicity in the occurrence while discussing the evidence of P.W.14. P.Ws. 20, 37, 42, 46 and 47 proved his subsequent conducts which could be used as corroborating evidence for furnishing further proof of the correctness of the conclusion of the guilt drawn from the evidence. He made confessional statements about his complicity in the occurrence and he also made extrajudicial confession admitting his involvement in the killing of the President. The other two confessing accused also implicated him. From the above evidence it cannot be said that his conviction is based without reliable and corroborating evidence on record.

As regards the appellant Lt. Col. Mohiuddin Ahmed (artillery) P.Ws. 17,18,21,22,24,25,27,29,32, 34 and 35 proved as regards his presence at the night parade wherefrom the troops of his unit came to Kalabagan Lake Circus play ground, and set up cannons aiming Bangabandhu's house and the Rakshibahini head quarter. The witnesses proved that as per his order, his troops fired 4 rounds of cannon-ball from Kalabagan play ground aiming Banglabandhu's house and Rakshibahini head quarter. He did not deny the statement of these witnesses. In view of these evidence on record it can not be said that there is no sufficient materials on record to implicate him in the occurrence of 15th August, 1975. He has also admitted his complicity in the confessional statement. He was also implicated by other two confessing accused and those confessions have been corroborated by the oral evidence on record. The first learned Judge on a superficial consideration of these witnesses and other evidence disbelieved his complicity in the occurrence. The learned Judge committed a fundamental error in holding that his presence at the night parade was a normal routine work and no exception could be inferred from this act of participation. The learned Judge also did not take any exception even after he was recognised at Kalabagan play ground with cannons and his participation for the attainment of the object by directing his troops to fire cannon-balls aiming Bangabandhu's house and Rakshibahini head quarter at the time of occurrence. In the premises, there is no doubt that he was involved in the occurrence and helped the

other co-accused to commit the carnage. The second and the third learned Judges are perfectly justified in finding his complicity in the occurrence.

It will not be out of place to mention here that all the above prosecution witnesses are army personnel of lancer and artillery units with which the appellants and other co-accused were attached as officers. The defence failed to point our any enmity with them or their motive to depose against them in support of the prosecution case. They appear to be unbiased, not even remotely inimical to the accused. The defence also failed to make out which may tend to indicate that they have a motive for attributing untruthful statements to the accused. They virtually admitted their participation in the incident of murder by not challenging the testimonies of those witnesses relating to the incriminating part of their complicity. All them are neutral and trust worthy witnesses. There is no cogent ground to discard their testimonies. The second and the third learned Judges of the High Court Division and the learned Sessions Judge have believed them as independent and reliable witness.

The first learned Judge also believed P.Ws.1, 4, 11, 12, 13, 14, 15, 16, 22, 25, while finding Major Bazlul Huda, Major A.K.M. Mohiuddin Ahmed, Lt. Col. Syed Farooque Rahman and Lt. Col. Sultan Shahrior Rashid Khan's guilty of the charges but disbelieved P.Ws.16, 17, 18, 21, 22, 24, 25, 26, 27, 32, and 35 while disbelieving about Lt. Col. Mohiuddin Ahmed's (artillery) complicity in the occurrence. While disbelieving them, the learned Judge made inconsistent findings, inasmuch as, the learned Judge believed some of them while finding the other four appellants guilty of the charges. The finding of the learned Judge that "the presence of the convict with C.O. at parade was part of duty and that parade in the night of 14th August was held as per pre-existing practice as seen from the evidence of P.Ws. 44 and 45" are based on misconception of fact and also on piecemeal consideration of the evidence of P.Ws 44 and 45. The learned Judge failed to comprehend the admitted fact that as a part of conspiracy the night parade on 14th August was arranged by Lt. Col. Rashid and in course of such night parade, the accused persons finalised their plan to fulfill their criminal object and with that end in view, they took ammunition from the kote, removed heavy artillery from the cantonment,

deployed the troops with artillery at key points and thereafter some of the officers with troops went to the house of the President to materialise their object and killed the President and other members of his family over which I have discussed earlier. If this appellant's participation at the night parade was a part of pre-existing practice, then when, where and how the accused persons hatched up the conspiracy to kill the President has not been explained by the first learned Judge. The learned Judge also did not clarify as to why the accused officers directed the troops to take arms and ammunition and why they amalgamated two units after the parade and why the night parade continued till the early hours of 15th August, and lastly, why the officers and the troops came to the President's house from the parade ground, which sufficiently proved that the nigh parade was the sheet-anchor of the premeditated criminal conspiracy for fulfilling their criminal object.

In the case of Nurul Islam 43 DLR (AD) 6, the leave was granted to consider the glaring inconsistency and discrepancy in the evidence of 4 eye witnesses, P.Ws. 1, 3, 7 and 8 that cast a doubt as to the truth of the prosecution case. The Appellate Division on assessing their evidence found it difficult to rely upon them and observed that the learned Judges of the High Court Division did not consider the material discrepancy of these eye witnesses while maintaining the conviction and sentence, and set aside the conviction disbelieving the prosecution case. This decision referred by the learned counsel is not applicable in this case in view of the fact that the prosecution has led unimpeachable evidence against the accused and that the defence has failed to point out any inconsistency to discard the evidence of prosecution witnesses.

In the case of Hazrat Ali (54 DLR 636), it has been observed that when the evidence of witnesses is disbelieved by the Court in respect of a major part of the prosecution case regarding the involvement of the accused persons, the testimony of those witnesses can not be accepted without independent corroboration from other sources. We do not dispute the observations made by the High Court Division in that case. In this particular case, the learned counsel has failed to point out any major

contradiction in the evidence of the witnesses so as to disbelieve them in respect of the majority part of the prosecution case.

In the case of Muslimuddin (38 DLR (AD) 311), the appellants were convicted for the charge of murder relying upon the evidence of the deceased's wife Majeda (P.W.1) who is said to have been corroborated by P.W. 3 another eye witness but the Appellate Division noticed that P.W.3 was examined by the police long after the occurrence, and on that score disbelieved her evidence. The Appellate Division also noticed that P.W.1 was present in the hut at the time of occurrence but she was not corroborated by other witnesses, and that it was totally improbable on her part to recognise so many accused persons with precision of their overt act and disbelieved her as well. I failed to understand why the learned counsel has referred this decision. In that case it has been observed:

> "In a criminal trial determination of a disputed fact is the main task before the Court and such determination is depended upon consideration of answers given by prosecution witnesses in their cross-examination. Cross-examination is therefore, indispensably necessary to bring out desirable facts of a case modifying the examination in chief or establishing the cross-examiner's own case. The object of cross-examination is two fold, to bring out the case of the party cross-examining and to impeach the creadieof the witness. In examination in chief the witness discloses only those facts which are favourable to the party examining him and does not disclose the necessary facts which go in favour of the other side. Cross-examination in a criminal case aims at extraction of the facts which support the defence version which is very often sought to be supposed by the prosecution. The opponents can of course establish facts favourable to them by calling their own witnesses; but "there is some thing dramatic in proving one's own case from the mouth of the witnesses of the opponent."

As observed above, the defence did not challenge the incriminating part of the material evidence of the witnesses and therefore, their evidence remain uncontroverted.

The defence failed to establish facts favourable to them by cross-examining the witnesses. Therefore, this decision instead of helping of defence helps the prosecution case.

In the case of Safdar Ali Vs. Crown (5 DLR (FC) 107(64), it has been observed that in a criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence. If , after examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused must be true, it is clear that such a view reacts on the whole prosecution. In these circumstances, it has been observed, the accused will be entitled to get benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt. I do not dispute the statement of law argued by the Federal Court. These are established principle of law for the administration of criminal justice. In this particular case, I find that the defence version put forwarded by the accused does not affect the prosecution case, rather it supports the prosecution case.

In the case of Moyezuddin (31DLR (AD) 37) it has been observed as follows:

> "We like to observe that the contradiction in the statement of a witness, either with his own statement or with the statement of another witness, is a task of appreciation of the evidence, and therefore, it is within the jurisdiction of the trial court and the Court of appeal on fact, to deal with the question. No doubt there is certain rule of prudence governing the case of contradicting statements. It is first to be seen whether the alleged statement is a discrepant statement or contradictory statement. The discrepant statement is one which is either irrelevant or incoherent, but it is not irreconcilable. A discrepant statement is not fatal to the credibility of a witness. A contradictory statement is one which is conflicting and is not reconcilable with other statements either of his own or any other witness. The question in such case is, that it is upon to a court of fact either to reject the whole evidence of a witness as untrustworthy or to reject the contradictory part as unreliable or to rely upon that portion,

which in the opinion of the court, fits in with other evidence and the facts and circumstances of the case."

What Mr. Mamun argued pinpointing the alleged discrepency on certain portions of the evidence of the witnesses regarding the presence of Major Bazlul Huda at the place of occurrence and his identification by the witnesses, are minor in nature, which can not be taken as contradictory statements. The learned counsel failed to point out any contradictory statements of the witnesses, rather he avoided the Court's query as to whether the incriminating statements made by the witnesses about Major Bazlul Huda's overt act had been challenged in course of cross-examination.

Digital Evidence

The prosecution has also tried to prove the charges against the appellants on the basis of electronic evidence and an alleged statement of Lt. Col. Farooque Rahman to a reporter on an issue of "The Sunday times" published on 30th May 1976. Md. Azizul Huq (P.W.58) exhibited the issue of "The Sunday Times" as exhibit 'X'. This witness stated that as per request of the Criminal Investigation Department while he was posted as Director, Ministry of Foreign Affairs, collected a copy of the megazine through Mr. Shafi-U-Ahmed, Counsellor, Bangladesh High Commission, London in which issue, the appellant Syed Farooque Rahman admitted his complicity in the incident of 15th August, 1975 to the effect that "I helped to kill Mujib, dare you put me on trial". This witness proved the signature in the forwarding letter sent with the magazine by Mr. Shafi-U-Ahmed. The trial Court marked the magazine with a note of objection by the defence. This witness also exhibited with objection a vedio-cassette broadcast by Granada Independent Television in the United Kingdom in the "world in Action" series on 2nd August, 1976 as material Ext. 32 along with a notorised certificate issued by Keith Robert Hopkings, Notary Public certifying that "events leading to the assassination of the late Sheikh Mujib Rahman in Bangladesh in 1975 and the military coup D'Etat following that assassination and that to the best of my knowledge information and belief the said vedio cassette is an authentic copy of a televion programme....." Md. Bakhtiar Hossain (P.W.59) a local vedio recorder testified that he displayed a vedio cassette in which Lt.

