

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

1. CRA-S No.3958-SB of 2013 (O&M)

Dr. O.P. Mahajan

... Appellant

Versus

State of Punjab

... Respondent

2. CRA-S No.4101-SB of 2013 (O&M)

Dr. Jagdish Gargi

... Appellant

Versus

State of Punjab

... Respondent

3. CRA-S No.4119-SB of 2013 (O&M)

Dr. S.P.S. Grover

... Appellant

Versus

State of Punjab

... Respondent

4. CRA-S No.4369-SB of 2013 (O&M)

Suresh Kumar Sharma

... Appellant

Versus

State of Punjab

... Respondent

5. CRA-S No.4473-SB of 2013 (O&M)

Dr. H.S. Bhutani

... Appellant

Versus

State of Punjab

... Respondent

6. CRA-S No.4474-SB of 2013 (O&M)

Dr. Arjinder Singh

... Appellant

Versus

State of Punjab

... Respondent

Date of decision: 17th October, 2018

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. R.S. Rai, Senior Advocate with
Mr. Anurag Arora, Advocate
for appellant-Dr.S.P.S. Grover.

Mr. A.P.S. Deol, Senior Advocate with
Mr. Himaat Deol, Advocate
for appellant-Dr. Jagdish Gargi.

Mr. Preetinder S. Ahluwalia, Advocate
for appellant-Dr. O.P. Mahajan.

Mr. Gautam Dutt, Advocate
for appellant-Suresh Kumar Sharma.

Mr. S.S. Narula, Advocate
for appellant-Dr.H.S. Bhutani.

Mr. K.S. Nalwa, Advocate
for appellant-Dr. Arjinder Singh.

Mr. H.S. Sullar, Dy. Advocate General, Punjab
for the respondent/State.

FATEH DEEP SINGH, J.

All the aforesaid criminal appeals bearing CRA-S No.3958-SB of 2013 filed by Dr. O.P. Mahajan; CRA-S No.4101-SB of 2013 filed by Dr. Jagdish Gargi; CRA-S No.4119-SB of 2013 by Dr. S.P.S. Grover; CRA-S No.4369-SB of 2013 by Suresh Kumar Sharma; CRA-S No.4473-SB of 2013 by Dr. H.S. Bhutani and CRA-S No.4474-SB of 2013 moved by Dr. Arjinder Singh, have arisen out of the common judgment of conviction and order of sentence dated 02.11.2013 passed by the Court of learned Additional Sessions Judge, Amritsar, whereby in

FIR No.118 of 2002 under Sections 420, 468, 469, 471, 295-A, 363, 367, 368, 506 IPC and Sections 18/19/20 of the Transplantation of Human Organs and Tissues Act, 1994 pertaining to Police Station Kotwali, District Amritsar, the Court has held all the accused guilty and sentenced them as follows:

<u>Name of convict</u>	<u>Offence u/s</u>	<u>Sentence & fine</u>
Suresh Kumar	367 IPC	Rigorous imprisonment for a period of eight years and to pay a fine of Rs.10,000/-, in default of payment of fine to further undergo rigorous imprisonment for six months.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover	368 IPC	Rigorous imprisonment for a period of five years each and to pay a fine of Rs.5,000/- each, in default of payment of fine to further undergo rigorous imprisonment for four months each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover	506 IPC	Rigorous imprisonment for a period of two years each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover	419 IPC	Rigorous imprisonment for a period of two years each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover	420 IPC	Rigorous imprisonment for a period of five years each and to pay a fine of Rs.10,000/- each, in default of payment of fine to further undergo rigorous imprisonment for four months each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani,	467 IPC	Rigorous imprisonment for a period of five years each and to pay a fine of Rs.10,000/- each, in default of payment of fine to further undergo

Dr.S.P.S. Grover		rigorous imprisonment for six months each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover	468 IPC	Rigorous imprisonment for a period of three years each and to pay a fine of Rs.5,000/- each, in default of payment of fine to further undergo rigorous imprisonment for three months each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover	471 IPC	Rigorous imprisonment for a period of two years each and to pay a fine of Rs.2,000/- each, in default of payment of fine to further undergo rigorous imprisonment for one month each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover, Dr.O.P. Mahajan, Dr.Jagdish Gargi	120-B IPC	Rigorous imprisonment for a period of three years each and to pay a fine of Rs.10,000/- each, in default of payment of fine to further undergo rigorous imprisonment for three months each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover, Dr.O.P. Mahajan, Dr.Jagdish Gargi	18 of Transplantation of Human Organs Act, 1994	Rigorous imprisonment for a period of five years each and to pay a fine of Rs.10,000/- each, in default of payment of fine to further undergo rigorous imprisonment for two months each.
Suresh Kumar, Dr.Arjinder Singh, Dr.H.S. Bhutani, Dr.S.P.S. Grover,	19 of Transplantation of Human Organs Act, 1994	Rigorous imprisonment for a period of five years each and to pay a fine of Rs.20,000/- each, in default of payment of fine to further undergo rigorous imprisonment for six months each.

The same is subject matter of challenge before this Court in these separate appeals.

Since all these appeals have arisen out of the same very judgment pertaining to the same very criminal case bearing common FIR

and therefore having common questions of facts and law, are being disposed off together by way of common judgment. For brevity, the facts have been enumerated from CRA-S No.3958-SB of 2013 titled ‘Dr. O.P. Mahajan vs. State of Punjab’.

