Crl. Appeal No.19 of 2017
Md. Ibraj Alam v. State of Sikkim
With
Crl.Appeal No.20 of 2017
Md. Tabrej Alam *alias* Roshan vs. State of Sikkim

THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appellate Jurisdiction)

S.B.: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Criminal Appeal No. 19 of 2017

Md. Ibraj Alam
S/o Oly Alam
R/o Depali, Mothihari,
Bihar,
A/p Rongyek Jail,
East Sikkim. .... Appellant

versus

The State of Sikkim
Through,
The Public Prosecutor,
High Court of Sikkim,
East Sikkim.

.... Respondent

With

Criminal Appeal No. 20 of 2017

Md. Tabrej Alam alias Roshan,
S/o Najir Mansuri,
R/o Madhopura, Chiraiya,
East Champaram,
Bihar,
A/p Rongyek Jail,
East Sikkim. .... Appellant

versus

The State of Sikkim
Through,
The Public Prosecutor,
High Court of Sikkim,
East Sikkim

.... Respondent

Criminal Appeal under Section 374 (2) read with Section 482 of the Code of Criminal Procedure, 1973.

Appearance:

Mr. Zangpo Sherpa, Legal Aid Counsel and Ms. Mon Maya Subba, Advocate for the Appellant.

Mr. S. K Chettri, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

(24.07.2018)

Bhaskar Raj Pradhan, J

1. The testimony of a 12 year old child, a victim of crime, is sought to be questioned by the Appellants who have been convicted on the ground that since he is but a child, corroboration is a must. Quite evidently this is not the correct proposition in law. Should the victim's deposition be held to be wanting merely because of the fact that he is a child although the same inspires confidence? The answer is obviously in the negative.

2. The First Information Report (FIR) (exhibit-1) lodged on 11.04.2016 by the father of the victim-P.W.1 (first informant) after his son-the victim who had gone missing since the morning of the day before was found by beat Constables of the Singtam Police Station at Singtam would initiate an investigation by the Mangan Police. Resultantly a charge-sheet would be filed and thereafter charges framed on 30.08.2016

against Md. Ibraj Alam (Appellant in Criminal Appeal No. 19 of 2017) as well as Md. Tabrej Alam *alias* Roshan (Appellant in Criminal Appeal No. 20 of 2017) by the Sessions Judge, North Sikkim at Mangan (Learned Sessions Judge). Charges under Section 363/34 IPC; 342/ 34 IPC; Section 323 IPC and Section 307 IPC would be framed against Md. Ibraj Alam and against Md. Tabrej Alam *alias* Roshan (jointly the Appellants) charges would be framed under Section 363/34 IPC, 342/ 34 IPC. The trial would result in conviction of both the Appellants who would prefer the present Appeals against the common judgment of conviction rendered by the learned Sessions Judge on 19.04.2017 convicting Md. Ibraj Alam under Section 363/34 IPC as well as Section 323 IPC and Md. Tabrej Alam *alias* Roshan under Section 363 IPC. Accordingly Md. Ibraj Alam and Md. Tabrej Alam *alias* Roshan would be sentenced to undergo simple imprisonment for a period of three and a half years and to pay a fine of ₹10,000/- (Rupees Ten Thousand) each for the offence under Section 363/34 IPC and in default to pay the amount of fine to undergo further simple imprisonment for a period of 3 months. Md. Ibraj Alam would also be sentenced to undergo simple imprisonment for a period of 6 months under Section 323 IPC. The period of imprisonment was to run concurrently and the incarceration already suffered by the Appellants was to be set off against the

sentence imposed. The total amount of fine payable was directed to be applied for the payment of compensation to the minor victim.

3. Mr. Zangpo Sherpa, Learned Counsel for the Appellants would seek to assail the impugned judgment as well as the order on sentence both dated 19.04.2017 rendered by the Sessions Judge on the ground that the Learned Sessions Judge would convict the Appellants in spite of the fact that the sole testimony was that of the victim-a child witness of 11 years of age although he himself had come to the conclusion that there were minor contradictions in the victim's statement.

