

(2019) 07 UK CK 0183

In the Uttarakhand High Court

Case No : Criminal Revision No. 276 Of 2018

Dr. (Mrs.) Sushma Das & Others

APPELLANT

Vs

State Of Uttarakhand

RESPONDENT

Date of Decision : 19-07-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 2(d), 4, 4(2), 167(2), 173(2), 202, 220(1), 221(1), 221(2), 227, 300
Indian Penal Code, 1860 — Section 120B, 167(2), 307, 326, 342, 370, 370(1), 405, 409, 415, 417, 420, 465, 473, 506
Transplantation Of Human Organs And Tissues Act, 1994 — Sections 13(3)(iv), 18, 19, 19A, 20, 22, 22(1)(a)
General Clauses Act, 1897 — Section 26, 188
Prevention Of Corruption Act, 1988 — Section 5
Insurance Act, 1938 — Section 105
Constitution Of India, 1950 — Article 20(2), 367

Citation : (2019) 07 UK CK 0183

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Virendra Sharma, J.S. Virk, Mamta Joshi, Pankaj Kumar

Final Decision : Dismissed

Judgement

Sudhanshu Dhulia, J

1. This criminal revision has been filed by the accused/revisionists against the order dated 07.07.2018 passed by the learned Third Additional Sessions Judge, Dehradun, by which their application for discharge was considered (in terms of Section 227 of CrPC), and dismissed.

2. Brief facts of the case are that a first information report was lodged by the Station House Officer, Doiwala at Police Station Doiwala, Dehradun on 11.09.2017, which was registered as Case Crime No. 256 of 2017 under Sections 420, 120-B, 342, 370 (1) of IPC and Sections 18, 19 and 20 of the Transplantation of Human Organs and Tissues Act, 1994 (from hereinafter

referred to as "TOHO"), inter alia, against the present revisionists.

3. The FIR discloses that the SHO got information at about 02:20 am on 11.09.2017 that in Gangotri Charitable Hospital (run in the premises of Uttaranchal Dental Institute Complex), a criminal activity of removal of kidney (for its transplantation elsewhere), is being carried out. The FIR further states that four persons have already been sent to Delhi for enquiry, and he has received information from the Haridwar Police that some of the persons who had their kidney removed in the hospital were being taken away to Delhi in an Innova Car No. UK08 TA 5519 which was checked by a police party; and the persons were detained. The car had five passengers, including two women. These five persons gave their address of distant places, which are outside of Uttarakhand, such as in Gujarat and Bengal. On interrogation it was revealed that each one of them had his/her kidney removed. They were assured that their kidney would be removed by a team of specialist doctors and no harm would be caused to them. The hospital where the kidney were to be removed is in Dehradun, near the Airport. They were told that the recipients of the human organs are "Sheikhs" of Arab countries and hence the donor will be suitably compensated. A job was also promised to each one of them. On this assurance, they agreed for the removal of their kidney. They complained that they have not received any money so far, and named a person called "Javed", who was an intermediary between them and the doctor. The FIR ends with the remarks of the SHO that this act at the hands of the accused persons is an offence under Sections 120B, 342, 420, 370 (1) of IPC and Sections 18, 19 & 20 of the Transplantation of Human Organs and Tissues Act, 1994 and therefore an FIR is being lodged.

4. However, after investigation charges were not filed by the Investigating Officer under any of the offences under TOHO. A charge-sheet was filed only under Sections 420, 370, 342 & 120-B IPC. A different procedure has been prescribed in law as regarding the offences under TOHO, to which we shall revert in a while.

5. As this case involves, inter alia, an appreciation of different penal provisions, both under IPC and TOHO, the provisions will be referred, but as of now the ingredients of Section 370 IPC needs to be appreciated first.

