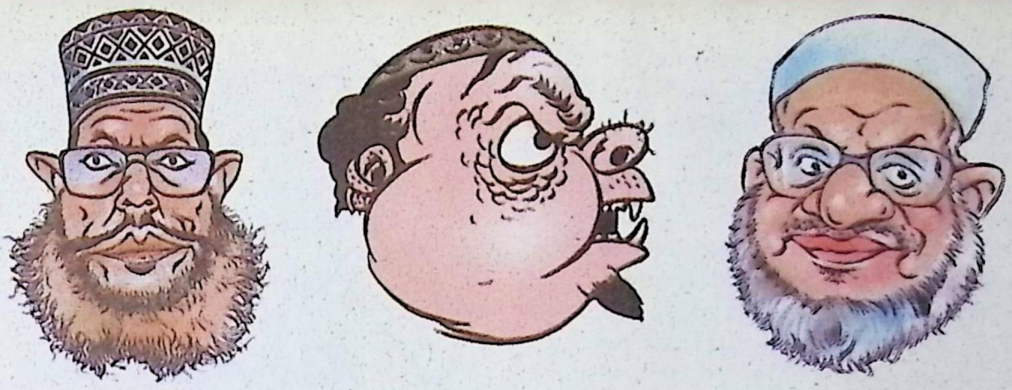


In plain English literature, *commander* means one who can command and *superior officer* means senior officers. Both these posts can be found in the military as well as non-military or civilian strata and as such, criminal liability under section 4 can be applicable for both military and civilian superiors.

Recently a claim has been made, that the above definition of *superior responsibility* under the 1973 Act is not entirely consistent with the definition adopted in more recent statutes of the international law. According to many, the above definition does not contain any reference to the 'mental element' of superior responsibility as is found in the definition of *superior responsibility* under Article 28 of the *Rome Statute of the International Criminal Court*, 1998. Hence, many suggest amendment to section 4 of the 1973 Act to include the words knew or should have known in the definition of *superior responsibility*.

It is conceded that to establish *superior responsibility* under Article 28 of the *Rome Statute of the International Criminal Court*, 1998, one of the important elements, *inter alia*, is to prove that the accused superior either *knew or should have known* that the subordinates were committing or about to commit relevant offences. Article 28, *Rome Statute of the International Criminal Court*, 1998 reads as:

> *'A military commander or person ... shall be criminally responsible for crimes ... committed by forces under his or her effective command and control, or effective authority and control ... as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes ...'*

It is further conceded that no such element is made a requirement to establish *superior responsibility* under section 4(2) of the 1973 Act. However, it is stated that the extent of *superior responsibility* is wider under the 1973 Act than that of under Article 28 of the *Rome Statute of the International Criminal Court*, 1998. In essence, to establish *superior responsibility* under the 1973 Act the prosecution needs not prove that the accused superior either had any 'actual knowledge' (*knew*) or 'constructive knowledge' (*should have known*) about commission of the subordinate's crime. In other words, under the 1973 Act, a superior is always responsible for the activities of his subordinates, whether he had any kind of knowledge or not. On the contrary, under the *Rome Statute of the International Criminal Court*, 1998 a superior is made liable for his subordinate's crimes, only when he had either actual or constructive knowledge of the same.

It is argued that such difference in the *state of knowledge* would not prejudice any trial under the 1973 Act. Necessary protection is given to the accused person (including superiors) regarding his extent of involvement in an offence. In this regard section 20 of the 1973 Act can be referred:

> *'(1) The Judgment of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based ... (2) Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper.'*

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The cartoons used in this article are by Shishir Bhattacharjee, courtesy, Ekattorer Ghatok Dalal Nirmul Committee.