“Do all the good you can, in all the ways you can, to all the souls you can, in every place you can, at all the times you can, with all the zeal you can, as long as ever you can” were the words quoted by the famous thinker J.Wesley in the 18th century. Precisely, it was with this philanthropic attainment, the framers of law, considering all the social and medical reasons in their wisdom, had framed and enacted the Transplantation of Human Organs and Tissues Act, 1994 (hereinafter referred to as, ‘THOTA’) with the aim to regulate removal, storage and transplantation of human organs and tissues for therapeutic purposes, however, that did not confer business opportunities and was purely for prevention of commercial dealings in human organs. However sadly to observe, the framers at the time of its inception failed to decipher its misuse and it was during the course of events when faced with the misuse of such an Act aimed at social welfare, forced the authorities to bring about drastic changes to curb this misuse and thus, the Act was repeatedly amended in the years 1998 and 2014 and so its Rules, which

were lastly brought about in the year 2014 stringently laying down the procedure after amending 1995 Rules because of the intervening period, its misuse had prompted the authorities to adopt such stricter measures to curb its misuse.

It is on 13.10.2002, a complaint Ex.PW20/A (also referred as Ex.P4) by way of application addressed to Superintendent of Police (City), Amritsar from one Bagicha Singh son of Ajit Singh resident of village Midadpura, Tehsil Jagraon, District Ludhiana was received with Police Station Kotwali, District Amritsar which was entered at DDR No.22 dated 13.10.2002 at 5:30 p.m. leading to registration of the present FIR. The brief allegations in the complaint levelled by the complainant Bagicha Singh are that in the month of February 2002 he had visited Golden Temple to pay obeisance and in the month of June the same very year, a clean-shaven boy named Baljit Singh alias Vicky alias Gabbar (hereinafter referred to as 'Vicky') son of Rajwinder Singh resident of Fatehgarh Shukar Chak met him and on the pretext of making him learn driving, enticed him. The complainant claims that he was 17 years of age. The said Vicky took him to the house of one Suresh Kumar Sharma (now appellant) revealing that the said person was his uncle and whose kidneys have been damaged and the complainant should give his kidney to him

on payment of Rs.40,000/- and in case the complainant refuses to do so, threatened that they would kill him. The complainant claims that he was taken to Chandigarh and was told to impersonate as Raju and thereafter, was taken to Govt. Medical College, Amritsar where before the team of doctors Bagicha Singh complainant represented himself as Raju and thereafter Bagicha Singh was taken in a vehicle to New Ruby Hospital, Jalandhar where he claims that a team of doctors conducted operation of his kidney and transplanted the same upon Suresh Kumar Sharma. It is after he gained consciousness upon operation, the complainant realized that Vicky had got removed his kidney in connivance with the doctors and did not pay him a single penny. He further alleged that thereafter, he was left at his house in the village and threatened that in case he disclosed this incident to anyone, they would kill him and his family. The then Superintendent of Police (City) Amritsar ordered that the complainant be joined in investigations of case FIR No.101 of 2002 pertaining to Police Station D Division, Amritsar. Thereafter, realizing that the incident has taken place in Golden Temple complex, the matter was referred to Police Station Kotwali, Amritsar for appropriate proceedings, where statement of the complainant Bagicha Singh was recorded by SI Vishwa Mitter, Police Post Durgiana Mandir, Amritsar

and the investigations were ordered to be conducted under the supervision of Superintendent of Police (City) who had made endorsement Ex.PW10/B for registration of the case within the jurisdiction of Police Station E Division, Amritsar and the report by SP Ex.PW8/A followed by subsequent endorsement Ex.PW8/A. During the course of investigations, evidence was collected and Dr.O.P. Mahajan, then Principal, Govt. Medical College, Amritsar who was the Chairman of the authorization committee and Dr.Jagdish Gargi, Professor and Head Forensic Medicine, Govt. Medical College, Amritsar, member of the authorization committee were arraigned as accused along with the recipient Suresh Kumar Sharma, a Sub Inspector in Chandigarh Police and challan was presented on 16.03.2003. Upon recording of statement of PW1 Ajit Singh and finding the case to be triable by the Court of Sessions, the case was committed by the Court of Judicial Magistrate 1st Class vide orders dated 06.09.2003. Finding prima-facie case against these accused, charges were got framed vide orders dated 11.05.2004. Thereafter, during the course of investigations, supplementary challan was presented on 12.05.2003 whereby remaining accused were arraigned. After examining PW1 Ajit Singh, father of Bagicha Singh, an application under Section 319 Cr.P.C. was moved by learned Special PP on

31.08.2005. It is vide orders dated 10.09.2005, the Court of learned Additional Sessions Judge had summoned Dr.Arjinder Singh; Dr.H.S. Bhutani and Dr.S.P.S. Grover as additional accused for commission of offences under Sections 420, 467, 468, 469, 471, 419, 368, 506, 367 IPC read with Section 120B IPC and Sections 18/19/20 of the THOTA. It is during the course of trial, amended chargesheet against Dr.O.P. Mahajan, Dr. Jagdish Gargi, Suresh Kumar Sharma, Dr.S.P.S. Grover, Dr. Arjinder Singh and Dr.H.S. Bhutani, under Sections 420, 467, 468, 469, 471, 419, 368, 506, 367 IPC read with Section 120B IPC and Sections 18/19/20 of the THOTA was framed vide orders dated 24.07.2006.

The prosecution, at the trial, examined the following witnesses:-

PW1 HC Balwinder Singh; PW2 Ajit Singh,
father of Bagicha Singh; PW3 Daljit Kaur retired
Head Mistress, Govt. High School; PW4 Dr. Prem
Arora, Ex-Professor, Govt. Medical College,
Amritsar, a member of the authorization committee;
PW5 Gurmej Singh retired Sub Inspector; PW6
Karamjit Singh; PW7 SI Charanjit Singh, SHO
Police Station B Division; PW8 SI Vishwa Mitter;

PW9 Arun Kumar SHO; PW10 Kunwar Vijay Partap Singh, IPS; PW11 Hardip Singh, Clerk, Punjab State Human Rights Commission; PW12 Yashwant Singh, Senior Assistant, Department of Home Affairs; PW13 Buta Singh, retired Under Secretary, Govt. of Punjab; PW14 Ms.Ranjit Kaur, Judicial Magistrate 1st Class, Amritsar; PW15 Arun Saini, Superintendent of Police; PW16 Karam Singh Khattri, Under Secretary Home (since retd.); PW17 Suman Lata, Steno-typist, Govt. Medical College, Amritsar; PW18 Dr.Ravinder Singh, then posted as Director, Research & Medical Education, Punjab; PW19 HC Ranjit Singh, computer operator from the office of SP (City); PW20 Retd. Inspector Ajit Singh.