6. In the year 1913, Section 370 IPC was amended by Act No. 13 of 2013. Section 370 IPC after amendment in the year 2013 reads as under:

"Section 370. Trafficking of person.- (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by-

First.- using threats, or

Secondly.- using force, or any other form of coercion, or

Thirdly.- by abduction, or

Fourthly.- by practising fraud, or deception, or

Fifthly.- by abuse of power, or

Sixthly.- by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.- The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2 .- The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

7. In the present case, the alleged "human trafficking" involves a trafficking of more than one person where punishment can be extended to life imprisonment, and consequently it becomes an offence triable by a Sessions court. Therefore after filing of the chargesheet, the case was committed to sessions, from where it went to the Third Additional Sessions Judge, Dehradun. At the time when the charges were to be framed, an application was moved for their discharge by the accused i.e. the present revisionists under Section 227 of CrPC, which has been dismissed by the learned trial court by order dated 07.07.2018. This is the order

which has been presently challenged in this revision.

8. Before the learned trial Judge the submission of the applicants was that for the same alleged action a complaint has also been moved by the Director (Medical), Medical Health and Family Welfare, Uttarakhand, Dehradun under the TOHO. This complaint has been filed before the Chief Judicial Magistrate by the Director (Medical), Medical Health and Family Welfare, Uttarakhand, Dehradun, who is the appropriate authority vested with the power to lodge such a complaint under TOHO under Sections 18, 19, 19A & 20 of the TOHO, and as the complaint is regarding the same offence, and as the TOHO being a special Act, it will override the general Act i.e. the Indian Penal Code, therefore the present proceedings which are on the charges of IPC, cannot go on and the accused must be discharged! The plea was of double jeopardy and the other was that TOHO being a special Act, its provisions will have an overriding effect on the general provisions.

9. The learned judge of the trial court came to the conclusion that by an Amendment Act No. 13 of 2013 wide-scale changes were incorporated in the Indian Penal Code, including in Section 370 IPC. Earlier the punishment under Section 370 IPC was only 7 years but now the maximum punishment is life imprisonment and therefore, the Amendment Act No. 13 of 2013 will be the special Act and it would override the General Act i.e. TOHO. This would be so as the Act No. 13 of 2013 (from hereinafter referred to as Amendment Act) being the later Act would be the special Act, according to the learned Judge. Now, it must be stated here at the very threshold that this reasoning of the learned Judge is incorrect. The fact that the law Act No. 13 of 2013 came at a later point of time than TOHO will itself does not make it a Special Act. To the contrary, TOHO is a Special Act, inasmuch as it prescribes a different procedure for initiating the process under the criminal law, which is by way of filing a "complaint" before a Magistrate by an "authorised officer" and not by filing a police report. There are other reasons as well, which make it special provision to which we will come in a while. However, though reasons for dismissing the application under Section 227 CrPC may not be proper, the ultimate dismissal of the application seems to be in order. It is not a question of special overriding the general in the present case, as the two provisions are different provisions. They occupy two different fields.

10. Section 4 of the Criminal Procedure Code lays down very clearly that all offences under the Indian Penal Code have to be investigated, inquired, tried and dealt with the procedure given under the Code of Criminal Procedure. All other offences under a different or special law have to be investigated, inquired, tried and dealt with under the special procedure prescribed under that law. Section 4 of the Criminal Procedure Code reads as under:-

"Section 4. Trial of offences under the Indian Penal Code and other laws. (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter

contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

11. In other words, if a special procedure is prescribed under a special enactment, then the procedure as laid down under the special law has to be followed and not the one as prescribed under the Code of Criminal Procedure.

12. Now before this Court the first plea taken by the revisionists is that regarding the same offences the revisionists are being tried before two different courts under two different penal provisions and this amounts to "Double jeopardy", and the accused are protected under Article 20 (2) of the Constitution of India, and they cannot be compelled to face two different trials for the same offence.

13. There are a number of judgments of Hon'ble Apex Court and the High Courts, which the learned counsel for the revisionists has relied upon in order to strengthen his argument regarding double jeopardy, to which we shall refer in a while.

14. As this question would necessarily need a reference of various provisions of law, we may just quickly refer to them.

15. Article 20 (2) of the Constitution of India reads as under:-

"20. Protection in respect of conviction for offences.-

(1).....

(2) No person shall be prosecuted and punished for the same offence more than once."

16. Since the matter is also regarding the interpretation of the Constitution of India, we may also refer to Article 367 of the Constitution of India. Article 367 of the Constitution of India reads as under:-

"367. Interpretation.- (1) Unless the context otherwise requires, the General Clauses Act, 1897 , shall, subject to any adaptations and modifications that may be made therein under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.

