

### Court Correspondent

Refuting the prosecution charge of liability for crimes holding superior command responsibility as a civilian made against ATM Azharul Islam, a 1971 'Al Badr' commander, a defence counsel on Monday claimed that the prosecution had miserably failed to establish the charge.

"Mere holding the post of president of Rangpur ICS, student wing of Jamaat-e-Islami, carrying out campaign for Jamaat candidate in the 1970 general election and being Al Badr commander during the Liberation War, do not justify the element of the charge under section 4 (2) of the International Crimes (Tribunals) Act 1973," said barrister M Shishir Manir during the defence case summing-up arguments for the second day.

The fundamental requirement of law is to prove accused Azharul's superior subordinate relationship under his command along with effective control as the charge of liability for crimes fall on the commander, which is missing according to the evidence made by the prosecution witnesses, he argued.

Defence counsel Shishir said none of the prosecution witnesses had made any such allegation against his client, now in custody.

About the charge of intellectual killing in April 1971 against Azharul as Al Badr commander, the defence counsel termed the charge unbelievable and said Al Badr had come into operation at the fag end of Bangladesh's Liberation War, according to the prosecution.

Opposing the prosecution demand of adequate compensation for the Liberation War victim PW Mansura Khatun, also a Birangana, along with the sentence of death, the defence counsel said there is no such scope under the ICT Act,

In support of his contention, Shishir said that after awarding a convict capital punishment or such other punishment like different jail terms proportionate to the gravity of the crimes, the tribunal has no other option providing compensation or fine as such other punishment curtails the liberty of the convict. Compensation or fine does not fall under the criteria, he added, referring to the construction of penal provision.

Interrupting the defence counsel, the three-member tribunal, headed by Justice M Enayerur Rahim, raised a legal question about his argument and asked him to go through the rule 46 (3) of the ICT Rules of Procedure and explain accordingly.

The relevant ICT rule says, "Proportionate to the gravity of the crime, in sentencing the accused, the tribunal may also impose fine and or pass reparation order which is deemed to be fit and proper."

Replying to the tribunal, Shishir said in fact, there is no clear explanation of such other punishment under the ICT Act which needs to be addressed.

The defence counsel, however, said that although the tribunal holds discretionary power in dispensation of justice, it would be prudent to avoid awarding sentence to the convict in case of any ambiguity in the penal law.

Admitting the prosecution argument on the admissibility of the hearsay evidence in proving the war crimes charge made against the accused, Shishir said though admitted, but its probative value has to be properly looked into.

Without any source or corroboration of the hearsay evidence by others over the charge, the credibility of such evidence might be unsafe, he said, adding that in that case documentary and circumstantial evidence can be considered together.

About the hearsay evidence over the charge of abduction followed by killing made by the

prosecution witnesses against his client, Shishir claimed those as full of contradictions. The defence summing-up arguments remained inconclusive.

On November 12, 2013, the tribunal framed charges against ATM Azharul Islam for his involvement in crimes against humanity, including genocide, during the Liberation War in collaboration with the Pakistan occupation army, dismissing his discharge plea.

Also assistant secretary general of Jamaat-e-Islami, Azharul faces six counts of charges of crimes against humanity during the 1971 Liberation War like killing, abduction, confinement, torture, loot, arson, rape and genocide in Rangpur district.

A week after submitting the formal charge by the prosecution, the tribunal on July 25, 2013 took cognisance of the charge against Azharul as it found a strong prima facie case against the accused under subsections 3(2) and 4(1) (2) of the International Crimes (Tribunals) Act 1973. According to the prosecution case, Azharul had been involved in the killing of more than 1,200 unarmed innocent civilians in Rangpur during the Liberation War in collaboration with the Pakistan occupation army.

It mentioned that Azharul Islam had played a key role in the killing of intellectuals, cultural personalities, physicians and lawyers in different areas of Rangpur during the 1971 war.

On August 22, 2012, police arrested Azharul from his Moghbazar house in the capital in connection with the war crimes case, after the tribunal issued a warrant for his arrest upon a prosecution plea.