Col. Rashid and Lt. Col. Farooque Rahman admitted to Anthony Mascarenhas in an interview that they killed Bangabandhu alongwith his family, Sheikh Mani and Sherniabat. He proved the cassette as ext. 12. He stated that some one gave him the vedio-cassette. He did not explain how he received the same and whether or not it was original one.

Learned Attorney General contended that the issue of 'Sunday Times' is a 'document' within the meaning of the Evidence Act in which Lt. Col. Syed Farooque Rahman in an interview admitted his participation in the killilng of Bangabandhu, and secondly, the incident of 15th August being a part our history, the Court may take judicial notice of any book or document relating to the incident under Section 57(13) of the Evidence Act on such fact, which is a relevant fact. Learned Attorney General contended that as the accused did not deny his interview with the reporter on his examination under Section 342 of the Code, this vedio-cassette may be admitted as evidence under Section 3 of the Evidence Act. Learned Attorney General further contended that in the vedio-cassette Lt. Col Farooque Rahman declared himself as the killer of Bangabandhu, which could be taken as corroborative evidence. In support of his contention, the learned Attorney General has cited the cases of S. Partap Singh V. State of Punjab AIR 1964 S.C. 72 and Islamic Republic of Pakistan Vs. Abdul Wali Khan 1976 PLD S.C. 57.

The Court may take judicial notice under Section 57 of the Evidence Act certain matters which are so notorious or clearly established that evidence of their existence is deemed unnecessary. The facts enumerated in Section 57 of the Evidence Act, if their existence comes into question, the party who assert their existence in the first instance, produce any evidence in support of their assertions. They need only ask the Court to say whether these facts exist or not, if the Court's own knowledge will not help it, then it must look the matter up: the Court can if it thinks proper, call upon the parties to assist it. In my view the alleged statement made by Lt. Col. Syed Farooque Rahman to a reporter in the issue of 'The Sunday Times' admitting his participation in the incident on 15th August 1975 will not be admissible under section 57(13) of the Evidence Act. Section 81 creates a presumption of genuiness in respect of the documents, such as, (a) an official

Gazette (b) the London Gazette (c) the Gazette of Bangladesh (d) the Gazette of any state Government, (e) a news paper or journal etc. etc. Though a presumption of genuiness attaches under this section to a document purporting to be a news paper or journal, it cannot be treated as proof of the facts reported therein. We cannot take judicial notice of the facts stated in the news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a news paper or magazine is only hearsay evidence. It is not one of the documents referred to in section 78(2) of the Evidence Act by which an allegation of fact can be proved. The presumption of genuiness attached under section 81 to a magazine report cannot be treated as proof the facts reported therein.

Now in respect of admission of Digital or Electronic Evidence, the party seeking to admit any statement or admission of any person recorded in a compact disk (C.D.) or video-cassette or any interview conducted by any television channel relating to a relevant fact or fact in issue must produce the original compact disk or video-cassette or the programme published in the television channel. The producer of the programme must certify their authenticity in the contents stating the date and place of recording of the programme. The certificate must be signed by the producer of the programme and his signature has to be proved. This procedure has not been followed in this case. The prosecution failed to produce the original copy of the vedio-cassette and the producer did not certify the authenticity of the cassette.

The scientific working group on Digital Evidence was established in February 1998 through a collaborative effort of the Federal Crime Laboratory Directors in USA. The scientific working group on Digital Evidence as the U.S based component of standardization efforts conducted by the International Organization on Computer Evidence was charged with the development of cross-disciplinary guidelines and standards for the recovery, preservating, and examination of digital evidence including electronic devices. In order to ensure that digital evidence is collected, preserved, examined, or transferred in a manner safeguarding the accuracy and reliability of the evidence, law enforcement and forensic organisations must establish and maintain an

effective quality system standard operative procedure are documented quality control guide lines that must be supported by proper case records and use broadly accepted procedures, equipment and materials.

Now the question is, if those procedures are followed, whether any digital evidence can be admissible in a criminal trial and used against accused under the existing law. The procedure for trial of a criminal case has been expressly laid down in the Code. The Procedure laid down therein is the 'presence of the accused' while recording the evidence. Section 353 provides the mode of recording evidence, which reads:

> "353. Evidence to be taken in presence of accused-Except as otherwise provided, all evidence taken under chapter XX, XXII, and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his advocate".

This Section provides for dispensation from personal attendance of the accused and in such cases the evidence can be recorded in presence of the advocate. The presence of the advocate is deemed to be the presence of the accused. This shows that actual physical presence is not a mandatory requirement. This indicates that the expression 'presence' used in the section is not used in the sense of actual physical presence of the accused. This section is analogous to the confrontation clause set out in the Sixth Amendment to the U S Constitution. After this amendment the Courts in USA are not admitting recording evidence by video-conferencing on the reasoning that video –conferencing does not satisfy the requirements of the confrontation clause. Video-conferencing is a new scientific device adopted by the developed countries in which the accused will be able to cross-examine the witness by putting suitable questions. In state of Maharashtra V. Dr Praful B. Desai, (2003)4 SCC 601, the Supreme Court of India ruled that the evidence taken from a witness through video-conferencing is compatible with the requirements of the Code. As regards admissibility of a statement recorded in a compact disk or video-cassette or in a television channel, if the accused does not deny his statement or admission, there is no difficulty in admitting such digital or electronic evidence as documentary evidence. If the accused denies the statement or admission, the

question of its admissibility has to be looked into under the prevailing rules of evidence. The Expression 'evidence' has been defined in section 3 of the Evidence Act, which reads as follows:

'Evidence' means and includes-

(1) all statements which the Court permits or requires to be made before it by a witness, in relation to matters of fact under enquiry; such statement are called oral evidence;

(2) all documents produced for the inspection of the court, such documents are called documentary evidence."

The documentary evidence defined in this section does not cover 'electronic record'. In India sub-section (2) of section 3 has been amended in the following manner.

(3) all documents including electronic record produced for the inspection of the Court; such documents are called documentary evidence."

Thus under the amended provision, evidence can be oral, documentary and electric record in India. This means that in criminal matters evidence can also be by way of electronic records such as, video-cassette, compact disk and video-conferencing. There is no corresponding law in our country. This Evidence Act is a procedural law and by the same time is an on going statute. The principles of interpreting an on going statute have been very lucidly explained by Francis Benion in his commentaries on 'statutory Interpretation' as under:

> "It is presumed parliament intends the Court to apply to an on going Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.
>
> "That today's construction involves the supposition that parliament was catering long ago for a state of affairs that did not then exist is no

> argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording."

In National Textile workers' Union V.P.R Ramakrishnan, AIR 1983 S.C. 75 Bhagwati, J. speaking for the majority observed as follows:

> "We can not allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast-changing society and not lag behind."

It is high time to evaluate how technological developments are transforming the functioning of the legal system. With the emergence of newer technologies, uncertainties arise with regard to the application of existing laws and occasionally there is a need to create new laws to regulate their use. The need for regulating new technologies is usually prompted by social and cultural perceptions about the advantage of a particular technology or alternatively the scope of its misuse.

In chapter 6: The validity – Reliability standard for scientific Evidence' in David H Daye, David E. Bernstein & Jennifer L. Mnookin, The New Wigmore: A Treatise on Evidence Expert Evidence it is stated:

> "The more dramatic impact of technology is however unfolding in the domain of procedure. For instance, investigative agencies have increasingly come to rely on forensic techniques such as analysis of fingerprints, voice, handwriting, blood samples, DNA and other bodily substances for evidence gathering. Software is also used for reconstructing

> the images of suspects and aiding investigation. As newer technologies are introduced to assist investigation agencies, it is important to not be blindly enthusiastic about their reliability. The use of scientific techniques holds immense promise in the criminal justice system, but before accepting each technic we must examine it critically in light of the constitutional rights granted to citizens and the requisite evidentiary standard."

The challenges before the criminal justice system are to balance the rights of the accused while dispensing speedy and effective justice. The criminal justice system machinery must also meet the challenge of effectively dealing with the emerging forms of crime and behaviour of criminals. It is thus hoped that the obsolete laws prevailing in the country will be amended and new suitable laws will also be enacted to respond to the needs of changing society in the light of the observations made above. In view of the lack of proper law, I am unable to use the digital evidence produced by the prosecution in this case.

Previous and subsequent conducts.

Section 8 of the Evidence Act embodies, in a statutory form, the rule of evidence, that the testimony of resgestae is always allowable when it goes to the root of the matter. Preparation is a relevant fact it being important in the consideration of the question whether a person did a particular act or not, to know whether he took any measures calculated to bring it about premeditated action must necessarily be proceeded not only by impelling motives but by appropriate preparation. Preparation and previous attempts to the offence are instances of previous conduct of the party influencing the relevant fact but other conduct also, whether of a party or of an agent to a party, whether previous or subsequent, and whether influenced by a relevant fact, is also admissible. Preparation consists in devising or arranging means necessary for the commission of the offence. The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act planned or designed.

If the previous and subsequent conducts have any reference to the proceedings or relevant to the proceedings, must be influenced by the relevant fact. The conduct made

relevant is conduct which is directly and immediately influenced by a relevant fact, and it does not include actions resulting from some intermediate cause, such as question or suggestions by other persons. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance, to Judge what the real state of accused's mind on a previous occasion was, the surrounding circumstances and subsequent events can be referred to. When once the prosecution has established the guilt of the accused by the evidence of the prosecution witnesses, then such subsequent conduct may be utilized as furnishing further proof of the correctness of the conclusion as to the guilt of the accused drawn from the evidence. This subsequent conduct may be exculpatory conduct of the accused which is equally admissible because an admission may be proved by or on behalf of the person making it if it is otherwise than an admission. In Anant Lagu V State of Bombay AIR 1960 SC 500, it has been observed by Hidayatullah,J, as follows:

> "A criminal trial, of course, is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material."