(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, as the case may be.

(3) For the purposes of this Constitution "foreign State" means any State other than India:

Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order."

17. In view of Article 367 of the Constitution of India while interpreting for adoption and interpretation of the Constitution of India, reliance can be placed under the provisions of General Clauses Act, 1897. Apart from Article 20(2) of the Constitution of India, the important provision which is necessary for our purposes is Section 26 of the General Clauses Act, 1897. Section 26 of the General Clauses Act, 1897 reads as under:-

"Section 26. Provision as to offence punishable under two or more enactments.-

Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

18. Section 300 CrPC, more or less, reiterates the above provision as under:

"Section 300. Person once convicted or acquitted not to be tried for same offence.- (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub- section

(1) of Section 221, or for which he might have been convicted under sub-section (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under sub- section (1) of Section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under Section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of

any other Court to which the first- mentioned Court is subordinate.

(6) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, 1897 (10 of 1897) or of Section 188 of this Code.

Explanation. - The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section."

19. The principle underlying "double jeopardy" is that no person should be prosecuted and punished for the "same offence", more than once! What is therefore necessary is that a person is not only being prosecuted and punished twice but it is "for the same offence"! The offences have to be the same. Frankly speaking, the principle of "double jeopardy" is being wrongly invoked here. We do not have a case where a person has been either "convicted" or "acquitted" allegedly for an offence, and is being tried again for the same. The case of the revisionist simply is that they are being "tried" for the same offence before two different courts. Strictly speaking therefore the very application of the principle of "double jeopardy" is misconceived. As regarding the question of special overriding the general, we shall revert to it in a while, but the question of "double jeopardy" as raised here may be dealt first.

20. A bare perusal of the two provisions i.e. the one contained in IPC, for which the revisionists have been charged, and the one contained under the Transplantation of Human Organs and Tissues Act, 1994, for which a complaint has been moved before the court of Chief Judicial Magistrate, needs to be examined. Our examination will show that the two are distinct offences. It is always possible that in a given "action", of a person which constitutes an offence under one penal law may also constitute a different offence, under a different law! It would not mean in such cases that a person will not be prosecuted under the second provision of law. It also does not mean that if a person has been either convicted or acquitted, in the first provision of law, prosecution against him cannot go on under the second provision, which is under a different provision. The act may be one, but it may give rise two or more offences! In other words, the act may be one, offences can be more than one, and under more than one penal law.

21. Before the learned Sessions Judge, the charges have to be now framed under Sections 370, 342, 420 and 120-B of IPC. Let us first deal with Section 370. Section 370 IPC relates to an offence of "human trafficking".

22. Section 370 as it now stands amended has already been quoted above. It defines "human trafficking" and the punishment the offence carries with it. The scope of Section 370 is extremely wide. This offence is committed when for the purposes of exploitation of a person or persons, the accused has recruited, transported, harboured, transferred or received a person (or persons), by using threat, coercion, fraud, deceit, or some other such means. The first explanation to Section - 370 is as under:

"Explanation 1.- The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs."

(emphasis provided)

23. Though the above explanation to Section 370 includes "forced removal of organs", yet when one examines in totality the broad expression of "human trafficking" under Section 370 IPC, and the limited and focused area of TOHO, we would come to the conclusion that the two provisions occupy two different fields.

24. Similarly section 342 IPC relates to an offence, which is punishment for wrongful confinement, which has again nothing to do with any penal provision as contained under the Transplantation of Human Organs and Tissues Act, 1994. Section 342 IPC reads as under:

"Section 342. Punishment for wrongful confinement.- Whoever wrongfully confines any person, 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."

25. Section 420 IPC is again punishment of cheating. "Cheating is defined under Section 415 of the Indian Penal Code, which has got nothing to do with any of the offence defined under the Transplantation of Human Organs and Tissues Act, 1994. Section 415 of the IPC reads as under:-

"Section 415. Cheating.- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.-A dishonest concealment of facts is a deception within the meaning of this section."