4. Mr. Zangpo Sherpa would also draw the attention of this Court to the deposition of the two beat Constables - P.W.5 and P.W.6 and their admission that it was not at the instance of the victim that Md. Ibraj Alam had been apprehended. Mr. Zangpo Sherpa would also submit that strangely the victim was admittedly not crying when Md. Ibraj Alam was apprehended which would be unnatural considering the fact that there was an allegation that Md. Ibraj Alam had allegedly attempted strangulation upon the victim a few hours ago. The fact that the child did not raise any alarm even while seeing the Police Officers is a cause of suspicion which therefore, ought to have led the Learned Sessions Judge to seek

corroboration of his statement as has been held by the Supreme Court in re: ***Hamza v. Muhammedkutty alias Mani & Ors. v. State of Kerala***[1]:

> ***"30.*** *The learned counsel for the State is right that the consistent version of PW 1 is that A-1 and A-2 have committed murder of the deceased. But the High Court has rightly relied on the observations of this Court in Suresh v. State of U.P. [(1981) 2 SCC 569 : 1981 SCC (Cri) 559] that children mix up what they see and what they like to imagine to have seen. Glanville Williams says in his book The Proof of Guilt, 3rd Edn., published by Stevens & Sons:*
>
> *"Children are suggestible and sometimes given to living in a world of make-believe. They are egocentric, and only slowly learn the duty of speaking the truth."*
>
> ***31.*** *Hence, the proposition laid down by the courts that as a rule of practical wisdom, the evidence of child witness must find adequate corroboration. (Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561])*
>
> ***32*** *[**Ed.**: Para 32 corrected vide Official Corrigendum No. F.3/Ed.B.J./49/2013 dated 8-8-2013.] . In Suresh v. State of U.P. [(1981) 2 SCC 569 : 1981 SCC (Cri) 559] cited by Mr Deepak, the evidence of child witness Sunil was corroborated by the conduct of the accused and from the pattern of crime committed by him and hence this Court maintained the conviction of the accused servant for the murder of the mistress of the house Geeta and her son Anil on the basis of evidence of a child witness, Sunil, as corroborated by other evidence. This Court specifically observed that if the case was to rest solely on Sunil's uncorroborated testimony, the Court might have found it difficult to sustain the conviction of the accused, but there were unimpeachable and most eloquent materials on record which lent an unfailing assurance that Sunil is a witness of truth and not a witness of imagination as most children of that age generally are.*

[1] **(2013) 11 SCC 150**

> ***33.*** *Similarly, in Promode Dey v. State of W.B. [(2012) 4 SCC 559 : (2012) 2 SCC (Cri) 513] cited by Mr Deepak, the Court found that soon after the incident on 23-2-2002, the girl child had told her grandmother and her father that it was the accused who had killed the deceased and her grandmother and father had deposed before the court in their evidence that they had been told by this child witness that the accused had killed the deceased with a dao. The evidence of this child witness was also corroborated by the fact that the bloodstained dao was recovered on the very day of the incident from a jungle by the side of the house of the accused. The evidence of the girl child that the accused had killed her mother by striking on her head, back, fingers and throat with a dao was thus believed by the Court because her evidence was adequately corroborated.*
>
> ***34.*** *In the present case, as we have found, the evidence of PW 1 is not adequately corroborated.****"***

5. Mr. Zangpo Sherpa would also draw the attention of the Court to the cross- examination of the Investigating Officer and his admission that there is no witness who had heard the two accused person planning/conspiring to kidnap the minor victim for ransom. He would thus submit that in the circumstances Md. Tabrej Alam *alias* Roshan could not have been convicted merely with the help of Section 34 IPC sans any evidence whatsoever of the alleged conspiracy. In support of his submission he would seek reliance upon the judgment of the Supreme Court in ***Laxman Anaji Dhundale & Anr V. State of Maharasthra***[2] in which it was held:

---

[2] **(2007) 10 SCC 771**

"10. *As regards invocation of Section 34 IPC, it was held by the Privy Council in Mahbub Shah v. Emperor [(1944-45) 72 IA 148 : AIR 1945 PC 118] (AIR at p. 120) as follows: (IA p. 153)*

"To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, *and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."*

(emphasis supplied)