The prosecution has proved the previous conduct of the accused appellants by examining P.Ws.11, 12, 13, 14, 17, 18, 21, 22, 23, 24, 25, 27, 32, 34, 35, 39 and 40. P.W.11 recognized Lt. Col. Syed Farooque Rahman, Major Mohiuddin Ahmed (lancer), and Major Bazlul Huda at the night parade. P.W.12 recognized Major Mohiuddin Ahmed (lancer), Lt. Col.Farooque Rahman and Major Huda at the night parade on 14th August. P.W.13 recognized Major Mohiuddin Ahmed (lancer) and Lt.Col. Farooque Rahman. P.W.14 recognized Major Mohiuddin Ahmed (lancer) and Lt. col. Shahriar Rashid Khan. P.Ws. 17 and 18 recognized Lt. Col. Mohiuddin Ahmed (artillery) at the parade ground on 14th night. P.Ws. 21 and 22 recognized Lt. Col. Mohiuddin Ahmed (artillery) and Major Bazlul Huda at the parade ground. P.W.23 recognized Lt. Col. Farooque Rahman at the parade ground. P.W. 24 recognized Lt. Col. Farooque

Rahman, Mohiuddin Ahmed (artillery) and Lt. Col. Shahriar Rashid Khan at the parade ground. P.W.25 recognized Lt. Col. Mohiuddin Ahmed (artillery) and Lt. Col. Farooque Rahman at the night parade. P.W.27 recognized Lt. Col. Mohiuddin Ahmed (artillery) at Kalabagan. P.W.32 recognized Lt. Col. Mohiuddin Ahmed (artillery) at the night parade. P.W.34 recognized Lt. Col. Mohiuddin Ahmed (artillery) at Kalabagan. P.W.35 recognized Lt. Col. Mohiuddin Ahmed (artillery) and Lt. Col. Farooque Rahman at the night parade ground. P.W.39 recognized Lt. Col. Farooque Rahman and Major Mohiuddin Ahmed (lancer) at the night parade ground. P.W.40 stated that Farooque told him that they were moving to topple the autocratic Government, but instead of toppling the Government, they killed the President and other members of his family. I have discussed their evidence in detail while considering the charge of criminal conspiracy. The appellants along with co-accused and their troops marched from the parade ground towards the key points, took control of those key points by deploying troops with arms and ammunition and then their object was materialised. There is continuity of purpose or design and continuity of action, the different acts of the accused may be regarded as parts of the same transaction. The offence of conspiracy and acts done in pursuance of the conspiracy form one and the same transaction. These conducts of the appellants are relevant which have no reasonable explanation other than their guilt.

P.Ws. 8,9,12,15,16,20,23, 24,37,42,44,45,46,47,49 and 60 deposed in support of the subsequent conduct of the appellants. P.W.8 stated that as per direction of commanding officer Lt. Col. Motiur Rahman to report about the condition of Bangabandhu's house, he along with two officers visited Bangabandhu's house on 15th August 1975 and at the gate Major Noor and Major Bazlul Huda received them. He further stated that Major Bazlul Huda admitted his complicity in the killing over which I have discussed earlier. P.W.9 went to the Bangabandhu's house as per direction of P.w.45 on 15th August at about 3 P.M. for ascertaining the condition prevailing in that house, when Major Bazlul Huda received him at the gate of Bangabandhu's house. This witness further stated that under the supervision of Major Mohiuddin, the dead body of Bangabandhu was sent to Tongipara through a helicopter. P.W.12 stated that he saw Lt.

Col. Syed Farooque Rahman while he was coming towards Mirpur Road from Road No.32 with a tank at 7.15 A.M. on 15th August. P.W.15 saw Lt. Col.Syed Farooque Rahman, Lt. Col. Shahriar Rashid Khan, Major Bazlul Huda and Mohiuddin Ahmed (lancer) at Bangabhaban on the day of occurrence at about 4 P.M. P.W.16 saw Lt. Col. Syed Farooque Rahman on a jeep while he was approaching towards south of the house of Bangabandhu in front of Shang Hai Restaurant, Kalabagan, Mirpur Road on 15th August in the morning. Thereafter he went to Bangabhaban and saw Mohiuddin Ahmed (artillery) with his troops. P.W.20 saw Lt. Col. Shahriar Rashid Khan and Lt. Col. Syed Farooque Rahman and other officers inside Bangabhaban after the occurrence.

P.W.23 stated that after the incident he did not see Lt. Col. Syed Farooque Rahman and Major Mohiuddin Ahmed (lancer) in the unit and then he heard that they were staying at Bangabhaban after the incident of killing. P.W. 24 stated that immediate after the killing of Minister Sherniabat and members of his family, he saw while Major Dalim, Major Noor, Major Shariar and other accused were entering into the Radio Station. P.W.37 stated that after the incident he saw Lt.Col.Shahriar and other accused were preparing speech of Khondker Mostaque on 15th August 1975 at 7 a.m. at the studio no.2 of the Radio Station. P.W.42 made unison statement and stated that he found Lt. Col. Shahriar Rashid Khan, Major Mohiuddin Ahmed (lancer) and Farooque Rahman in the Radio Station on 15th August when the Chiefs of Army, Navy and Air Force came there to express their allegiance through the radio. He further stated that he also found Major Bazlul Huda and Major Noor when he went to road no.32 on 15th August at 11 a.m. for taking pictures of the victims as per direction of the authority. He further stated that he also saw Lt. Col. Shahriar Rashid Khan, Lt. Col. Farooque Rahman, Major Mohiuddin Ahmed (lancer) and other accused persons in the President's room at Bangabhaban in the afternoon on 15th August. P.W.44 stated that while the officers involved in the killing of 15th August and 3rd November, 1975 were staying in Bangkok, the "sepahi biplob" (armed revolution) occurred on 7th November, 1975, that Major General Ziaur Rahman became the absolute leader and that after assuming power, he repatriated the officers involved in the killing of 15th August and 3rd November by

arranging their services at different Foreign Embassies of Bangladesh. This statement proved that after the incident of 3rd November, the officers involved in the killing of 15th August left this country and took shelter in Bangkok. He further stated that those officers made abortive attempt to revolt against Ziaur Rahman and thereafter, they were removed from the service and then they lived abroad as fugitives. The appellants did not challenge the statements of this witness.

P.W.45 stated that he saw Major Bazlul Huda, Lt. Col. Farooque Ahmed and other co-accused at the oath taking ceremony of Khondker Mostaque Ahmed as President, at Bangabhaban. P.W 46 stated that he saw Lt. Col. Syed Farooque Rahman, Lt. Col. Shahriar Rashid Khan, Major Bazlul Huda and other accused persons were sitting beside Khondker Mostaque Ahmed, who was sitting on the President's, chair on 15th August at about 3.30 P.M. at Bangabhaban. P.W.47 also saw Lt. Col. Syed Farooque Rahman, Lt. Col. Shahriar Rashid Khan, Major Mohiuddin (lancer) and Major Bazlul Huda at the oath taking ceremony of the then President and the Cabinet on 15th August. He further stated that after the incident of 3rd November, Lt. Col. Rashid and other accused persons left for Bangkok. These officers are junior army officers and some of them were removed officers including Lt. Col. Shahriar. They were not supposed to remain present at such state level ceremony unless they were not involved in the killing of the President. These facts suggested that they were involved in the occurrence.

There is corroborative evidence of P.Ws. 44 and 47 that the appellants and other accused persons left the country and took shelter in Bangkok after the incident of 3rd November, 1975. It is also an admitted fact that Khandaker Mostaque Ahmed assumed the office of President after the death of Bangabandhu. There is also corroborative evidence on record that the appellants and other accused were found in the company of Khandaker Mostaque at Bangabhaban. According to the prosecution, the accused persons as a part of their conspiracy made Khandaker Mostaque as President to fulfill their purpose although as per provisions of the Constitution, he was not supposed to become the President of the country. The appellants' presence at the Radio Station and Bangabhaban after the occurrence and their fleeing away from the country jointly after

the incident of 3rd November 1975 when Khandaker Mostaque Ahmed was dethroned, supported the prosecution case that they fled away the country for the fear of being prosecuted for the killing. The fact of fleeing away from the country of the appellants jointly is a relevant fact to connect them in the occurrence. Otherwise there was no reason for them to leave the country jointly. It is also a relevant fact that most of these accused persons have been absorbed in the Ministry of Foreign Affairs and posted at Foreign Embassies. They did not deny these facts. P.W.49 stated that on 15th August Major Dalim introduced him with Lt. Col. Syed Farooque Rahman after broadcasting the statements of allegiance by the Chiefs of Army, Navy and Air Force in the Radio Station. P.W.60 proved the absorption of the accused persons in the Ministry of Foreign Affairs on 8th June, 1976 in pursuance of the Army Head Quarter's letter under Memo. dated 15th August, 1976 .

The first learned Judge disbelieved P.W.24 on the reasoning that in course of cross-examination on behalf of Lt. Col. Syed Farooque Rahman he stated that he deposed as per version of the police against the accused on the apprehension that he would be made an accused in the case as he was present at Sherniabat's house. The second learned Judge, however, believed him on the reasonings that on perusal of his statement in its entirety in cross would suggest that he denied the suggestion but the learned Sessions Judge recorded his statement in the positive form inadvertently . He, however, denied the almost similar suggestion made on behalf of Lt. Col. Mohiuddin (artillery). In view of the difference in opinion regarding the veracity of this witness we have ventured to assess his evidence afresh in entirety. This witness deposed in Court on 19th October, 1997 after more than 22 years of the occurrence and at this belated stage, there was no occasion on his part to harbour any apprehension of being implicated in Sherniabat's murder case since the cases were already filed long ago. He made this statement in Court and not before the police. In view of the above, I fully agree with the views of the second learned Judge that the learned Sessions Judge inadvertently recorded the suggestion in affirmative although he denied the suggestion.

The first learned Judge also disbelieved P.W.46 about his identification of the appellants Lt. Col. Syed Farooque Rahman, Lt. Col. Shahriar Rashid Khan, Major Bazlul Huda and other accused at Bangabhaban on the reasoning that there was nothing on evidence that he knew them earlier. This finding of the learned Judge is inconsistent, inasmuch as, the learned Judge himself took exception about these appellants' presence at Bangabhaban on the occasion of the oath taking ceremony of the President and made adverse presumption that they being junior army officers were not supposed to remain present at Bangabhaban in the President's oath taking ceremony . P.Ws. 15 and 47 also deposed that they saw them at Bangabhaban. Therefore, the learned second Judge has rightly believed this witness.