26. Section 120-B IPC, which relates to punishment for criminal conspiracy reads as under:

"Section 120-B. Punishment of criminal conspiracy.- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

27. Criminal conspiracy is in itself an independent and substantive penal offence. There is nothing exactly similar to this in TOHO. Chapter V of TOHO is regarding "Offences and Penalties" and none of the offences mentioned therein speak of conspiracy, though in Section 19 and 19-A the word "abetment" or more precisely "abets" has been mentioned. But "abetting" is different from a "criminal conspiracy" as laid by the Hon'ble Apex Court in the case of *The State of Andhra Pradesh v. Kandimalla Subbaiah* and another reported in AIR 1961 SC 1241 (V 48 C 222).

28. The prosecution of the revisionists before the Chief Judicial Magistrate under TOHO, is hence on a distinct and different category of offences; different from the ones which they are facing before the learned Third Additional Sessions Judge, Dehradun. There is hence no application of the principle of double jeopardy in the present case, and the reliance by the revisionists on this principle is totally misconceived. We shall now examine the nature of offence under TOHO.

29. The complaint which has been moved by the appropriate authority before the learned Chief Judicial Magistrate, Dehradun is relating to offences under Section 18/19/19A/20 of TOHO. A bare perusal of these offences shows the distinct nature of the offences. The offences for which complaint has been lodged by the appropriate authority are as follows:-

"Section 18. Punishment for removal of [human organ or tissue or both] without authority. - (1) Any person who renders his services to or at any hospital and who, for purposes of transplantation, conducts, associates with, or helps in any manner in, the removal of any human organ without authority, shall be punishable with imprisonment for a term which may extend to [ten years and with fine which may extend to twenty lakh rupees]

(2). Where any person convicted under sub-section (1) is a registered medical practitioner, his name shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of [three years] for the first offence and permanently for the subsequent offence.

(3) Any person who renders his services to or at any hospital and who conducts, or associates with or helps in any manner in the removal of human tissues without authority, shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to five lakh rupees."

"Section 19. Punishment for commercial dealings in human organs. - Whoever -

(a) makes or receives any payment for the supply of, or for an offer to supply, any human organ;

(b) seeks to find person willing to supply for payment any human organ;

(c) offers to supply any human organ for payment;

(d) initiates or negotiates any arrangement involving the making of any payment

for the supply of, or for an offer to supply, any human organ;

(e) takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the initiation or negotiation of any arrangement referred to in clause (d); or

(f) publishes or distributes or causes to be published or distributed any advertisement-

(a) inviting persons to supply for payment of any human organ;

(b) offering to supply any human organ for payment; or

(c) indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d), [(g) abets in the preparation or submission of false documents including giving false affidavits to establish that the donor is making the donation of the human organs, as a near relative or by reason of affection or attachment towards the recipient] shall be punishable with imprisonment for a term which shall not be less than [five years] but which may extend to ten years and shall be liable to fine which shall not be less than twenty lakh rupees but may extend to one crore rupees."

" Section19A. Punishment for illegal dealings in human tissues. - Whoever -

(a) makes or receives any payment for the supply of, or for an offer to supply, any human tissue; or

(b) seeks to find person willing to supply for payment and human tissue; or

(c) offers to supply any human tissue for payment; or

(d) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human tissue; or

(e) takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the initiation or negotiation of any arrangement referred to in clause (d); or

(f) publishes or distributes or causes to be published or distributed any advertisement-

(i) inviting persons to supply for payment of any human tissue; or

(ii) offering to supply any human tissue for payment; or

(iii) indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d); or

(g) abets in the preparation or submission of false documents including giving false affidavits to establish that the donor is making the donation of the human tissues as a near relative or by reason of affection or attachment towards the recipient,

Shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and shall be liable to fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees."

"Section 20. Punishment for contravention of any other provision of this Act. - Whoever contravenes any provision of this Act or any rule made, or any condition of the registration granted, thereunder for which no punishment is separately provided in this Act, shall be punishable with imprisonment for a term which may extend to [five years or with fine which may extend to twenty lakh rupees]."