11. *In Hamlet v. State of Kerala [(2003) 10 SCC 108 : (2006) 2 SCC (Cri) 518] (vide SCC para 17) this Court held that to establish the common intention of several persons to attract Section 34 IPC, the following two fundamental facts have to be established: (i) common intention, and (ii) participation of the accused in commission of the offences. In the present case, neither common intention nor participation of the appellants in the commission of the offence has been established beyond reasonable doubt.*

12. *No doubt, as held by this Court in Anil Sharma v. State of Jharkhand [(2004) 5 SCC 679 : 2004 SCC (Cri) 1706] (vide SCC para 17) direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case. However, in order to bring home the charge of common intention the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit*

*the offence for which they are charged with the aid of Section 34. In the present case there is no credible evidence, direct or circumstantial, that there was such a plan or meeting of minds of all the accused persons to commit the offence in question. Hence, in our opinion, the charge under Section 34 IPC has not been established.***"**

6. Mr. Zangpo Sherpa would also submit that mere presence of Md. Tabrej Alam a*lias* Roshan is not enough to draw the inference of common intention and to satisfy the ingredients of Section 34 IPC, keeping in mind that the allegation against Md. Tabrej Alam *alias* Roshan was that he was admittedly not the person who took the child victim from Mangan and further that the Md. Ibraj Alam and the child victim had got into the taxi on which the Md. Tabrej Alam *alias* Roshan was travelling in. To buttress his submission Mr. Zangpo Sherpa would rely upon the judgment of Supreme Court in re: ***State of U.P. v. Rohan Singh & Anr.***[3] in which it was held:

"4. *From the statement of Mashooq Khan, PW2, it transpires that Rohan Singh had fired on him and at the same time Dulare had fired a shot by his unauthorized single barrel gun on Naqi Raza. Neither Rohan Singh assaulted Naqi Raza, deceased nor did Dulare fire any shot at Mashooq Khan, PW.2. After analysing the evidence led by the prosecution, we are of the opinion, that the most that can be said in favour of the prosecution is that the two respondents shared a similar intention to shoot at the two victims but from the material on record, it is not possible to positively attribute to them the common intention to commit the crime. There is a material difference between the sharing of similar intention and common intention.*

[3] **(1996) CRI. L.J. 2884**

*Section 34, IPC can be attracted only if the accused share a common intention and not where they share only similar intention. There are no circumstances on the record from which it may be possible to draw the inference that the respondents had shared the common intention. Mere presence together is not sufficient to hold that they both shared the common intention to murder Naqi Raza and injured Mashooq Khan. In this view of the matter, we find that the judgment of the High Court does not call for any interference. The reasons recorded by the High Court are sound and cogent and the same have appealed to us.***"**

7. Mr. S. K. Chettri, Learned Counsel for the State would however, submits that the evidence of the victim is cogent and thus reliable. The victim has given a detailed account of the facts from the time when he was taken by the Md. Ibraj Allam from Mangan and thereafter when the Md. Tabrej Alam *alias* Roshan joined them at Rangpo and proceeded to Siliguri. He would submit that the defence has not been able to demolish the evidence of the victim which clearly establishes the commission of the offences alleged. He would further submit that the evidence of the victim would also coherently satisfy the ingredients of Section 34 IPC against the Md. Tabrej Alam *alias* Roshan. Mr. S. K. Chettri would also draw the attention of this Court to the deposition of the child witness (P.W.3) who had also deposed that in the year 2016 when he had gone to play cricket near one bank at Mangan he met Md. Ibraj Alam who he also identified in Court as *"Piyaji uncle"* who told him to accompany him thrice to move around ("*ghumnu*"-roam

around in nepali) which was rejected by him. Mr. S.K. Chettri would submit that this fact would be relevant to consider his past conduct. Mr. S. K. Chettri would also rely upon two judgments of the Supreme Court to submit how the evidence of a child witness must be considered. In re: ***Mohd. Kalam v. State of Bihar***[4] the Supreme Court would hold:

> ***"7.*** *In Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] it was observed by this Court that the evidence of a child witness cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before the court is the voluntary expression of the victim and that she was not under the influence of others.*
>
> ***8.*** *The trial court and the High Court have found the evidence of the child witness cogent, credible and had grain of truth. The High Court found that the evidence of victim was free from any influence. Therefore, the trial court and the High Court have relied upon the evidence of the victim. Additionally, it would be appropriate to take note of the observations of this Court in Rameshwar v. State of Rajasthan [AIR 1952 SC 54] . At para 25 it reads as follows: (AIR p. 58)*
>
> *"25. Next, I turn to another aspect of the case. The learned High Court Judges have used Mt. Purni's statement to her mother as corroboration of her statement. The question arises, can the previous statement of an accomplice or a complainant be accepted as corroboration?"*
>
> *The answer was, it was to be treated as corroborative."*

[4] **(2008) 7 SCC 257**

8. In re: ***Alagupandi Alias Alagupandian v. State of Tamil Nadu***[5] the Supreme Court would hold:

> ***"36.*** *It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. (Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341 : 1997 SCC (Cri) 685] and Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561])"***

9. Mr. S. K. Chettri would submit that Md. Tabrej Alam *alias* Roshan has been correctly identified in the Test Identification Parade conducted by the Learned Judicial Magistrate, First Class, North Sikkim at Mangan and chronicled in the report (exhibit-17).

---

[5] **(2012) 10 SCC 451**

10. Section 363 IPC provides:

> ***"363. Punishment for kidnapping****.-Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

11. To fall within the mischief of Section 363 IPC the accused should have kidnapped any person from India or from lawful guardianship. The allegation in the present case is that the victim was kidnapped from his lawful guardianship. Section 363 IPC merely prescribes a penalty for the two offences described in Section 360 and 361 IPC. Since Section 360 IPC is not applicable in the present case, it is important to examine Section 361 IPC.

12. Section 361 IPC provides:

> ***"361****. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*
>
> *Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.*
>
> *(Exception) —This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."*

13. Section 361 IPC is intended for the protection of minors and persons of unsound mind. The object of the provision is to

provide security and protection to minors and persons of unsound mind. The ingredients of the offence are:

(i) There must be taking or enticing of a minor or of a person of unsound mind;

(ii) The minor must be under 16 years of age, if a male, or under 18 years of age if a female;

(iii) The taking or enticing must be out of the keeping of the lawful guardian of the minor or person of unsound mind; and

(iv) The taking or enticing must be without the consent of such guardian.

14. The use of the words *"takes"* or *"entices"* in Section 361 IPC makes the intention of the legislation clear. In order to constitute the offence of kidnapping there is no necessity of force or fraud. No one who is responsible for taking or enticing a child from the keeping of his or her guardian, whether physical or by inducement should escape the penalty of law.

15. Section 323 IPC provides:

> ***"323. Punishment for voluntarily causing hurt****.— Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."*

16. Section 323 IPC is therefore, intended to provide for punishment for those voluntarily causing hurt upon another in all cases except in the case provided for by Section 334 IPC.

17. Section 319 IPC defines *"hurt"* and provides:

> ***"319. Hurt.**-Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."*

18. Section 34 IPC provides:

> ***"34. Acts done by several persons in furtherance of common intention.—**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."*

19. Section 34 is intended to meet circumstances in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention. It is a principle of joint liability in doing a criminal act. Act done by two or more persons with the common intention can be taken as if it is committed by each of them individually. To invoke the provisions of Section 34 IPC, at least two factors must be established; (1) common intention, and (2) participation of the accused in the commission of an offence. The aforementioned purpose does not necessitate overt act to be attributed to the individual accused but before a person is convicted by applying the doctrine of vicarious liability not only his participation in the crime must be proved but presence of common intention must be established. For proving formation of common intention, direct evidence may not be always available. To attract the said provision,

prosecution is under a bounden duty to prove that the participants had shared a common intention. It is also well settled that only the presence of the accused by itself would not attract the provisions of Section 34 IPC. Other features and elements should also be taken into consideration for arriving at the said deduction. It is not necessary that the acts of the accused persons charged with commission of the offences jointly must be the same or identically similar. It could be different in character but must have been influenced by one and the same common intention in order to attract the provision of Section 34 IPC.