The third learned Judge disbelieved P.W.60 who proved exts. 10/5, 35, 10/5/A about the absorption and deployment of the accused persons in the Foreign Embassies on the reasonings that this absorption could not be taken as reward and their involvement in the carnage of 15th August and that no adverse presumption could be drawn against the accused by reason of such employment. The third learned Judge erred in law in failing to consider that there is uncontroverted evidence on record that after Ziaur Rahman assuming power from Khandaker Mostaque Ahmed absorbed their services in the Foreign Ministry and posted most of the accused persons at different Embassies of Bangladesh and that unless they were not involved in the occurrence, there was no reason for their being absorbed in the Ministry of Foreign Affairs, some of them were removed officers. P.Ws. 44 and 47 proved that they were absorbed by General Ziaur Rahman after he came to power on 7th March 1975 and that they left the country on the evening of 3rd March when Khondker Mostaque Ahmed was dethrowned by Khaled Mosharref. The accused did not deny those facts. There is nexus between the accused persons' fleeing away from the country on 3rd November and their absorption in the Ministry of Foreign Affairs after Ziaur Rahman assumed power on 7th November, and in the intervening period Khaled Mosharef was in powr. The third learned Judge without properly appreciating the evidence of P.Ws. 44, 45 and 47 disbelieved P.W.60. If the evidence of those witnesses are read together no inference could be drawn other than that the killers

of Bangabandhu were rewarded by General Ziaur Rahman after he assumed power on 7th November, 1975.

The evidence of these witnesses proved that the appellants and other co-accused, as part of their premeditated plan arranged night parade and then came out from the cantonment with their troops armed with tanks, cannons and other arms, to the house of Bangabandhu situated at Road No. 32, and killed Bangabandhu Sheikh Mujibor Rahman and family members, and after the killing they compelled the Chiefs of Army, Navy and Air Force to express their allegiance of the killing and to accept Khondker Mostaque Ahmed as the President of the country. Thereafter they stayed at Bangabhaban, guarded Khondker Mostaque Ahmed and the Radio Station so that anybody could topple him. They attended the oath taking ceremonies of the President and the Cabinet although they were not supposed to be present at such national ceremonies. Lt. Col. Shahriar Rashid Khan was a removed officer but he was seen at the night parade and then at the Radio Station in the early hours of 15th August. He was also found present at Bangabhaban with other accused at the state ceremony after the carnage. Some of the accused arranged for burying the dead bodies. All these circumstances sufficiently proved that they were involved in the killing of Bangabandhu Sheikh Mujibor Rahman and other members of his family. These conducts of the accused persons are relevant under section 8 of the Evidence Act and may be taken as corroborative evidence for furnishing further proof of their guilt. These previous and subsequent conducts of the accused appellants played an important part in the determination of their guilt and could be taken as circumstantial evidence. All these evidence sufficiently proved beyond doubt that these appellants and other convicts were involved in the carnage of 15th August 1975, and the learned Judges of the High Court Division were perfectly justified in finding them guilty of the charges and accepting the death reference.

Now turning to the charge of murder, it is contended by the learned counsels that there is no legal evidence on record in support of the charge under section 302/34 of the Penal Code against the appellants. Mr. Khan Saifur Rahman argues that there is no nexus between the deployment of artillery troops at Kalabagan play ground by the appellant

Mohiuddin Ahmed (artillery) and the killing of Bangabandhu Sheikh Mujibor Rahman and therefore, he has been illegally convicted under section 302/34 of the Penal Code. Mr. Khan Saifur Rahman, further contended that if the offence committed is found to be a mutiny which being a military offence, Section 34 or Section 38 has no manner of application in this case. Mr. Adur Razzaque Khan argued that Lt. Col. Shahrier Rashid Khan was not present at or about the place of occurrence and in the absence of any overt act or his participation in the incident of killing with the other accused persons, his conviction under section 302/34 is totally illegal and baseless. Mr. Khan strenuously argued that in order to bring the appellant Shahrier Rashid Khan within the ambit of section 34 of the Penal Code some overt act or acts relating to the incident must be established to lead to the inference that he had participated with the perpetrators of the crime in a pre-concerted or pre-arranged manner. Learned counsel further argued that this appellant's presence at the Radio Station at or around 6 a.m. on 15th August after the occurrence was part of his official duty, for which, he could not be saddled with the charge of murder.

To meet the points raised, I would like to discuss the true purports of section 34 which should be considered along with sections 35 and 38 of the Penal Code, which read as follows:

> "34.When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.
>
> 35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.
>
> 38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act."

A reading of these provisions show that Sections 34 and 35 create responsibility for the total result while Section 38 creates individual responsibility only. Section 34 applies where there is a common intention and for a criminal act done in furtherance of common intention of all, every one is equally responsible. Section 35 requires the existence of the knowledge or intent in each accused before he can be held liable if knowledge or intent is necessary to make the act criminal. Thus if two persons beat a third and one intent to cause his death and the other to cause only grievous injury and there is no common intention, their offences will be different. This would not be the case if the offence is committed with a common intention or each accused possess the necessary intention or knowledge. Section 38 provides for different degrees of responsibility arising from the same kind of act. The illustration brings out the point clear:

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

A criminal intention within the meaning of section 34 is simultaneous consentious of the minds of persons participated in the criminal action to bring such particular result if one facilitates the execution of the common design; such person commits an act as much as his co-participants actually committing the planned crime. The essence of section is that the person must be physically present at the actual commission of the crime. This must be coupled with actual participation, which may be of passive character such as standing by a door or near about the incident with the intention of assisting in furtherence of common intention of all the accused and with a readiness to play his part when the time comes for him to act.

Let us now apply these principles to the facts of the present case. As observed above, these appellants attended in the night parade, and it was organized to fulfill and implement their object. They deployed jawans under the command of the officers at

different key points such as, Rakhibahani head quarter, BDR head quarter, Radio Station, Mintoo road. and Road No. 32. This deployment of army at Rakhibahini head quarter gate and BDR gate was a part of their preconcerted plan to prevent these paramilitary forces if they came forward for protecting the President on getting any information for help. The deployment at the Radio Station was for preventing any person on behalf of the then Government to seek any help from the army, navy, air force, paramilitary forces, political activists or from other sources. The deployment at Mintoo Road was also to prevent the Ministers to mobilize the public or any other force for the protection of the President. The existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused. The principles governing circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can safely be drawn and no the hypothesis against the guilt is possible (1977 SCC (Cri) 1004). The circumstances before, during and after the occurrence can be proved to decide about the complicity of the accused. In Nalini case ((1999)5 SCC 253) wadha, J. Pointed out the criminal responsibility for a conspiracy requires more or less passive attitude towards an existing conspiracy. Learned Judge set out the legal position as under:

> "One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of conspiracy and goes along with other conspirators actually standing by while the others put the into effect, is guilty though he intends to take no active part in the crime."

They proved that Lt. Col. Mohiuddin(artillery) was deputed with cannons at Kalabagan play ground near road no. 32, Lt. Col. Sultan Shahriar Rashid Khan was deputed at the Radio Station, Lt. Col. Farooque Rahman took the overall responsibility for checking Rakhibahani and the Bangabandhu's house, Major Mohiuddin (lancer), Major Bazlul Huda, Major Noor with some troops were given the main task of implementing the main object of killing the President and other members of his family. The acts of the appellants and co-accused that they took control of vital points was a part of the criminal conspiracy to fulfill the common design of killing Bangabandhu Sheikh

Mujibor Rahman and his family members without any interruption. There is no dispute that Major Bazlul Huda and Major Mohiuddin (lancer) actively participated in the killing, of them, Mazjor Bazlul Huda shot to death of Sheikh Kamal and the President. His act attracts Section 302 but he has been charged under Section 302/34 of the Penal Code. His conviction cannot be converted to one under section 302 for the substantive offence. Major A.K.M.Mohiuddin(Lancer) brought the President down for facilitating his killing. He has actively participated in the act of killing. Although Lt. Col. Syed Farooque Rahman did not join in the actual killing but his presence at the main gate of Bangabandhu with a tank at the time of killing was part of the agreement with a view to attainment of the object which all the accused persons were pursuing. Similarly Lt. Col. Mohiuddin (artillery) aided co-accused Major Bazlul Huda, Major A.K.M.Mohiuddin (lancer) and others in the attainment of the object by his act of remaining presence with troops and artillery with the motive that if anybody come forward to rescue the President, he would resist them, and with that object, he fired four cannon-balls letting others to show that he was prepared to use the cannon- balls whenever time comes for him to act. The acts of these accused persons lead to the conclusion unaffected by reasonable doubt that they were parties to the conspiracy and guilty of criminal conspiracy for killing Bangabandhu and other members of his family. Their offence can also be spelt out by applying the principle of constructive liability for the offence of murder as they participated in the crime in furtherance of common intention of all.

Admittedly Lt. Col. Sultan Shahriar Rashid Khan was not present at the place of occurrence. He was deployed at the Radio Station at the time of occurrence. As observed above, his task was also for preventing anyone from seeking any help by sending message through the radio. Now the crux of the point is whether his act falls within the ambit of section 34 since he was not physically present at the place of occurrence. The learned Judges of the High Court Division were of the view that he shared the common intention with other accused- persons, although his participation was not active, it was passive, which act also attracted the ambit of section 34. The first learned Judge observed that “besides being present at the night parade and his presence at the Radio Station was

part of the said agreement that he entered into agreement with other convicts for the purpose of causing the incident in the official residence of the President". The second learned Judge also noticed his presence at the Radio Station about 4.30/5.00 A.M. and expressed similar views. The learned Judges considered the cases of Barendra Kumar Ghose V. Emperor, AIR 1925 P.C.1, Shocekantiah Ramayya Muni Palli, V. The State of Bombay AIR 1955 SC. 287, Takaram Gonapat V. State of Maharashtra AIR 1974 SC 514, Ramaswami V. State of T.N. AIR 1976 Sc. 2027, Abdur Rahman Mandol Vs. The State , 29 DLR(SC)247, Bangladesh Vs. Abed Ali, 36 DLR(AD) 234, Abdus Samad @ A.K.M. Abdus Samad Vs. The State 44 DLR (AD) 233 and State Vs. Tajul Islam and others 48 DLR 305 in coming to their conclusion.