30. TOHO is indeed a Special Act, enacted by the Parliament with the following purposes, which is contained in its preamble:

"An Act to provide for the regulation of removal, storage and transplantation of [human organs and tissues for therapeutic purposes and for the prevention of commercial dealings in human organs and tissues and for matters connected therewith or incidental thereto."

31. The purpose for the above parliamentary legislation was the regulation, storage and transplantation of human organs and tissues for therapeutic purposes and for prevention of its misuse and the prevention of commercial dealings in human organs or tissues. The Act sets up a regulatory mechanism for the above purposes and prescribes as to who has the "authority" for the removal of human organs or tissues. When and how can it be done, etc. A very detail and stringent mechanism has been set up to monitor, regulate and guide hospitals for the purposes. Anyone who removes a human organ or tissue or both, in violation of the above process, is liable to be punished under the penal provision contained in Chapter VI of the Act.

32. Broadly speaking the present transaction of the offences can be divided into two main prongs. One is of luring or bringing donors, transporting and harbouring them and the second is the actual removal of their organs. The first category of offences come under IPC, the second under TOHO.

33. The distinction between Section 370 of IPC and the penal provisions contained in Section 18/19/19A/20 of TOHO is apparent. Simply put, Section 370 IPC, inter alia, prescribes a punishment when a man harbours or transports a person with intention of removing his organs. Penal provisions under TOHO on the other hand are focused on the violation of the regulatory mechanism, set up under the Act, when "removal" of a human organ or tissue, or both is done contrary to the Act.

34. Therefore a bare perusal of the two laws i.e. the one contained in IPC and the other being TOHO, will show that the two Acts occupy two different fields. The application of the principle of "double jeopardy" is completely misconceived here.

35. To reiterate what has already been said above, it is permissible in law to

prosecute and punish a person under two different penal provisions of law, even though broadly speaking, the act which has led to the different offences may be the same. In order to attract the bar of Article 20 (2) of the Constitution of India, the two offences have to be the same and identical. In case the offences are distinct, Article 20 (2) of the Constitution of India will not apply as a bar.

36. In *Om Prakash Gupta v. State of U.P.* (AIR 1957 SC 458), the Hon'ble Apex Court made a distinction between the offences under Section 409 of Indian Penal Code (relating to breach of trust by a public servant) and section 5 of the Prevention of Corruption Act and held that though the act constituting offences under the two different provisions may be the same, yet one can be prosecuted for both the offences since the ingredients of offence contained in the two penal provisions are different. This was subsequently relied upon by a Constitution Bench of the Apex Court in the case of *The State of Bombay v. S.L. Apte* and another reported in AIR 1961 SC 578 (V 48 C 84), where a distinction was made of the offence under Section 405/409 of IPC on one hand and Section 105 of the then Indian Insurance Act and the Court held that if the offences are distinct there is no question of applicability of "double-jeopardy" as embodied in Article 20(2) of the Constitution of India.

37. Same analogy will apply to Section 26 of the General Clauses Act, as held by the Constitution Bench of Hon'ble Apex Court in para 16 in the case of *The State of Bombay v. S.L. Apte* and another reported in AIR 1961 SC 578 (V 48 C 84). Para 16 of the said judgment reads as under:-

"16. The next point to be considered is as regards the scope of S. 26 of the General Clauses Act. Though S. 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence." If the offences are not the same but are distinct, the ban imposed by the provision also cannot be invoked...."

38. Another submission of the learned counsel for the revisionist before this Court is also closely linked with his first argument. This is as regards the special overriding the general. The learned counsel for the revisionist submits that cognizance taken in this case by the Additional Sessions Judge for an offence under Sections 370, 342, 420 and 120-B of IPC is wrong as TOHO being a special Act will override the general Act i.e. CrPC and IPC. Here the learned counsel has relied upon a decision of Hon'ble Apex Court i.e. *Jeewan Kumar Raut & Anr. V. Central Bureau of Investigation* reported in AIR 2009 SC 2763.

39. Indeed in the above case, it was held by the Hon'ble Apex Court that the ordinary procedure prescribed under the Criminal Procedure Code would not apply in a case under TOHO and what would be applicable would be the procedure prescribed under TOHO, since it is a special Act. But then under what

circumstances was it held, and how far will that be applicable here has to be seen. The question before the Hon'ble Apex Court in the said case was different.