Following documents were proved during evidence by the prosecution:-

- Ex.PA : Complaint;
- Ex.PB : Recovery memo school leaving certificate and ration card;
- Ex.PX : Judgment of Juvenile Justice Board dt. 10.02.2012;
- Ex.PY : File of New Ruby Hospital;

- Ex.P1 : Arrest memo of Dr.O.P. Mahajan;
- Ex.P2 : Arrest memo of Dr.Jagdish Gargi;
- Ex.P3 : Original ration card (As per ration card age 16 years);
- Ex.P4 : Marking of complaint by SP to PP Durgiana Mandir.
- Ex.P5 : Affidavit of Bagicha Singh;
- Ex.P6 : Photograph of Bagicha Singh;
- Ex.P7 : School leaving certificate of Bagicha Singh;
- Ex.PW3/A : Photocopy of school admission and withdrawal certificate;
- Ex.PW3/B : School leaving certificate;
- Ex.PW3/C : Admission register;
- Ex.PW3/D : Attestation of signatures of complainant;
- Ex.PW4/A : Affidavit of Parkash;
- Ex.PW4/B : Affidavit of wife of Parkash;
- Ex.PW4/C : Affidavit of wife of Parkash;
- Ex.PW4/D : Endorsement;
- Ex.PW4/E : Copy of letter of Dr.Prem Arora;
- Ex.PW4/F : Approval in the case of Parkash;
- Ex.PW4/G : Approval in the case of Krishan Lal Sahni;
- Ex.PW5/A : Rough site plan of the spot;
- Ex.PW5/B : recovery memo of marks card (mark A1), certificate (mark A2) and photograph of Naresh Kumar (mark A3);
- Ex.PW5/C : Possession memo of statement u/s 164 Cr.P.C.;
- Ex.PW7/A : Arrest memo of Suresh Kumar Sharma;
- Ex.PW8/A : Endst. of SI Vishva Mittar on complaint;
- Ex.PW8/B : Arrest memo of accused Baljit Singh @ Gabbar;
- Ex.PW8/C : Arrest intimation memo of Baljit Singh @ Gabbar;
- Ex.PW9/A : Arrest intimation memo of Dr.O.P. Mahajan;

- Ex.PW10/A: Endst. of SP on the complaint;
- Ex.PW10/B: Another endst. of SP (City-I) on the complaint;
- Ex.PW10/C: Copy of letter sent to DRME Punjab;
- Ex.PW10/D: Reply of DRME;
- Ex.PW11/A: Complaint of Dr. Jagdish Gargi;
- Ex.PW11/B: Order of Pb. State Human Rights Commission;
- Ex.PW11/C: Order of Pb. State Human Rights Commission;
- Ex.PW11/D: Complaint of Baljit Singh Naik;
- Ex.PW11/E: Enquiry report of DSP;
- Ex.PW11/F: Order of Pb. State Human Rights Commission;
- Ex.PW12/A: Copy of letter written by Under Secy. Home to
Sh.A.A. Saddiqui, ADGP;
- Ex.PW13/A: Sanction of prosecution against Dr.O.P. Mahajan &
Dr.Jagdish Gargi;
- Ex.PW14/1 : Statement of Bagicha Singh u/s 164 Cr.P.C.;
- Ex.PW16/A: Noting letter dated 18.12.2002;
- Ex.PW17/A: Record of kidney transplantation of Krishan Lal
Sahni;
- Ex.PW17/B: Record of kidney transplantation of Krishan Lal
Sahni;
- Ex.PW17/C: Record of kidney transplantation of Krishan Lal
Sahni;
- Ex.PW17/D: Record of kidney transplantation of Suresh Kumar;
- Ex.PW17/E: Record of kidney transplantation of Suresh Kumar;
- Ex.PW17/F: Record of kidney transplantation of Suresh Kumar;
- Ex.PW18/A: Letter of Dr.Ravinder Singh;
- Ex.PW20/A: Formal FIR;

Thereafter, the prosecution closed its evidence and all
incriminating evidence of the prosecution, oral as well as documentary,

proved at the trial of each of the accused was put to them in their separately recorded statements under Section 313 Cr.P.C. The accused denied the allegations of the prosecution to be false, mis-conceived and concocted, with a motivated cause. Dr.O.P. Mahajan took the stand that he has been falsely implicated being Chairman of authorization committee and as per the then prevalent practice there was no requirement of giving affidavits of donor and recipient, and that he has done so to ensure fairness. The stand of Suresh Kumar Sharma accused was of innocence, who claimed that Raju was a major and had come to him on his own to seek job as a helper in his house and during that period became quite close to his family and had volunteered to donate his kidney to him, and on the basis of which tests were conducted and there was no coercion or misrepresentation. Accused Dr.Jagdish Gargi took the plea of false implication and claimed that because of his post he was made a member of the authorization committee on the orders of the State Govt. and though there was no need to get affidavits of donor and the recipient but for caution purpose had done it so, which were attested by the Executive Magistrate and had acted bonafidely on the basis of the same. Accused Dr.Arjinder Singh took the plea of total innocence claiming that he was found innocent during investigations and that he had

produced before the investigating officer the entire treatment record and video filming showing consent of Raju and it was by virtue of Section 319 Cr.P.C. he has been wrongly summoned. Accused Dr. S.P.S. Grover took the similar plea that it was accused Suresh Kumar Sharma who had represented before their hospital and brought Raju and they had advised tests to both the donor and the recipient, and it is on the basis of the sworn attested affidavits of these persons, they had performed surgery without any monetary consideration. Same is the stand of accused Dr.H.S. Bhutani as that of the operating surgeon accused Dr.Arjinder Singh.