As observed above, the dominant feature of Section 34 of the Penal Code is the element of participation is actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. This section requires that there must be a general intention shared by all the persons unite with a common purpose to do any criminal offence, all of those who assist in the accomplishment of the object would be equally guilty. It follows, therefore, that common intention is an intention to commit a crime actually committed and every one of the accused should have participated in that intention. In Barendra Kumar Ghosh's case, their Lordships of the Privy Council have clearly expounded the principles animated in the section. In that case three men fired at the post master, of whom Barendra Kumar, the appellant was one of them. He wore distinctive clothes by which he could be identified; and while these men were just inside the room, another was visible from the room through the door standing close to the others but just outside on the doorstep in the courtyard. This man was armed but did not fire. The defence of Barendra was that he was the man outside the room, that he stood in the courtyard and was very much frightened. It was observed that whether he was present as one of the firing party or as its commander or as its reserve or its sentinel was of no special importance on the case made for the crown. Why he was there at all and why he did not take himself off again he did not say, nor did he even indicate his precise position

in the yard. Their Lordships while maintaining his conviction expounded the ambit of Section 34 as follows:

> "By S. 33 a criminal act in S.34 includes a series of acts and, further "act includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S.37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait." By S. 38 when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar or diverse by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it."(emphasis given)

Therefore, the dominant feature of Section 34 is the element of participation is action, this participation need not be in all cases be by physical presence. The Supreme Court of India in Jaikrishnadas Monohardas Desai and another V. State of Bombay, AIR 1960 SC 889 has distinguished the cases in which the physical presence of the accused person at the place of incident is prerequisite and in which cases the physical presence of the accused is not necessary- his participation by doing separate acts similar or diverse would bring him within the ambit of the Section. It has been observed as follows:

> "But the essence of liability under S. 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the

offender sought to be rendered liable under S. 34 is not, on the words of the statute, one of the conditions of its applicability. As explained by Lord Summer in Barendra Kumar Ghose v. Emperor, 52 In App 4o at p.52: (AlR 1925 PC 1 at p.7), the leading feature of S.34 of the Indian Penal Code is 'participation in action'. To establish joint responsibility for an offence, it must of course be established that a criminal act was done by several persons; the participation must be in doing the act, not merely in its planning. A common intention- a meeting of minds-to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of S. 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places.(emphasis added)

These views have been approved in Ramaswami Ayyangar's case(AIR 1976 SC 2027) as under:

"The contention is fallacious and cannot be accepted. Section 34 is to be read along with the preceding Section 33 which makes it clear that the "act" spoken of in Section 34 includes a series of acts as a single act. It follows that the words "when a criminal act is done by several persons" in Section 34, may be construed to mean "when criminal acts are done by several persons." The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co-participants actually

committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Sec.34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or prompting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act.' The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (emphasis added)

In the case of Shocekantiah Ramayya Munipalli and another Vs. The State of Bombay, (AIR 1955 SC 287) it was observed :

"The essence of S.34 that the person must be physically present at the scene of occurrence couple with actual participation which, of course can be of a passive character such as standing by a door, provided that is done with the intention of consisting in furtherence of common intention of them all and there is a readiness to play his part in the prearranged plan when the time comes for him to act".(emphasis given)

Five member Bench of this Court also took similar views in Abdur Rahman mondal's case (29 DLR (SC) 247) as follows :

"The common intention to bring about a particular result may will develop on the spot as between a number of persons. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference or the incriminating acts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. Further it is the essence

> of S.34 that the person must be physically present at the actual commission of the crime."(emphasis added)

The learned second Judge also considered the case of Rasool Bux Vs. The state 22 DLR (SC) 297, in which case the views taken in Barendra Ghosh have been approved. In that case accused Lal Bux and Rasul Bux abducted Mst. Roshna from the house of her father, if necessary, by the use of force. They were both armed with deadly weapons. When their presence was discovered in the courtyard they abandoned their original plan but were nevertheless determined to escape, if necessary by use of weapons carried by them.

In the facts of the case, H. Rahman, C.J., speaking for the Supreme Court observed:

> "There is no doubt that to bring a case within the ambit of section 34 PPC it is necessary that some overt act or acts must be established to lead to the inference that the participators in the crime acted in pre-concert or under some pre-arranged plan but this does not mean that every participant in the crime must be shown to have committed the same kind of act. It is sufficient to show that they joined together in the commission of a particular act, for then they must all be deemed to have intended the natural and inevitable consequences of that act even if some of them did nothing but merely helped by their presence the commission of the act."(emphasis added)

In Tajul Islam's case (48 DLR 305), the High Court Division noticed the evidence produced by the prosecution in support the charge that Badsha in his confession stated that he pressed the legs of second son of Biroja Rani, and accused Inu cut him into two pieces by a dao. Other confessing accused stated that for the purpose of committing the offence they went to the house of Biroja and were on guard either in the boat or in front of the door of neighbours of Biroja or in the road leading to the house of Biroja presumably to prevent any person from coming in the way of their committing the offence.

In the facts of the case the learned Judges observed as follows:

> "In offence involving physical violence, normally presence at the scene of the occurrence of the offender sought to be rendered liable on the principle of joint liability is necessary such is not the case in respect of other offences where offence consists of adverse acts which may be done at different time and place."

Thus, the consistent views right from the privy council to the apex Courts of India, Pakistan and Bangladesh are that in order to bring an offence within the ambit of section 34, in respect of physical violence, the offender must be physically present at the actual commission of the crime for the purpose of facilitating the offence. Even if the offender did nothing but merely helped by his presence for facilitating the offence, he will be liable for joint liability. In order to bring the offence within the ambit of the section there must be simultaneous consensus of minds of persons participating in the criminal action to bring about a particular result- such consensus can be developed at the spot.

In Noor Mohammad Mohd. Yusuf Momin(appellant) V. The State of Maharastra, AIR 1971 SC 885, the trial Court convicted Mohd. Taki Haji Hussain Momin under Section 302 and acquitted three other accused including the appellant. On appeal against acquittal, the Bombay High Court reversed the acquittal and convicted the appellant and two others under Section 120B and 302 read with Section 34 I.P.C. The appellant was also convicted under Section 302/109 IPC and sentenced to imprisonment for life on two counts separately. As there was no conclusive evidence about the appellant's physical presence at the place of occurrence, the Supreme Court gave him the benefit of doubt of sharing common intention in the accomplishment of the object and acquitted him of the charge under Section 302/34 on the following observations:

> "From the evidence it seems highly probable that at the time of the actual murder of Mohd. Yahiya the appellant was either present with other three co-accused or was somewhere nearby. But this evidence does not seem to be enough to prove beyond reasonabole doubt his presence at the spot in

> the company of the other accused when the murder was actually committed ..... we are, therefore, inclined to give to the appellant the benefit of doubt in regard to the charge under Section 302 read with Section 34 IPC."

I am not inclined to multiply the decisions on this point any further. As observed above, several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill and each can individually inflict a separate fatal blow and yet none could be vicariously convicted for the act of any of the others . Same or similar intention should not be confused with common intention. Similarly it should be borne in mind that physical presence at the scene of occurrence is necessary for a man can be vicariously liable for an offence of physical violence since the essence of common intention is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result.

The application of Section 34 in respect of the offences other than physical violence have been explained in Tukaram Ganpat's case (AIR 1974 SC 514). The facts against the accused including the appellant Tukaram Ganpat were that they stole some bundles of copper wire from the godown of a company after breaking open the godown and removed them away by a lorry which stopped at a weigh-bridge where the brokers for sale were present. There was no evidence about the presence of the appellant at the scene of offence. The concurrent findings of the courts below were that the appellant was in possession of duplicate keys of the burgled godown found missing from the factory and that he was present at the weigh bridge. The appellant had no explanation for possessing of godown keys nor for his presence at weigh-bridge. In the context of the matter the Supreme Court maintained the conviction of the appellant on applying the principles of common intention as under:

> "Mere distance from the scene of crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. In Barendra Kumar Ghosh v. The King Emperor (1924) 52 IA 40- (AIR 1925 PC 1) the Judicial Committee

> drew into the criminal net those 'who only stand and wait.' This does not mean that some form of presence, near or remote, is not necessary, or that mere presence without more, at the spot of crime, spells culpability. Criminal sharing, overt or covert by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of Section 34. Even assuming that presence at the scene is a pre-requisite to attract Section 34 and that such propinquity is absent. S. 107 which is different in one sense, still comes into play to rope in the accused. The act here is not the picking the godown lock but house-breaking and criminal house trespass. This crime is participated in by those operating by remote control as by those doing physical removal. Together operating in concert, the criminal project is executed. Those who supply the duplicate key, wait at the weigh bridge for the break-in and bringing of the booty and later secrete the keys are participles criminal. And this is the role of accused No.2 according to the Courts below. Could this legal inference be called altogether untenable?

The Supreme Court explained the principles of joint liability observing that mere distance from the scene of crime cannot exclude culpability under Section 34 of the Penal Code in criminal sharing making out a certain measure of jointness in the commission of the act. The learned Judges failed to appreciate the ratio decidendi of this decision and applied it in this case which is not applicable in the facts and circumstances of this case.

I do not dispute the principle of law stated in the considered by the High Court Division cases and those are settled principles. The prosecution is required to prove the physical presence of the accused persons at the place of occurrence in order to bring them within the ambit of section 34 of the Penal Code because the common intention to commit an offence of physical violence develop at the spot. Even if it is assumed that Section 34 is not applicable in respect of Lt. Col. Sultan Shahriar Rashid Khan, this would, however, be of little practical in benefit to him because his participation in the criminal conspiracy to implement the object has been established by the prosecution.

There is no substantial difference between conspiracy as defined in Section 120A and acting on a common intention as contemplated in Section 34. In the former the gist for the offence is bare agreement and association to break law even though illegal act does not follow while the gist of an offence under section 34 is the commission of a criminal act in furtherence of a common intention of all the offenders which means that there should be a unity of criminal behaviour resulting in something for which an individual will be punishable if it is done by himself alone. When a criminal conspiracy for committing murder has been established there is no need to award a conviction in the aid of Section 34 for, in an offence of criminal conspiracy anything said, done or written in reference to their common intention after the intention was entertained is relevant against all the accused. When specific acts done by each of the accused have been established showing their common intention they are admissible against each and every other accused. Though an act or action of one accused can not be used as evidence against other accused but an exception has been carved out in section 10 of the Evidence Act in case of criminal conspiracy. If there is reasonable ground to believe that two or more persons have conspired together in the light of the language used in 120A of the Penal Code, the evidence of acts done by one of the accused can be used against the other.

Section 120A which defines criminal conspiracy enacts that an agreement to commit an offence may itself amount to a criminal conspiracy even if no overt act follows on the agreement. The second class of cases is that in which the conspiracy is formed in order to do an illegal act or an act not illegal by illegal means; this sort of conspiracy in no case amounts to abetment and does not amount to criminal conspiracy unless some act besides the agreement is done in pursuance thereof. It is thus clear that Section 120A provides the extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of Section 107; Section 120B provides punishment for criminal conspiracy where no express provision is made in the Penal Code for the punishment of such conspiracy.