40. The question before the Hon'ble Apex Court was as regards the applicability of sub-section (2) of Section 167 Code of Criminal Procedure in a case where cognizance has been taken under Section 22 of TOHO on a complaint. This was answered by the Hon'ble Apex Court as follows:

"24. For the views we have taken, we are of the opinion that *stricto sensu* sub-section (2) of Section 167 of the Code would not apply in a case of this nature.

Even assuming for the sake of argument that sub-section (2) of Section 167 of the Code requires filing of a report within 90 days and the complaint petition having filed within the said period, the requirements thereof stand satisfied."

41. The facts of the case were that a first information report was filed against certain medical practitioners on 08.02.2008 under Section 420/342/326/506 and 120-B of IPC as well as under Section 18 and 19 of TOHO. After the FIR, the accused were arrested and produced before the Magistrate. Subsequently, a common complaint i.e. for offence under IPC as well as offence under TOHO was filed under Section 22 of TOHO before the Judicial Magistrate stating as under:-

"51. That required authorization u/S. 22 of TOHO Act 1994 has been accorded by the Govt. of Haryana vide order dated 11.4.08 in favour of undersigned IO of the case....

52. That as per provisions contained in TOHO Act, 1994, cognizance for the offences punishable under the provision of said Act can only be taken up on a complaint filed by prescribed authority or by a person duly authorized by competent authority. Ms. Firoza Mehrotra, Financial Commissioner & Principal Secretary to the Govt. of Haryana, Home Department being the competent authority has authorized the undersigned IO of this case to file the complaint for the violation of provisions of TOHO Act, 1994 by the said accused persons before a competent Court of law. Since offences punishable under the provisions of Indian Penal Code committed by above said accused persons are pursuant to a criminal conspiracy in the same transaction, hence a composite complaint is being filed against all the said accused persons."

42. Thereafter it was prayed in the complaint as follows:

"54. It is most respectfully prayed that cognizance under Sections 120-B r/w 326, 342, 417, 465, 473, 506 and 307, IPC and Secs. 18, 19 & 20 of Transplantation of Human Organs Act, 1994 and substantive offences thereof may kindly be taken against accused A-1 to A-9 and they may be tried as per law. It is also prayed that permission to conduct further investigation against the arrested persons, namely, Smt. Pooja Kumar, Umesh Kumar and Harpal may kindly be given as also against the others whose names have emerged during investigation."

43. In the above case a common complaint was filed before a Judicial Magistrate relating to offences both under TOHO as well as under IPC. The learned Magistrate for the purposes of TOHO took the matter as a written complaint as contemplated under Section 22 of the Act, and for the offences relating to IPC it was considered as a police report. The next question which came up before the learned Magistrate was of the remand and detention of the accused. The plea as to the remand and the prescribed period of detention as raised by the accused, was rejected by the learned Magistrate. Aggrieved, the accused filed a revision before the High Court, which was also dismissed and the High Court and it refused to go into the question raised by the accused that the complaint is not a police report and cannot be treated as such. The reasoning given by the High Court was as under:-

"...The cognizance of the offence under the TOHO Act in terms of Section 22 is to be taken on the basis of a complaint filed by the appropriate authority concerned. Conceded position is that the complaint against the petitioners under the TOHO Act was filed on 29.4.2008, which was within a period of 90 days in respect of all the petitioners. Once the complaint was filed within a statutory period for a cognizable offence, which is non-bailable, of which cognizance was taken by the Magistrate, the petitioners would not be entitled to seek the protection of Section 167(2), Cr.P.C. even if it is construed for the sake of argument that a complaint is not a police report or cannot be treated as such. The net effect of the argument raised by the counsel for the petitioners would be that even if the complaint is not treated as a police report for offences under I.P.C., still the petitioners would not be entitled to be released on bail by operation of Section 167(2), Cr.P.C. as complaint against them stood filed within a statutory period of 90 days. The petitioners could, thus, be denied the concession of said provision without going into the elaborate and detailed submissions made by counsel for the parties in regard to the status of complaint, being police report or not. I am, thus, not inclined to go further into the aspect whether this complaint can be treated as a police report for the purpose of offences under the IPC or not. The definition of 'complaint' as contained in Section 2(d), Cr.P.C., would prima facie tend to indicate that complaint as such, would exclude the police report, though it is equally true that the police report need not be on any particular format..."