20. A scrutiny of the deposition of the victim makes it apparent that the evidence is reliable, cogent and truthful. The victim, although a child of 11 years, has given a detailed narration of what transpired with him on that fateful day when Md. Ibraj Alam took him from Mangan to Siliguri and back to Singtam where he was apprehended by the beat Constables of the Singtam Police Station with the victim. The victim has given a vivid description of every little incident, names of specific places where the victim had been taken and what occurred there. The narration of facts leaves no room for doubt that it could be a figment of the victim's imagination. The victim's evidence makes it unreservedly certain that Md. Ibraj Alam had taken the victim out of the keeping of his lawful

guardian without the consent of the guardian. The victim's evidence also makes the role of Md. Tabrej Alam *alias* Roshan in the crime clear. The victim identified the said Md. Tabrej Alam *alias* Roshan during the Test Identification Parade conducted by P.W.13-the then Learned Judicial Magistrate, North Sikkim at Mangan on 07.05.2016 at the State Jail Rongneck, East Sikkim. The victim once again identified Md. Tabrej Alam *alias* Roshan in Court on 06.09.2016 as the person who came in a vehicle from Gangtok to Rangpo in which Md. Ibraj Alam put the victim and proceeded to Siliguri. The Appellants thereafter took him to a lodge near Chota Masjid but the hotel owner refused to give them room as they did not have identity card. Thereafter, the victim was taken by the Appellants to Pala's lodge where they booked a room. The Appellants then went out locking the victim inside, came back after sometime, took him and returned to Singtam in a vehicle. At Singtam Md. Ibraj Alam and the victim got down and Md. Tabrej Alam *alias* Roshan proceeded to Gangtok in the same vehicle. On reaching Singtam Md. Ibraj Alam had suddenly *"squeezed"* the victim's neck with his hands making it difficult for the victim to breathe properly while he was sitting on a bench. The victim somehow managed to free himself. Md. Ibraj Alam once again *"squeezed"* the victim's neck near the bridge due which he sustained lacerated injury on his neck.

This resulted in the victim being unable to eat food properly for almost a week.

21. The first informant i.e. the father of the victim states the age of the victim as 11 years. P.W.18-the founder Principal of the school attended by the victim would prove the date of birth of the victim by producing the School Admission Register maintained by the School. This confirmed that the date of birth of the victim in the said register was 12.12.2003. Copies of the relevant portions/entries of the said School Admission Register have been exhibited as Exhibit-20 after comparison with the original. A certificate to that effect issued by the Principal would be also exhibited as Exhibit-19 confirming the date of birth as entered in the said School Admission Register. The minority of the child and his age is not contested by the Appellants. The age of the victim thus would have been 12 years 3 months and 29 days exactly at the time of the incident. The Learned Sessions Judge has held the age of the victim as 12 years. For the purpose of Section 361 IPC the victim would thus be considered as a minor male *"under 16 years of age"*.

22. The fact that the victim went missing from Mangan on 10.04.2016 after 11 a.m. and was found at Singtam after 09.30 p.m. has been cogently established by the evidence of the first informant. The fact that the victim was taken by Md.

Ibraj Alam from Mangan thereafter by both the Appellants from Rangpo has also been proved by the victim. P.W.8-a resident of Mangan, who had also searched for the victim on the relevant day, confirms the search. P.W.12-also a resident of Mangan and a relative of the first informant and the victim had also searched for the victim on 10.04.2016 since the victim had gone missing. He also confirms the phone call received by the first informant at around 1.a.m. from the Singtam Police Station and having accompanied the first informant to the said Police Station where he had seen both Md. Ibraj Alam and the victim. P.W.9 narrates what the victim told him about the incident and how Md. Ibraj Alam had taken the victim away from Mangan bazaar to Siliguri and their return the same day to Singtam where Md. Ibraj Alam had *"squeezed"* the neck of the victim twice. P.W.12 confirms having noticed that the victim had sustained black scar mark on his neck due to the squeezing. As per the deposition of P.W.12 Md. Ibraj Alam was taken into custody and thereafter the first informant went to the Mangan Police Station and lodged the FIR. P.W.14-the Medical Officer at the Mangan District Hospital who examined the victim on 11.04.2016 itself noticed superficial laceration present over right side of his eyebrow and bruises present over his neck. P.W.4-the driver of the taxi vehicle bearing registration No.SK-03-T-0146 Alto-800