Sub-Section (1) of Section 120B imposes a penalty equal to the punishment for abetment on participation in criminal conspiracy to commit an offence. The Section appears to have been introduced to fill up the gap in section 107 defining abetment. Under section 107 "secondly" provides that a person abets the doing of a thing who engages with others in a conspiracy for doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy. Abetment of an offence is punishable under sections 109 and 116 as the case maybe, if the offence is not committed; but it is clear that a conspiracy will not amount to an abetment unless an act or illegal omission takes place in pursuance of the conspiracy. Therefore, the first class of cases which section 120B is designed to cover, is that in which the conspiracy is formed for the commission to a serious offence. But no act or illegal omission has taken place in presence of it.

Put very briefly, the distinction between the offence of abetment under the second clause of section 107 and that of criminal conspiracy under section 120 A is this, in the former offence a mere combination of persons or agreement between them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence. In pursuance of the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences. It is not required to prove that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime since from its very nature a conspiracy is hatched in secrecy, direct evidence of a criminal conspiracy to commit a crime is not available otherwise the whole purpose may frustrate- in most cases only the circumstantial evidence which is available from which an inference giving rise to the commission of an offence of conspiracy may be legitimately drawn.

In Noor Mohammad Mohod Yusuf Momin (Supra), the distinctive features of sections 34, 107 and 120B have explained. It is said that so far as Section 34 of the Penal

Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109 of the Penal Code, on the other hand, may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission on a charge under section 120B of the Penal Code. An offence of criminal conspiracy was made a substantive offence in 1913 by the introduction of chapter V-A in the Penal Code. I.D.Dua,J. spoke for the Supreme Court as under:

> "Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. In deed in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything, done by anyone of them in

> reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto. ”

The next question is whether a conviction on the charge of conspiracy could have been given after the conspiracy has borne its fruits as raised by Mr. Abdur Razzak Khan. In State of Ahdhra Pradesh V. Kandimalla Subbaiah and another, AIR 1961 S.C.1241, the point for consideration was whether an offence is said to have been committed in consequence of abetment, when it has been committed in pursuance of the conspiracy, and the abettor by conspiracy can be made punishable with the punishment provided for the actual offence. The Supreme Court of India argued the point as under:

> “Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy. There is no analogy between S.120 B and S.109 I.P.C. There may be an element of abetment in a conspiracy; but conspiracy is something more than an abetment. Offences created by Ss. 109 and 120B, I.P.C are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, that is, abetment when the allegation is that what a person did was something over and above that. Where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those offences as well as with the offence of conspiracy to commit those offence.”

In the State of Andhra Pradesh V. Cheemalapati Ganeswara Rao and another, AIR 1963 S.C.1850, similar points arose. It is said that the offence of conspiracy is an entirely independent offence and though other offences are committed in pursuance of the conspiracy the liability of the conspirators for the conspiracy itself cannot disappear. In the Penal Code, as originally enacted, conspiracy was not an offence. Section 120 B which makes criminal conspiracy punishable was added by the Criminal Law Amendment Act, 1913 (Act VIII of 1913) along with S. 120-A. Section 120-A defines conspiracy and S. 120-B provides for the punishment for the offence of conspiracy.

Criminal conspiracy as defined in S. 120 A consists of an agreement to do an illegal act or an agreement to do an act which is not illegal by illegal means. Section 120 B provides that whoever is a party to a conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards shall be punishable in the same manner as if he has abetted such offence unless there was an express provision in the Code for the punishment of such conspiracy. J.R.Mudholkar,J. speaking for the Supreme Court argued as under:

> "Criminal conspiracy was, however, not an unknown thing before the amendment of the Indian penal Code in 1913. But what the amendment did was to make that conspiracy itself punishable. The idea was to prevent the commission of crimes by, so to speak, nipping them in the bud. But it does not follow that where crimes have been committed the liability to punishment already incurred under S. 120B by having entered into a criminal conspiracy is thereby wiped away. No doubt, as already stated, where offences for committing which a conspiracy was entered into have actually been committed it may not, in the particular circumstances of a case, be desirable to charge the offender both with the conspiracy and the offences committed in pursuance of that conspiracy. But that would be a matter ultimately within the discretion of the court before which the trial takes place."

In a later case in Suresh Chandra Bahri V. Gurbachan Singh AIR 1994 S.C. 2420, Suresh Bahri Bachan and Raj Pal Sharma were convicted under section 302 of the Penal Code- they were also convicted under section 302 /120 B for committing murder of three persons in pursuance of the offence of criminal conspiracy. Two of them were also convicted under section 201 for causing disappearance of evidence. The Patna High Court maintained the sentence of death. In the Supreme Court it was argued that there is no direct and legal evidence against Gurbachan and Raj Pal for their involvement in the conspiracy and that there is no evidence against Gurbachan about his participation in the crime. In the context of the matter, the Supreme Court while maintaining the conviction

under section 302/120B of the accused on the basis of circumstantial evidence considered whether such conviction can be given in pursuance of criminal conspiracy. It is said that the provisions of S. 120-A of the Penal Code defines criminal conspiracy. It provides that when two or more persons agree to do, or cause to be done (1) an illegal act, or (2) an act which is not illegal by illegal means, such agreement is designated a criminal conspiracy; provided that no agreement except an agreement to commit an offence shall amount to criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Thus a cursory look to the provisions contained in Section 120-A reveal that a criminal conspiracy envisages an agreement between two or more persons to commit an illegal act or an act which by itself may not be illegal but the same is done or executed by illegal means. The essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a fact situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120-B read with the proviso to sub-sec (2) of Section 120-A of the Penal Code, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under S. 120-B and the proof of any overt act by the accused or by any one of them would not be necessary. Faizan Uddin, J. on consideration of almost all earlier decisions on the point argued as under:

> "The provisions in such a situation do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trapping of the provisions contained in S. 120B since from its very nature a conspiracy must be conceived and hatched in complete secrecy, because

> otherwise the whole purpose may frustrate and it is common experience and goes without saying that only in very rare cases one may come across direct evidence of a criminal conspiracy to commit any crime and in most of the cases it is only the circumstantial evidence which is available from which an inference giving rise to the conclusion of an agreement between two or more persons to commit an offence may be legitimately drawn."

Therefore, in order to constitute the offence of conspiracy, there must first be a combining together of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy in order to the doing of that thing. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. Therefore, I find that each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. The cumulative effect of the proved circumstances should be taken into account in determining the guilt of the accused rather than adopting an isolated approach to each of the circumstances. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The common intention of the conspirators then is to work for the furtherance of the common design.

Mr. Abdur Razzak Khan finally argues that the act of Lt. Col. Sultan Shahriar Rashid Khan's attracts an offence of abetment of murder punishable under Section 109 of the Penal Code. In support of his contention, the learned counsel has referred the cases of Md. Shamsul Hoque vs. State 20 DLR 540, Amor Kumar Takur and others Vs. The State 40 DLR(AD)147 Hazral Ali and others Vs. The State 44 DLR (AD)51 and Dharan Pal and others V. State of Haryana (1978) 4 S.C.C 440. Md. Shamsul Hoque's case was decided following the case in AIR 1938 Mad 130, which was also followed in 8 DLR 48. It was observed in the Madras case that where an offence is alleged to have been committed by two or more persons, the person responsible for commission of the offence should be charged with the substantive offence, while the persons alleged to have abetted it by conspiracy should be charged with the offence of abetment under section 109. The

views taken AIR 1938 Mad 130 have been overruled in Kandimalla Subbaiah's case (AIR 1961 S.C. 1241 paras 7 and 8). The facts and the principles of law applicable in Amar Kumar Thakur's case are quite distinguishable. In that case the accused were charged for an offence punishable under sections 302/34, and this Court on sifting evidence came to the conclusion that "the appellants no.2-4 had no intention of their own to cause the death of Nandalal particularly when he was proceeding at their request to hold the mediation at that unearthly hour of the night." In Hazrat Ali's case, the Appellate Division on assessment of the evidence came to the conclusion that Hazrat Ali abetted the offence of the murder of Zahura Khatun and converted his conviction to one under section 302/109 from an offence of 302/34. In Dharam Pal's case, it was observed that the existence or otherwise of the common intention depends upon the facts and circumstances of each case, and in the absence of materials, "the companion or companions can not justifiably be held guilty for every offence committed by the principal offender." These cases are quite distinguishable and not applicable in this case.

On an overall consideration of the evidence and the principles of laws discussed above, I fully agree with the conclusion arrived by the High Court Division that the appellants and other convicts hatched up conspiracy to kill Bangabahdhu Sheikh Mojibor Rahman and the members of his family and accomplished their object by killing them and three other security personnel. In a case where the agreement is for accomplishment of an act which constitutes an offence, then if the prosecution fails to prove the overt act committed by each of the conspirators, the criminal conspiracy is established by proving such agreement and the proof of overt act by all the accused would not be necessary. In other words, in such situation it is not required that each and every accused who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy. In this case, although an offence of murder has been committed in pursuance of conspiracy; the liability of the conspirators for the conspiracy cannot disappear. When specific act done by each of the accused have been established showing their common intention, they are admissible against each and every other accused. In the case of Nalini((1999)5 SCC 253) the accused persons were arraigned as members of the

conspiracy to extirpate former Prime Minister of India Rajib Gandhi. The accused persons were convicted under section 302/120B of the Indian Penal Code. Their conviction was maintained by the Supreme Court. Similarly, in Kehar Singh's case, (AIR 1988 SC 1883),Kehar Singh, Balbir Singh and Satwant Singh were charged under section 302 read with section 120B and other offences for the assassination of Smt. Indira Gandhi, the Prime Minister of India by her security guards. The conviction of the two accused was maintained by the Supreme Court. In Suresh Chandra Bahri's case(AIR 1994 SC 2420) the Supreme Court of India maintained the conviction of three accused under Section 302/120B of the Penal Code. On consideration of the evidence on record and the principles of law discussed above, I am of the view that the proper conviction of the appellants Lt. Col. Syed Farooque Rahman, Lt.Col. Mohiuddin Ahmed (artillery), Major A.K.M.Mohiuddin Ahmed and Major Bazlul Huda would have been under section 302 read with Section 120B and Section 34 of the Penal Code instead of sections 302/34 and section 120 B of the Penal Code, and that of Lt. Col. Sultan Shahriar Rashid Khan under Section 302/120B of the Penal Code. Their conviction is modified accordingly.