The accused in their defence, examined the following witnesses:-

DW1 Anjana, Receptionist; DW2 SI Mangat Ram; DW3 Ashok Kumar, Photographer; DW4 SP Rajinder Singh; DW5 Karam Singh, Record Keeper; DW6 Amit Kamal, Record Keeper; DW7 Sarabjit Kumar, Junior Assistant; DW8 Bhupinder Singh, Accountant Clerk; DW9 HC Nirmal Chand; DW10 Karandeep Singh Bhullar, Tehsildar; DW11 Rajesh Kumar Clerk; DW12 Dr.Uttampreet Singh; DW13

Dr. Poonamjit, Director; DW14 Dr.Vijay Singh

Rawat; DW15 Harbinder Singh, Statistical Assistant.

During the defence evidence, the accused proved following documents:

- Ex.DW1/A : Authorization letter of New Ruby Hospital;
- Ex.DW1/B : Authorization letter of New Ruby Hospital;
- Ex.DW1/C : Authorization letter of New Ruby Hospital;
- Ex.DW1/D : Authorization letter of New Ruby Hospital;
- Ex.DW8/A : Voters list of village Sidhwan Bet for 2002;
- Ex.DW9/A : Order of SP, Jalandhar for destroying record;
- Ex.DW10/A: Record of attestation of affidavit of Raju;
- Ex.DW11/A : Order of SSP regarding destruction of record;
- Ex.DW12/A: Ultrasound test report of Raju;
- Ex.DW12/B: Ultrasound test report of Suresh Kumar Sharma;
- Ex.DW12/C: Signatures on ultrasound test report of Suresh K. Sharma;
- Ex.DW12/D: Signatures on ultrasound test report of Raju;
- Ex.DW13/A: Lab test report of Raju;
- Ex.DW13/C: Lab test report of Suresh Kumar;
- Ex.DW14/A: CT Angiography report of Raju;
- Ex.DX/1 : Birth certificate of Bagicha Singh;
- Ex.DX/2 : Copy of death & birth register;
- Ex.DX/3 : Copy of death & birth register;
- Ex. D1 : Video Cassette;
- Ex.DA : Statement of Ajit Singh u/s 161 Cr.P.C.

Thereafter the defence evidence was closed.

Heard Mr.R.S. Rai, Senior Advocate assisted by Mr.Anurag Arora, Advocate appearing on behalf of appellant-Dr.S.P.S. Grover; Mr.A.P.S. Deol, Senior Advocate assisted by Mr.Himmat Deol, Advocate for Dr.Jagdish Gargi; Mr.Preetinder Singh Ahluwalia, Advocate representing appellant-Dr.O.P. Mahajan; Mr. K.S. Nalwa, Advocate for appellant-Dr.Arjinder Singh; Mr.Gautam Dutt, Advocate appearing on behalf of appellant-Suresh Kumar Sharma; and Mr.S.S. Narula, Advocate on behalf of appellant-Dr.H.S. Bhutani. The counsel, opening their submissions, have highlighted that the occurrence is alleged to have taken place in June 2002 and at that time the Transplantation of Human Organs Act, 1994 (hereinafter called, 'TOHO' or 'the old Act') was in place along with Transplantation of Human Organs Rules, 1995 (hereinafter called, 'the old Rules') and which has subsequently been rechristened in the year 2011 and 2014, which has brought about overhauling of the provisions for this purpose with the passing of the Transplantation of Human Organs and Tissues Act, 1994 and the Transplantation of Human Organs Rules, 2014 ; arguing further that the impugned judgment is under the mistaken misconception of the learned Court below, whereby it has applied the provisions of the new amended Act and Rules, and therefore, the same was violative of the constitutional provisions,

especially Article 20 of the Constitution of India. Furthering their submissions, learned counsel representing various appellants have sought to vociferously stress that under the very provisions of the TOHO, the police is not empowered to investigate the offence, which needs to be carried on by the authorized officer under the Act and the Rules, and have placed reliance on **‘Jeewan Kumar Raut & another vs. Central Bureau of Investigation’** 2009(3) RCR (Criminal) 586 and **‘State of Bihar vs. Murad Ali Khan and others’** (1988) 4 SCC 655 submitting that since TOHO and the Rules prescribe comprehensive provisions for filing of a complaint by competent authority, its investigation and therefore has to be done fully in accordance with those provisions as provisions of special law override the provisions of general law and sought support from **‘Central Bureau of Investigation vs. State of Rajasthan & others’** (1996) 9 SCC 735; **‘Aniruddha Bahal, Niraj Kumar and Thomas Mathew vs. Central Bureau of Investigation’** 2014(16) RCR (Criminal) 1092; **‘Tarannum Banu vs. State of Karnataka and others’** 2018(3) KantLJ 437; **‘Pancham Singh vs. State of Jharkhand and others’** 2014(10) RCR (Criminal) 584; **‘Harmela Ram vs. State of Haryana’** 2013(3) RCR (Criminal) 141; **‘C.Muniappan & others vs. State of Tamil Nadu’** 2010(9) SCC 567;

‘Suo Motu vs. State of Gujarat’ 2009 CriLJ 721; and ‘Hardeep Singh and another vs. State of Haryana and another’ (CRM-M No.4211 of 2014, decided on 04.12.2014), submitting further that the same resulted in mistrial, necessitating setting aside of the judgment of conviction. Learned counsel have further sought support from **‘N. Ratnakumari vs. State of Odisha’ 2014 Cri LJ 4433; ‘B. Muthuraman @ Balesubavramanian Muthuraman and others vs. State of Jharkhand’ 2009(3) JCR 261; ‘Suresh Kumar @ Bobby vs. State of Punjab’ 2012(3) RCR(Criminal) 640; and ‘Jamiruddin Ansari vs. Central Bureau of Investigation and another’ 2011(5) RCR (Criminal) 743** to impress upon the Court that since TOHO is a special law where procedure has been prescribed and therefore the procedure under the general law needs to be excluded.