(red in colour) confirms that Md. Ibraj Alam had hired the said taxi in which Md. Ibraj Alam and one minor child had boarded from near the bank situated at Mangan bazaar and he had taken them till the Rangpo stand at Singtam. P.W.5 posted at Singtam Police Station as Nayak confirms that on 10.04.2016 while on patrolling duty along with P.W.6 at Singtam at around 12:30 a.m. Md. Ibraj Alam was apprehended by them. P.W.5 noticed the minor child nervous and took both the minor child and Md. Ibraj Alam to Singtam Police Station and handed them over to the duty officer. P.W.6 the Constable confirms the facts narrated by P.W.5. P.W.9-the then Sub-Inspector at the Singtam Police Station confirms the fact that P.W.5 and P.W.6 had on 11.04.2016 between 1 to 1.30 a.m. informed him that they had found Md. Ibraj Alam suspiciously loitering around at Singtam bazaar with a small child. After being informed that the victim was nervous P.W.9 had directed them to bring both Md. Ibraj Alam and the victim to the Singtam Police Station. After interrogating the victim P.W.9 had called his guardian and called him and confirmed that the victim was missing from Mangan, North Sikkim. The guardian informed P.W.9 that they would be coming to Singtam Police Station immediately. P.W.9 detained Md. Ibraj Alam and the victim was kept at the Thana until the first informant arrived along with other relatives and confirmed that the child in

custody of the Singtam Police Station was in fact his missing child. P.W.9 further confirms that he handed over Md. Ibraj Alam to police personnel from the Mangan Police Station who came for investigation.

23. Minor contradictions which do not go to the root of the evidence and make it doubtful should not deter the Court from accepting evidence which is otherwise reliable, cogent and truthful.

24. Appreciation of the evidence of a child witness has come up for consideration before the Supreme Court in a number of occasions and the law is well settled. This Court has had occasion to examine the law pertaining to appreciation of the evidence of a child witness who was also a victim of crime in a recent judgment rendered in re: ***Damber Singh Chettri v. State of Sikkim***[6]. The law recognises the child as a competent witness. The evidence of a child witness can be considered under Section 118 of the Indian Evidence Act, 1872 provided that such witness is able to understand the questions and able to give rational answers thereof. A child witness if found competent to depose to the facts and is a reliable one, his evidence could form the basis of conviction. The tender age of a child witness may make them susceptible to be swayed by what others tell them and may fall easy prey to tutoring and

[6] **2018 SCC OnLine Sikk 132**

thus, although not as a general rule to be applied in every case but as a precautionary measure, in cases in which there is an element of uncertainty, corroboration may be sought for and the evidence evaluated carefully. This is a rule of prudence and the evidence of child witness cannot be rejected per se on the presumption that they are likely to have been tutored. The tender age of a child alone cannot be a ground to discard the evidence of a child.

25. It is also equally well settled that the victim stands at a higher pedestal than even an injured witness as he suffers from emotional injury. In cases of injured witnesses there is injury on the physical form, while in the cases of an injured victim the injury is physical, psychological and emotional. The Court may convict the accused on the sole testimony of a child victim if it has no reason to doubt its truthfulness and veracity. Corroboration is only a matter or prudence and not a rule. In a case relating to a child victim corroboration can be dispensed with if, in the particular circumstances of a case the Court is satisfied that it is safe to rely upon the sole testimony of a child victim. The advisability of corroboration should always be in the mind of the Court as a matter of prudence. It is not a rule of practice that in every case there must be corroboration before a conviction. Where the Court deems it proper to seek corroboration it must be kept in mind that it is

not necessary that there should be independent confirmation of every material circumstance. Some additional evidence rendering it probable may be required to come to the conclusion that it is reasonably safe to act upon the testimony of the child victim as to the guilt of the accused. The corroboration need not be direct and circumstantial evidence is sufficient if it connects the accused to the crime. Since the victim is a child and therefore may be susceptible to be swayed by what others tell them the Court must remain conscious and assess whether the statement of a child victim is the voluntary expression of the victim and that he was not under influence of others.