Confirmation of sentence.

It is contended that since the appellants have been in the death cell for a long period, the ends of justice demands that the sentence awarded to the appellants be commuted to imprisonment for life. In this connection Mr. Khan Saifur Rahman, has referred in the case of Nurul Hoque Kazi V.State 7 BLC (AD)52. Mr. Abdullah-Al Mamun learned counsel adds that this prolong delay in carrying out a sentence of death after their sentence had been passed amounts to inhuman punishment and torture and violative of fundamental rights guaranteed in Article 35(5) of the Constitution. According to the learned counsel, under this provision no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment, and on consideration of their sufferings the sentence of death awarded to these appellants is liable to be commuted to imprisonment for life. In support of his contention, the learned counsel has referred the case of Pratt and another V. Attorney General for Jamaica and another, (1993) 4 All E.R.

768, Henfield V. Attorney General of Commonwealth of Bahamas, 3 W.I. R. (P.C) 1079 and Guerra V. Baptiste and others (1995) 4 All. E.R. 583.

Pratt was convicted in Jamaica on a charge of murder and sentenced to death. He applied for leave to appeal within few days from his conviction. There was delay of two years before hearing by a Court of appeal of Jamaica of the application for leave could be arranged due to delay in obtaining aid and for other reasons. The appeal for leave was dismissed but no date was fixed for execution for sentence. The rules in force in Jamaica laid down a strict time table for appeals to the Judicial Committee of the Privy Council and further provided that execution would only be stayed so long as the time table was adhered to. Further more, as per Jamaica's Constitution a written report of the case from the trial Judge and the case record were required to be submitted to the Jamaica Privy Council. Pratt wrote to the Registrar of the Court of appeal asking for the reasons why his application for leave to appeal was dismissed. It was then transpired that no reasons have been prepared because the papers have been misfiled and forgotten. The convict also petitioned to the Inter American Human Rights for commutation of sentence. Then he applied to the United Nations Human Rights Committee which requested Jamaica not to carry out death sentence before the committee had an opportunity to consider the complain but in the mean time Jamaican Privy Council recommended that the State not to accede to the request. Thereafter the accused also obtained an order of stay of execution from the Governor General. In this way there was delay of about 12 years for execution of the sentence. Thereupon Pratt petitioned for Constitutional redress under Section 25(1) of the Constitution claiming that his execution after such a prolong delay "would be inhuman punishment or other treatment" and thus in breach of Section 17(1) of the Constitution. The Privy Council accepted his plea and commuted the sentence to imprisonment for life on the following reasons:

> "prolonged delay in carrying out a sentence of death after that sentence had been passed could amount to inhuman..... punishment or other treatment contrary to s. 17(1) of the Jamaican Constitution irrespective of whether the delay was caused by the shortcomings of the state or the legitimate resort of the accused to all

> available appellate procedures. A state that wished to retain capital punishment had to accept the responsibility of ensuring that execution followed as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve and, if the appellate procedure enabled the prisoner to prolong the appellate hearings over a period of years, the fault was to be attributed to the appellate system that permitted such delay and not to the prisoner who took advantage of it."

In Henfield, the convict was sentenced to death for murder in 1988. The Court of appeal of the Commonwealth of The Bahamas dismissed his appeal and a warrant was read for his execution. He thereupon obtained stay of execution from the Judicial Committee. His leave petition was dismissed by the Judicial Committee. Thereafter he applied to the Supreme Court of the Bahamas for a declaration that the period of time for which he had been held awaiting execution amounted to such a delay as to constitute inhuman punishment contrary to Article 17(1) of the Constitution of the Commonwealth of The Bahamas. There was delay for about 5 years in the disposal of the proceeding up to the Supreme Court. Thereafter a warrant for execution was issued. The convict thereupon applied to the Judicial Committee for leave to appeal on the similar ground of "inhuman or degrading punishment or other treatment". The Privy Council following Pratt's case commuted the sentence of death to imprisonment for life observing as follows:

> "They therefore reviewed the relevant considerations, at pp. 34-35, and concluded that in any case in which execution was to take place more than five years after sentence there would be strong grounds for believing that the delay was such that execution thereafter would constitute inhuman punishment contrary to section 17(1)".

In Guerra's case, the accused was convicted for murder in May, 1989 in Trinidad and Tobago and was sentenced to death. He then applied for leave to appeal to the Supreme Court. The transcript of summing up at the appellant's trial was available in February 1990 but there was considerable delay in transcribing the Judge's notes of

evidence and the appellant's lawyer was not notified that they were available in May, 1993. The appeal was ultimately heard in October, 1993 which was dismissed in November. The appellant's petition for leave to appeal to the Privy Council was also dismissed and his execution was fixed on the following day. The appellant thereupon filed a constitutional motion alleging that his execution the next day pursuant to the warrant would constitute a violation of his fundamental rights. The motion was heard and dismissed. Thereupon he appealed to the Privy Council contending that his execution after a delay of 4 years 10 months, during which time he was on death row was a "cruel and unusual punishment" contrary to section 5(2)(b) of the Constitution of Trinidad and Tobago and that giving him less than 17 hours notice of his execution was a breach of his constitutional rights. The Privy Council on applying the principles of "due process law" under common law jurisdiction commuted his sentence to imprisonment for life, on applying the principles of Pratt's case as under:

> "Where a person was sentenced to death in a common law jurisdiction, execution was required to be carried out by the state as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve, since under the common law a long-delayed execution was not in accordance with the due process of law. In Trinidad and Tobago such an execution, if not stayed, would constitute a cruel and unusual punishment contrary to s. 5(2)(b) of the constitution and would not be in accordance with the due process of law under s. 4(a) of the Constitution."

These principles are not applicable to our Courts. The phrase 'due process of law' is synonymous with 'law of the land' as used in the famous twenty-ninth chapter of 'Megna Charta' which declared that "no freeman shall be taken, or imprisoned, or dissiezed, or outlawed, or banished, or anyways destroyed, nor will the king pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land." This principle has been adopted in the Fifth and Fourteenth Amendment of the American Constitution. Both these amendments prohibit deprivation of life, liberty or property

'without due process of law'. The essence of the concept is fairness and avoidance of arbitrariness. These principles are being followed in Courts of Jamaica, Trinidad and Tobago, The Bahamas. Article 31 of our Constitution the like the American due process clause ensures fair procedure in any proceeding affecting rights and liberties of individuals and this fairness concept is embodied in the principles of natural justice. The American and Caribbean decisions may throw light in making the inquiry, but the standard set by those Courts cannot be applied to our Courts without careful evaluation of our laws, economic and social conditions and values. Secondly, there are uniform decisions of our Superior Courts that mere delay is not a legal ground for the commutation of a sentence of death.

In the case of Furman V. State of Georigea, Nos. 69-5003, 69-5030 and 69-5031 in the Federal Supreme Court of USA the Judges were invited to reject capital sentence on the ground that it violated the Eight Amendment which forbade 'cruel and unusual punishments'. Though the learned Judges by a majority set aside the sentence of death, however, the three Judges namely Douglas, Stewart and White, JJ. who formed majority with Brennan and Marshall, JJ. did not take the view that the Eight Amendment prohibited capital punishment for all crimes and under all circumstances. In our Constitution there is no such provision like the Eight Amendment nor are we apply the test of reasonableness with the freedom with which the Judges of USA Supreme Court are accustomed to apply, the due process clause. We are dealing with punishments for crimes as prescribed by law. This capital punishment can not be termed as unusual because this type of punishment has been with us from the ancient times. Our Constitution recognised this punishment under the law.

Learned Attorney General contends that the delay in concluding hearing of the appeals is not due to the laches of the State but it is in fact due to the laches of the accused appellants. It is further contended that most of the accused persons including two appellants remained in abscondence through out the trial and the confirmation of the sentence in the High Court Division, and as a result, the lengthy procedures for hearing the reference in absentia have been complied with. On perusal of the record I noticed that

no endeavour was ever taken on the part of the appellants to dispose of the appeals and the reference in the High Court Division. In this Court also they did not take any step for early hearing. It was the State which frequently prayed for fixation of the hearing of the matters and on its prayer, a Bench was constituted for hearing of the appeals. The delay, in the premises, was not due to the laches on the part of the State. Since the condemned prisoners did not take any steps for hearing of the death reference and their appeals at any point of time, they can not claim that they have been subjected to "torture or to cruel, inhuman, or degrading punishments or treatment" as a result of delay in carrying the sentences of death. Therefore, I find no merit in the contention of the learned counsels.

Normally this Court does not interfere with the discretion exercised by the High Court Division on the question of sentence unless it is shown that the High Court Division has disregarded the recognized principles in imposing the sentence and there has been a failure of justice. The learned Sessions Judge has assigned reasons for awarding the death sentence. It has been observed that after the occurrence accused appellants openly declared at home and abroad that they killed Bangabandhu and other members of his family, that the incident was a barbarous one, they brutally killed two newly married women and a child aged below 10 years and the wife of Bangabandhu who were not in any way involved in political activities, that they had committed the offence of murder against humanity, that the killing was not harmful to any individual but it was a loss to the nation, and that the accused persons in a planned manner committed the heinous crime with their knowledge of the consequence, for which, they did not deserve any special sympathy in awarding the sentence.

The learned Sessions Judge has taken into consideration the provisions of law and rightly exercised his discretion in awarding the sentence. The second learned Judge while maintaining the sentence observed "in this case, 11(eleven) innocence persons were brutally and diabolically murdered. Sheikh Mujibor Rahman, the then President of Bangladesh, became a target of vicious intrigue and was murdered by a handful of disgruntled army officers, some of them were dismissed. With him 10(ten) other persons including 3(three) ladies and 1(one) boy were also murdered. The manner in which they

were so brutally and mercilessly murdered ripples any consideration of reduction of sentence. As such none of the accused deserves any leniency in the matter of sentence". It seems that the learned Judge is conscious about the requirement of law and has maintained the sentence on assigning reasons required by law.

Let us now consider the provisions of law in case of awarding a sentence of death. The provision contained in section 367(5) of the Code reads as follows:

> "(5) if the accused is convicted of an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term years, the Court shall in its judgment state the reasons for the sentence awarded."