It has been elaborated by the learned counsel for the appellants in unison that initially, much prior to the registration of the present FIR bearing No.118/2002, another FIR bearing No.101/2002 of similar nature had already been filed and bringing about the present FIR was totally uncalled for, untenable and in violation of Articles 14, 20 and 21 of the Constitution of India. Once the police has already registered an FIR and started investigations in respect of the same offences, which to

create an impression is termed as kidney scam, they had no right for filing of second FIR and have sought support from **‘Amitbhai Anilchandra Shah vs. The Central Bureau of Investigation and another’ 2013(2) RCR (Criminal) 819.**

The next point raised by the learned counsel for the appellants that Ajit Singh was initially examined at the time of taking cognizance of the offence on presentation of challan as PW1 and subsequently on presentation of supplementary challan he was examined as PW2 and did not support the prosecution story and therefore, his previous statement made in a Court of law cannot be read into evidence and rather is inadmissible in terms of Section 33 of the Evidence Act, and have sought support from **‘Sashi Jena vs. Khadal Swain and another’ 2004(3) RCR (Criminal) 338.**

It was further contended that stand of the accused under Section 313 Cr.P.C. in view of the settled proposition of law laid down in **‘State of Haryana vs. Rajbir’ 2011(1) RCR (Criminal) 758** cannot sustain conviction of the accused. The counsel have argued that the statement of Bagicha Singh under Section 164 Cr.P.C. was not recorded in the present FIR and it was in the previous first FIR and therefore, cannot be legitimately taken to be a piece of evidence and much less,

does not pertain to the circumstances leading to his death as at that point of time, his death was not in question, and have sought to place reliance on **‘Bhairon Singh vs. State of Madhya Pradesh’ 2009(13) SCC 80** and **‘Sudhakar vs. State of Maharashtra’ 2000(3) RCR(Criminal) 383.**

It was with much elance and force, the counsel have sought to seek support from **‘Dr.Arvind Pal Singh Gambhir and another vs. State of Punjab and others’ (CRM-M No.23040 of 2012, decided on 10.07.2013); ‘Dr. Ashok Kashyap vs. State of Haryana’ 2015(4) RCR (Criminal) 194; ‘Dr. Tejinder Pal Singh Multani vs. State of Punjab and another’ 2015(2) RCR(Criminal) 399; and ‘Sharat Babu Digumarti vs. Government (NCT of Delhi)’ (2016) 235 DLT 618** to bring about the stand of the appellants that the Court is not competent to take cognizance of the offence of a police complaint and therefore, the police report under Section 173 Cr.P.C. cannot be taken cognizance of in the light of inherent defects therein, especially when no fruitful reasons worth acceptance are coming forth from the competent authority under the TOHO, which did not carry on with the investigations nor any reason is forthcoming from the side of the prosecution. It was on the strength of **‘Rajinder Kumar Chibbar vs. Assem Baksh’ 2006(3) RCR(Criminal)**

586; ‘Mashak Ali Mohammed vs. State of Meaharashtra’ 2010(15) SCC 657; ‘Hari Ram vs. The State of Rajasthan’ 1991 AIR (SCW) 721; ‘Vinod Chaturvedi etc. vs. State of M.P.’ 1984 AIR (SC) 911; ‘Tej Parkash vs. State of Punjab’ 2016(4) RCR(Criminal) 983; ‘Kavita vs. State of Haryana & others’ 2011(2) RCR(Criminal) 683; ‘Kulwant Singh vs. State of Haryana’ 2009(4) RCR(Criminal) 660; ‘Rajesh vs. State of Haryana’ 2005(2) RCR(Criminal) 931; ‘Satish Mehra vs. State (NCT of Delhi) (2012) 13 SCC 614; ‘State of Bihar vs. Murad Ali Khan and others’ (1988) 4 SCC 655; and ‘Central Bureau of Investigation vs. State of Rajasthan & others’ (1996) 9 SCC 735, the learned counsel for the appellants have sought to stress the fact that the very own story of the victim Bagicha Singh shows that he has left his home in February 2002 and had been roaming about in the Golden Temple as per his own stand till he came across one Vicky, a clean-shaven person and has befriended him and till the allegations of removal of kidney, there is no allegation or role that has come in the evidence of the prosecution pertaining to other accused. It was with much stress, learned counsel have sought to bring about that from the Golden Temple, Amritsar, Bagicha Singh claims to have gone to Chandigarh at the house of appellant Suresh Kumar Sharma and had thereafter, together

got themselves medically examined from various centres in Chandigarh, in New Ruby Hospital, Jalandhar and thereafter had moved appropriate application before the authorization committee and therefore, the allegations that he was enticed, kidnapped or coerced to give his kidney, do not sustain that for almost a long period of time, spanning over weeks, he had been roaming about, are rather reflective of the fact that it was voluntary act of the donor. Since no element of exchange of money as an enticement for getting a kidney has been alleged before the Court, it would be too preposterous to presume that such a donation of kidney was on account of money or threat and rather it was a voluntary act for which the donor had kept silent till he moved the authorities in October 2002, and therefore, apparently is suggestive that all was not well with the prosecution and for a motivated cause by means of false and fabricated evidence, the allegations have been brought about to suit certain vested interests. More so, when the authorization committee can, by no means, adjudge the identity of the donor and as a precautionary measure had taken sworn attested affidavits of the donor and the recipient, and at that very period of time there was no prescribed procedure for implanting such an organ and it was left to the discretion of the authorization committee and since New Ruby Hospital, Jalandhar was the designated

hospital so authorized to conduct kidney transplant by the appropriate authority of the State, there was no illegality in carrying out so. It was stressed that there is no evidence against any of the officials of the hospital of having ever connived or carried on this dubious allegations and there is no proven element of criminal conspiracy inter-se the accused persons.