26. In the present case not only the deposition of the victim is reliable, cogent and truthful and its veracity unblemished but there is adequate corroboration from equally competent prosecution witnesses who have proved the sequence of events beyond reasonable doubt.

27. The Learned Sessions Judge has put questions to the victim before recording his deposition and endorsed his satisfaction that the victim is able to answer the questions put to him and tender his evidence. The ability of the victim to understand the question and give rational answers to those questions because of his tender age is not under question. As

per the evidence of the victim Md. Tabrej Alam *alias* Roshan came in a taxi and joined Md. Ibraj Alam at Rangpo shortly after they had reached there. Md. Ibraj Alam had put the victim in the vehicle in which Md. Tabrej Alam *alias* Roshan had come to Rangpo from Gangtok. Both the Appellants had thereafter taken the victim to Siliguri. Md. Tabrej Alam had actively taken part in taking the victim to Siliguri. Thereafter, Md. Tabrej Alam *alias* Roshan had along with Md. Ibraj Alam tried to book a lodge near Chota Masjid but they had failed to do so as both of them did not have identity card. The Appellants thereafter took the victim to Pala's lodge where they booked a room and kept the victim for a while. Thereafter, both the Appellants took the victim and returned to Singtam in a vehicle from where Md. Tabrej Alam alias Roshan and Md. Ibraj Alam separated. While Md. Tabrej Alam alias Roshan continued in the said vehicle towards Gangtok and Md. Ibraj Alam got off from the vehicle along with the victim at Singtam. The deposition of the victim confirms Md. Tabrej Alam's *alias* Roshan active participation in the act of taking the victim from Rangpo to Siliguri and back to Singtam. There could have been no other reason for Md. Tabrej Alam *alias* Roshan to do what he did save joining Md. Ibraj Alam's plan to commit the offence making it clear that there was meeting of minds of the Appellants. Merely because there is no direct evidence of the

initial conspiracy to commit the offence it would be wrong to let go Md. Tabrej Alam *alias* Roshan in spite of the reliable, cogent and truthful evidence of the victim which clearly brings out his active participation in the crime and therefore proves the common intention. Conspiracy most always is hatched in secrecy and it is seldom that one finds direct evidence to prove it. Such intention can only be inferred from the circumstances appearing from the proved facts of the case. In the present case the direct evidence of the victim and the corroborative evidence of the other prosecution witnesses coupled with the unflinching identification of Md. Tabrej Alam *alias* Roshan by the victim both during the Test Identification Parade and in Court leave no room for doubt about his complicity in the crime. Not only can the common intention of the Appellant be inferred but the active participation in the commission of a crime by both the Appellants has also been proved. The prosecution has been able to prove all the ingredients of each of the offences alleged against the Appellants.

28. The learned Sessions Judge after analyzing the evidence and the law would hold:

> ***"29****. Needless to say, on a conjoint reading of the evidence of PWs 2 & 1 it becomes absolutely clear that the two accused persons, in furtherance of a common intention, took/kidnapped PW2 (minor) out of the lawful keeping of his parents without their consent. The fact that the accused No.2 joined the accused*

*No.1 at Rangpo and then they took PW2 further upto Siliguri, and later again brought him back to Singtam (Sikkim), makes it absolutely clear that he shared a common intention with the accused No.1. He is thus guilty to the same extent as the accused No.1. The case of Kala Raja & Anr., Petitioners v. State of Assam, Respondent 1983 Cri. L.J(NOC) 81(Gau) can be referred to in this Context.***"**

29. This Court has no hesitation in upholding the judgment and order on sentence both dated 19.04.2017 passed by the Learned Sessions Judge. Accordingly both the Appeals are dismissed. The judgment and order on sentence dated 19.04.2017 passed in Sessions Trial Case No. 02 of 2016 are upheld. The Appellants are in judicial custody. They shall continue there to serve out the remaining sentences.

(Bhaskar Raj Pradhan)
Judge
24.07.2018

Approved for reporting: yes.
to Internet: yes.