This provision shows that it is left to the discretion of the Court on the facts of each case to pass a sentence of death or a lesser sentence, and the Court while awarding the sentence shall have to assign reason. The Courts are principally concerned with the facts and circumstances of the crime under inquiry and decide whether there are aggravating or mitigating circumstances to award a sentence of death or life sentence. In India Section 367(5) has been reenacted in the Code of 1973. The corresponding provision is provided in Section 354(3) which reads as follows:

> "Section 354(3) when the conviction is for a sentence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in case of sentence of death, the special reason for such sentence".

Under this new provision life sentence is now the rule and it is only in exceptional cases, for special reasons to be assigned the death sentence can be imposed. Our sentencing procedure is completely distinct from that of the India procedure. In India a sentence of death can be imposed by a Court in exceptional cases on assigning reasons for imposition of such sentence. The constitutionality of imposition of sentence has been challenged in Jogmohan Singh V. State of U.P AIR 1973 SC 947. It is stated that the sentencing procedure and section 302 so far the imposition of death sentence are violative of

Articles 14 and 19 of the Constitution of India. It is urged that the law has given to the Judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime and that no law can deprive the life of a citizen unless it is reasonable and in the public interest. It is further urged that capital punishment can not be regarded per se unreasonable or not in public interest. Article 14 is similar to Article 27 of our Constitution and Article 19 corresponds to the combination of Articles 29, 36, 37 and 38 of our Constitution. Jogmohan's case was reconsidered by a larger Constitution Bench in Bachan Singh V. State of Punjab AIR 1980 S.C. 898. It was urged that the sentencing procedure provided in Section 354(3) of the Code of 1973 is violative of Articles 14, 19 and 21 of the Constitution. Article 21 of the Indian Constitution is similar to Article 32 of our Constitution. It was held by majority that the procedure for sentencing does not violate Articles 14, 19 and 21 of the Constitution. It is said that for making a choice of Punishment or ascertaining the existence or absence of 'special reasons' the Court must pay due regard to both the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of a particular case.

In Jogmahan Singh's case it is said that in India this onerous duty is cast upon Judges and for more than a century the Judges are carving out this duty under the Indian Penal Code. The impossibility of laving down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter of sentence is liable to be corrected by superior Courts. Laving down of standards to the limited extent possible as was done in the Model Judicial Code would not serve the purpose. The exercise of judicial discretion on well-recognised principles is in the final analysis the safest possible safeguards for the accused. It is further said that there is no merit in the contention that uncontrolled and unguided discretion in the Judges to impose capital punishment or imprisonment for life is hit by Article 14 of the Constitution. If the Law has given to the Judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime it will be

impossible to say that there would be at all any discrimination since facts and circumstances of one case can hardly be the same as the facts and circumstances of another. While exercising the discretion Palekar,J . argued as follows:

> "A large number of murders is undoubtedly of common type. But some at least are diabolical in conception and cruel in execution. In some other where the victim is a person of high standing in the country society is liable to be rocked to its very foundation. Such murders can not simply be whisked away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks. In opinion of many for the inevitability of death penalty not only by way of deterrence, but as a token emphatic disapproval by the society".

What are the mitigating circumstances in the exercise of Court's discretion have been explained thus: (a)that the offence was committed under the influence of extreme mental or emotional disturbance; (b)the age of the accused – if the accused is young or old, he shall not be sentenced to death; (c)the probability that the accused would not commit criminal acts of violence as would constitute or continuing threat to society; (d) in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence; (e)the accused acted under duress or domination of another person , and (f) the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct. In Jagmohan the following circumstances are considered in mitigation of punishment which should be inflicted such as (i) absence of bad intention; (ii) provocation; (iii) self-preservation; (iv) preservation of some near friends; (v) transgression of the limit of self-defence; (vi) submission to the menaces; (vii) submission to authority; (viii) drunkenness; (ix) childhood.

In Bachan Singh's case, Bachan Singh was convicted and sentenced to death under Section 302 for murder of three persons. His sentence of death was confirmed by the Punjab High Court. His appeal by Special Leave came up for hearing before a Division Bench. The leave was granted to consider whether "the facts found by the courts

below would be 'special reasons' for awarding the death sentence as required under S. 354(3) of the Code of Criminal Procedure 1973". The Division Bench of the Supreme Court referred the matter to a Constitutional Bench for a decision in regard to the constitutional validity of death penalty for murders provided in Section 302 and the sentencing procedure embodied in Section 354(3) of the Code. The Supreme Court by a majority maintained the sentence of death observing as follows:

> (c) The normal rule is that the offences of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (d) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution , a source of grave danger to the society at large, the court may impose the death sentence."

In Machhi Singh and others V State of Punjab, AIR 1983 S.C. 957, after considering Jagmohan's case and some other cases on the point of sentence, the Supreme Court of India classified the cases in which death penalty may be imposed as follows:

> "When the victim of murder is (a) an innocent child who could not have or has not proved even an excuse, much less a provocation, for murder, (b) a helpless woman or a person rendered helpless by old age or infirmity, (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust, (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him

> and the murder is committed for political or similar reasons other than personal reasons."

In the murder case of Rajiv Gandhi, the ex-Prime Minister of India, the Supreme Court of India while maintaining of death sentence under Section 354(3) of the Code in the case of Nalini (1999) 5 S.C.C. 253, D.P.Wadhwa, J. observed as follows:

> "A former Prime Minister of the country was targeted because this country had entered an agreement with a foreign country in exercise of its sovereign powers. Rajiv Gandhi being the head of the Government at that time was signatory to the Accord which was also signed by the head of the Government of Sri Lanka. The Accord had the approval of Parliament. It was not that Rajiv Gandhi had entered into the Accord in his personal capacity or for his own benefit. Though we have held that object of the conspiracy was not to commit any terrorist act or any disruptive activity, nevertheless murder of a former Prime Minister for what he did in the interest of the country was an act of exceptional depravity on the part of the accused, an unparalleled act in the annals of crimes committed in this country. In a mindless fashion not only was Rajiv Gandhi killed but along with him others died and many suffered grievous and simple injuries. It is not that intensity of the belt bomb strapped on the waist of Dhanu was not known to the conspirators as after switching on the first switch on her belt bomb Dhanu asked Sivarasan to move away. Haribabu was so keen to have close-up pictures of the crime that he met his fate in the blast itself. We are unable to find any mitigating circumstance not (sic) to upset the award of sentence of death on the accused."

In the Indira Gandhi killing case, in Kehar Singh's case (AIR 1988 S.C.1883) similar question was raised about the imposition of extreme sentence of death in the context of Section 354(3) of the Code of 1973. The Supreme Court of India while maintaining the death sentence of Kehar Singh and Satwant Singh, G.L OZA,J. observed as follows .

> "The person killed is a lady and no less than the Prime Minister of this Country who was the elected leader of the people. In our country we have adopted and accepted a system wherein change of the leader is permissible by ballot and not by bullet. The act of the accused not only takes away the life of popular leader but also undermines our system which has been working so well for the last forty years. There is yet another serious consideration. Beant Singh and Satwant Singh are persons who were posted on the security duty of the Prime Minister. They are posted there is protect her from any intruder or from any attack from outside and therefore if they themselves resort to this kind of offence, there appears to be no reason or no mitigating circumstance for consideration on the question of sentence. Additionally, an unarmed lady was attacked by these two persons with a series of bullets and it has found that a number of bullets entered her body. The manner in which mercilessly she was attacked these two persons on whom the confidence was reposed to give her protection repels any consideration of reduction of sentence. In this view of the matter, even the conspirator who inspired the persons who actually acted does not deserve any leniency in the matter of sentence. In our opinion, the sentence awarded by the trial court and maintained by the High Court appears to be just and proper."

Our Appellate Division in the case of Abul Khair V. The State, 44 DLR (AD) 225 held that delay itself is not an extenuating circumstance to commute the sentence. The observations are as under:

> "Delay by itself in the execution of sentence of death is by no means an extenuating circumstance for commuting the sentence of death to imprisonment for life. There must be other circumstances of a compelling nature which together with delay will merit such commutation. We find no compelling extenuating circumstance in this case and therefore, find no ground whatsoever to interfere."

According to our provision the Court has been left with the discretion on the facts of the given case whether or not a sentence of death should be awarded, and in case of awarding a sentence of death the Court is required to assign reason. The Court is of course keeping in mind while awarding the extreme sentence whether there is mitigating circumstances to exercise such discretion. The mitigating circumstances in the exercise of Courts discretion as analysed in Jogmohan's case are undoubtly relevant circumstance and might be given weight in the determination of sentence.

There is no denial of the fact the appellants and other accused persons not only killed the sitting President of the country, they killed the entire family. The victim, the then President, who had sacrificed his life for the cause of the people – his struggle for the just and the democratic rights of the people of the country was marked by extraordinary patriotism. The liberation struggle of Bangladesh from the treacherous occupation of the marauding military ruler of Pakistan was a rare example of a patriotic was fought by the people from inside and outside under order of Bangabandhu which was clearly proclaimed in a historic public meeting on 7th March 1971. This historic speech not proclaimed guidelines for action but also inspired the deep determination of the people to fight for the independence. He was determined on the creation of independent Bangladesh and advanced strategically through the six point charter of demands. The six points were later on led to one point – the independence from which Bangabandhu did not return. Consequently we achieved our independence. The accused persons brutally killed such a leader who is none but the father of the nation. They even did not spare the child son of the President who was below 10 years old. They killed him in such a brutal manner the nation was shocked and dumbfounded. There was no explanation why they killed the three women. They committed the crime against humanity by killing a child and three innocent women who were unarmed. They eliminated almost the entire family who were found in the house. There is no explanation on the side of the accused as to why they killed these innocent persons. The acts of the accused was so barbarous which could only be compared with orgies. The accused persons by their barbarous act proved that the object of the conspiracy was not to oust the President from power, but their

object was to eliminate the entire family and it was an act of exceptional depravity on the part of the accused persons, an unparallel act in the annals of crime committed in the country. Although there is no evidence against all the accused persons of directly participating in the carnage but it should be borne in mind that for the killing of the sitting President, all the accused persons with a view to attainment of the object played different roles. Without jointly operating in concert the criminal object could not have been executed. It was not possible to bring about the result of the criminal object without support of all. In view of the matter, all the conspirators who actually participated and acted the crime do not deserve any leniency in the matter of sentence. On consideration of the brutality in the commission of the offence, the appellants and other co-accused do not deserve any leniency in the matter of sentence. The appellants failed to make out a case of mitigating circumstance to commute their sentence. The sentence awarded to the appellants called for no inference by this Court. Accordingly, I affirm their sentence.

J.