Mr. H.S. Sullar, Deputy Advocate General, Punjab on the other hand has sought to project that it was a serious matter, a scam whereby the poor persons were enticed and by sheer use of money-power and muscle-power, were made to part with their vital organs and therefore, the matter needs to be strictly dealt with, keeping in view the social angle to it. With a view to cover up for the police lapse that initially the first FIR No.101/2002 was registered regarding such a scam and that the present FIR bearing No.118/2002 has come about subsequently, and seeking support from **‘P.Sreekumar vs. State of Kerala & others’ 2018(2) RCR (Criminal) 542; ‘Nirmal Singh Kahlon vs. State of Punjab & others’ 2009(1) RCR(Criminal) 3; ‘Upkar Singh vs. Ved Parkash’ 2004(4) RCR(Criminal) 294; and ‘Babubhai vs. State of Gujarat & others’ 2010 (12) SCC 254** has argued that there is no prohibition under the law that the second FIR

cannot cover the allegations of the first FIR where there is violation in the version put forth by the allegations contained therein and even a second FIR in such a situation is permissible. The second point that has been brought about in his arguments on behalf of the State is that the victim Bagicha Singh in the meanwhile has passed away in a motor-vehicular accident and the prosecution has been deprived of his evidence, and his father PW2 Ajit Singh has resiled from his stand and therefore, seeking support from '**Mohinder Singh and others vs. State of Punjab**' 2007(2) RCR (Criminal) 227 has brought about submissions that evidence of a hostile witness can be accepted and there is no bar for considering the same if it is corroborated by other means and appears to be truthful. Further, it is sought to be elaborated by the learned State counsel by seeking support from '**Zahira Habibullah Sheikh & another vs. State of Gujarat & others**' 2006(2) RCR (Criminal) 448 that even in cases where there are defects in investigation, the courts need to circumspect while evaluating the evidence and it would be a travesty of justice if the accused are acquitted purely on account of such defects which are basically inherent in certain investigations because of unforeseen events and therefore, has stressed that it is the faith and confidence of the people and the public at large which needs to be taken account of. Referring to

the statement under Section 164 Cr.P.C. of deceased Bagicha Singh vide memo Ex.PW5/C, the learned State counsel has sought to hammer home the point that the same being the last statement of the deceased prior to his death can be construed as dying declaration within the definition of Section 32 of the Evidence Act and lastly, has sought to point out that letter Ex.PW18/A by Dr.Ravinder Singh DRMC, Punjab addressed to the SP (City) Amritsar falls within the fulfillment of pre-requisites of Section 22 of the TOHO. Concluding his arguments, learned State counsel has sought to seek prayer for dismissal of the appeals holding out that the Court below sensing the legal evidence and the social requirements in such a matter, has rightly held the appellants guilty and convicted them for various heinous offences and therefore, the appeals need to be dismissed.

Going through the arguments that have been advanced by the appellants side and the respondent State, and on perusal of the records of the case, the following questions permeate that need to be answered by this Court:-

- 1. The question as to the very identity of Raju and Bagicha Singh and age of alleged Bagicha Singh at the time of this occurrence, whether he was major or not, and if he was**

kidnapped and against his wishes and consent, under coercion and pressure he was forced to part with his organ; or was it a voluntary act of the donor together with the fact whether the complainant so alleged Bagicha Singh's kidney was in fact removed or not?

- 2. What role each of the accused/appellants/convicts had played in commission of the offences for which they have been charged and convicted, and to what effect they have contributed in commission of these offences?**
- 3. Whether the procedure adopted by the investigating agency in filing an FIR regarding the alleged offences rather than filing a complaint in terms of Section 22 of TOHO and its effect on the present case and the findings of the learned trial Court, tantamounts to mistrial or not; and if offences under the TOHO as well as IPC can be tried together?**
- 4. What is the effect of evidence collected in a prior case upon this case, especially in the light of the fact that at the time of investigations and collecting of evidence the present FIR has not come about?**

It is much in evidence that the occurrence has taken place on 06.06.2002. At that point of time, as is also conceded to at the bar, the provisions of Transplantation of Human Organs Act, 1994 ('TOHO' or 'the old Act') were in place and thus, applicable to the case in hand. It was in exercise of the powers conferred under Section 24 of the old Act of 1994, there has been supersession of the Transplantation of Human Organs Rules, 1995 which were brought about under the old Act of 1994; and thus, the Transplantation of Human Organs and Tissues Act, 1994 (THOTA) which was notified on 27.03.2014 could not apply in the present scenario. This Court is fortified in its view from the Hon'ble Apex Court view laid down in '**Ramesh Kumar Soni vs. State of Madhya Pradesh**' 2013(2) RCR (Criminal) 271, whereby their Lordships considering a catena of case law to enable them to answer if amendments in the Cr.P.C. are to be applied retrospectively, have laid down as a residual conclusion that a Statute which not only changes the procedure but also creates new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication; and therefore, as an offshoot of these discussions that amended provision is to be made applicable to the pending cases, is not correct principle and it was with a view that

prospective declaration of law, as is advised, which has been brought about to avoid reopening of settled issues, and thus, prevent multiplicity of litigation which would avoid uncertainty. Therefore, the old Act and the Rules which were there, need to be applied in the present case as well.