44. It was under the unique circumstances of the case, as narrated above, that the Hon'ble Apex Court gave the following determinations clarifying the legal position in such cases:

"14. The FIR lodged before the officer incharge of the Gurgaon Police Station was by way of information. It disclosed not only commission of an offence under TOHO but also under various provisions of the Indian Penal Code. The officer in charge of the Police Station, however, was not authorized by the appropriate Government to deal with the matter in relation to TOHO; but the respondent was. In that view of the matter, the investigation of the said complaint was

handed over to it.

15. TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences. TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code.

16. The investigation in terms of Section 13(3)(iv) of TOHO, thus, must be conducted by an authorized officer. Nobody else could do it. For the aforementioned reasons, the officer incharge of the Gurgaon Police Station had no other option but to hand over the investigation to the appropriate authority.

17. The respondent has been constituted under the Delhi Special Police Establishment Act, 1946. In terms of the provisions of the said Act, the authorities specified therein could make investigation in connection with a complaint. The mode and manner in which the investigation could be carried out have been laid down in the Act and/ or the manual framed thereunder.

18. It is for the aforementioned reason, upon receipt of the complaint from the officer incharge of the Gurgaon Police Station, it presumably having made a preliminary inquiry, lodged the FIR. Only because it lodged the FIR and proceeded in terms of the said Act and the manual, the same by itself would not mean that all the provisions of Chapter XII of TOHO vis-a-vis Chapter XV thereof could not be invoked.

19. Section 22 of TOHO prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as laid down therein. Respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of TOHO. If by reason of the provisions of TOHO, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of Sub-section (2) of Section 173 of the Code did not and could not arise. In other words, if no police report could be filed, Sub-section (2) of Section 167 of the Code was not attracted.

20. It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in

exercise of its authorization under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; Sub-section (2) of Section 167 of the Code may not be applicable. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO.

To put it differently, upon completion of the investigation, an authorized officer could only file a complaint and not a police report, as a specific bar has been created by the Parliament. In that view of the matter, the police report being not a complaint and vice-versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the offence only in the manner laid down therein and not by any other mode. The procedure laid down in TOHO, thus, would permit the respondent to file a complaint and not a report which course of action could have been taken recourse to but for the special provisions contained in Section 22 of TOHO.

21. It is one thing to say that the court could take recourse to the procedure laid down in Section 202 of the Code or even reject the complaint but then only because such a course of action could be resorted to by the learned Magistrate, the same, by itself, would not lead us to a conclusion that the complaint petition should have been treated to be a police report; the logical corollary whereof would be to invoke the provisions of Sub-section (2) of Section 167 of the Code."

(emphasis provided)

45. It was necessary to refer in detail of what has been said by the Apex Court to make the point clear that firstly the above case reiterates the settled position of law. When a special procedure has been given in an Act then that has to be followed and not the ordinary procedure as contained in CrPC. This is also the mandate of Section 4 of CrPC. Consequently when a special provision has been given in TOHO, which is of filing a complaint by an "authorised officer" before a Magistrate then the ordinary procedure of report being filed before the police cannot be adopted. In any case under TOHO it is not the "police" but only the "authorised officer" who can file a complaint. Thus the criminal proceedings under TOHO can be initiated only on a "complaint", that too by an "authorised officer" who is defined under Section 22 (1) (a) of the Act. The Transplantation of Human Organs and Tissues Act, 1994

46. This, however, does not mean that the police case against the same accused which is on the penal provision of IPC will not go on. As already stated above, it

will go on as it is a different offence where the ordinary procedure under CrPC will be followed.

47. In the case at hand, it is only the authorised officer who has filed a complaint against the accused before the Magistrate. That is a separate procedure. We are presently dealing with the set of charges against the accused under IPC, which cannot be faulted procedurally.

48. In view of the above findings, I do not find any merit in the criminal revision. The criminal revision is accordingly dismissed.