Under the old Act, Section 9 lays down restrictions on removal and transplantation of human organs and under which by way of sub-section (4) clause (b) authorizes the State Government to constitute by notification one or more authorization committee(s) consisting of such members as may be nominated by the State Government on such terms and conditions, as may be specified in the notification, for the purposes of this Section. In the present case, admittedly, there was a Chairman and four members of the authorization committee at Govt. Medical College, Amritsar whose Chairman was appellant Dr.O.P. Mahajan (then Principal, Govt. Medical College, Amritsar); and other members were appellant Dr. Jagdish Gargi, Head, Forensic Medicine; Dr.Prem Arora, who has also appeared as PW4, but has not signed the proceedings in the present case, which have been signed by one Dr.Santokh Singh being Head of the Medicine Department, (who has never been examined as a witness nor has been arraigned as an accused in this case). Under sub-

section (5) of Section 9 the procedure prescribed is that on an application jointly made in such form and in such manner as may be prescribed, by the donor and the recipient, the authorization committee shall, after holding an inquiry and satisfying itself that the applicants have complied with all the requirements of this Act and the Rules made thereunder, grant to the applicants approval for the removal and transplantation of the human organs. Sub-Section (6) emphatically makes it clear that after the inquiry and giving an opportunity to the applicants of being heard, if the authorization committee is satisfied that the applicants have not complied with the requirements of the Act and the Rules made thereunder, it shall for the reasons to be recorded in writing, reject the application for approval.

Since object of the Statute is crystal clear and it ensures to prevent commercial dealings in human organs and therefore, casts a duty upon the authorization committee to satisfy the actual purpose of the donor authorizing removal of his organ by reason of affection or attachment towards the recipient or for any other reason but the same is not established before this Court by any means or through any witness, whatsoever may be. It is ill-luck of the prosecution that during the investigations, no semblance of efforts have come about by the

investigating agency for gathering evidence which could have enabled the Courts to help the legislature in achieving its intent in curbing such a nefarious trade in transplantation of human organs.

As is there in the present case, the own stand of the prosecution, initially an objection was raised by the authorization committee and subsequently after removal of the objection and having been satisfied that the applicants, the donor and the recipient, have complied with the requirements, due sanction was accorded for this purpose. Furthermore, by virtue of Section 10 of this old Act provides that no hospital, unless registered under the Act, which admittedly New Ruby Hospital has been authorized, by the appropriate authority defined under Section 2 Clause (b) by exercise of its powers under Section 13 of the Act whereby the appropriate authority has been authorized to perform the functions for grant of registration under Section 15 of the Act carrying on such transplantation (which is not disputed that the New Ruby Hospital was duly authorized at the time of this transplantation of kidney). The removal of such an organ can only be accomplished with the prior approval of the authorization committee and therefore, it is not the case of the prosecution that the donor Raju (alleged to be Bagicha Singh) had not authorized donation of his kidney to the recipient Suresh

Kumar Sharma appellant. Thus, in the light of this background, the allegations of the prosecution and the stand of the defence in the evidence led at the trial, needs to be evaluated.

It is settled proposition of law and is even otherwise the golden principle of criminal jurisprudence that onus to prove its case, by virtue of Sections 101 and 105 of the Evidence Act, always rests upon the prosecution which is supposed to prove its case beyond shadow of reasonable doubt, whereas accused is required to prove his defence by mere preponderance of probabilities, and therefore, need not establish his case fully and more so, the prosecution cannot derive any benefit out of the weaknesses of the case of the defence. Reliance placed on '**Partap vs. State of U.P.**' 1976 CLR 74 (SC) and '**Dayabhai Chhaganbhai Thakker vs. State of Gujarat**' AIR 1964 SC 1563.

The semblance of evidence that has come about in the statement of the star witness of the prosecution Ajit Singh who was initially examined as PW1 prior to the summoning of newly added accused and had supported the prosecution version, and subsequently as PW2 after the summoning of newly added accused which is on 10.09.2005. Thus, his initial deposition as PW1 was partly recorded on 31.08.2005 and his further evidence was deferred, as is the note given

under his examination as the Special Public Prosecutor wants to move application under Section 319 Cr.P.C. and after summoning of additional accused this witness has been examined as PW2, firstly on 31.10.2007 and a close look at his examination in chief reflects that he states that in February 2002 his son Bagicha Singh left house and went to Darbar Sahib (Golden Temple) Amritsar and at that time he was approximately 17/18 years old, thus, corroborating the date of birth proved in the defence, and accepts that he was a student of 9th Class and having a vote. What is more important in his statement is that he states that he came to know from his son that Baljit Singh alias Vicky had offered to take him to Chandigarh for teaching driving and thereafter enumerates the story how said Vicky made contact of his son with Suresh Kumar Sharma at Chandigarh and that it was at the instance of his son he came to know that Vicky used to show that Suresh Kumar Sharma was his uncle and that Vicky was asking his son to donate his kidney to Suresh Kumar Sharma and did not offer anything to his son in lieu of this donation of kidney except to make him learn driving and thus, it is all based on hearsay and which was objected to in the examination in chief. In the light of law laid down in '**State of Maharashtra vs. Kamal Ahmed Moha Vakil Ansari & others**' 2013(2) RCR(Criminal) 1450 and the

provisions of law laid down under Section 60 of the Evidence Act, hearsay evidence cannot be taken as a legal piece of evidence. What is most detrimental to the interests of the State is that this witness volunteered that his son accepted Suresh Kumar Sharma as his father and donated his kidney to Suresh Kumar and thus, completely rules out violating any of the provisions of TOHO and Rules in operation at that time. He further states that his son told him that he was operated upon by Dr. O.P.Mahajan, Dr. Jagdish Gargi and other doctors of Jalandhar, when these two doctors were not the operating doctors as per the own story of the prosecution and this statement is based more on hearsay. The witness states that he does not remember the name of any other doctor of Jalandhar except Dr.Arjinder Singh and therefore, rules out roles assigned to appellant convict Dr.H.S. Bhutani. He also rules out the role of other accused by stating that his son Bagicha Singh was produced before the committee of doctors at Amritsar by Suresh Kumar and Baljit Singh alias Vicky, and that the committee approved his case after his production. Though, this witness accepts that he has earlier testified in Court but in the light of subsequent summoning of additional accused, the same fades into oblivion and cannot be legitimately taken to be a piece of evidence and fresh evidence collected at the trial of all the

accused together needs to be taken into account, for which this Court seeks support from the ratio laid down in '**Brindaban Das & others vs. State of West Bengal**' 2009(1) RCR(Criminal) 672 as well as '**Om Parkah & others vs. State of Haryana**' 2007(1) RCR(Criminal) 632.

He is further not sure about the doctors of New Ruby Hospital, and said they may be Dr. H.S. Bhutani, Dr. Arjinder Singh and Dr. S.P.S. Grover, and further stated that they might have recommended the transplantation of kidney and forwarded the same to the authorization committee. He is even not aware of whether the donor and recipient in this case appeared before the authorization committee or not as he was not there, and as to who were the members of the same, Whether Dr.O.P. Mahajan and Dr.Jagdish Gargi were there or not. Rather the most damaging statement made by this witness is that what he had stated in the earlier statement was at the instance of APP, rather a tutored witness who has been influenced by the learned State counsel, is sought to be projected by this witness of the prosecution. He accepts that his son never disclosed that the doctors had fabricated the entire record and was not aware of the case of transplantation of kidney of Bagicha Singh.

This witness was thereafter examined on 05.12.2007 and accepts in further cross examination that the school certificate of his son

does not carry the fact that Bagicha Singh was known as Raju as well. What is most astonishing is that he stated that Bagicha Singh lived with them for 2/4 years after operation and stayed separately from them during this period. Further glaring remiss that has come about, is that this witness admits his earlier statement in Court that Dr.S.P.S. Grover, Dr.Rajinder Singh (*sic*) and Dr.H.S. Bhutani in New Ruby Hospital removed the kidney of his son and transplanted the same to Inspector Suresh Kumar. The witness volunteered that he stated so at the instance of the police. To similar effect regarding confinement of Bagicha Singh by these doctors, he has volunteered that he had stated it so as he was tutored to do so. The correlation between Bagicha Singh and Raju is set to knots by this witness when he accepts the fact that it is nowhere recorded in the records of the Government that Bagicha Singh is also known as Raju, though has sought to accept the photograph on the affidavit to be of Bagicha Singh which is of a clean-shaven person. Thus, the overall effect of the testimony of this witness, who has been declared as hostile, and the overall compiling of his evidence does not bring any solace to the prosecution story and rather the very credibility of this witness, his veracity to be a reliable witness worth credence, to the mind of this Court, has lost its value as a piece of evidence for the prosecution.

Even the other witness of the prosecution Karamjit Singh PW5 (in fact PW6) did not come to the aid of the prosecution and was declared hostile and to the similar effect is his deposition when he denied his statement. Strange enough, being from the same village, this witness bases his testimony on what was told to him by Bagicha Singh thus, on that score, within the ambit of hearsay evidence. Learned State counsel, to the very specific query of the Court, could not point out even a single piece of evidence of acceptable nature that has come in the cross-examination of these two witnesses by the State.

The other semblance of evidence, upon which the prosecution has sought to ride with its case, is the statement of Bagicha Singh under Section 164 Cr.P.C. Ex.PW5/C and which has been sought to be proved by the prosecution through the testimony of PW14 Ms. Ranjit Kaur, Judicial Magistrate 1st Class, Amritsar who claims that she has recorded the statement of Bagicha Singh in case bearing FIR No.101/2002 under Section 420 etc. IPC proved as Ex.PW14/1, which she did on 08.10.2002 when the present case has come about on 13.10.2002, much thereafter and in the light of settled proposition of law that evidence in one case cannot be taken into account in another case. Reliance placed on **‘Mitthulal & another vs. State of M.P.’ 1975 AIR (SC) 149.** At that

time when statement under Section 164 Cr.P.C. was recorded by the Magistrate, neither there was any such allegation before the police pertaining to the present set of allegations much less any FIR and investigations. A clear look at Section 164 Cr.P.C. shows that such a confession/statement can be recorded by any Magistrate whether having jurisdiction or not in the case in the course of an investigation or after an inquiry has come about upon the allegations. It is well settled proposition of law, reliance of which can be placed on **‘Naresh Rai @ Naresh Singh & others vs. State of Bihar’ 1994 Cri LJ 978** and **‘Mitthulal & another vs. State of M.P.’ (ibid)**, where it was held by their Lordships that it is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at a decision, which is applicable even in civil cases as well.

Looking from another angle, while dispensing justice it is strange enough, a mere photostat copy of the statement has been exhibited as Ex.PW14/1 without having recourse to means of adducing secondary evidence. To the very specific query of the Court, learned State counsel was totally at loss of words as to the whereabouts of the original one. Furthermore, it is well settled law that mere exhibiting of a

document does not dispense with its proof and has to be proved fully in accordance with law, reliance of which can be placed on '**Rakesh Mohindra vs. Anita Beri & others**' 2015(6) (Raj) 101 as well as '**Sait Tarajee Khimchand & others vs. Yelamarti Satyam and others**' 1971 AIR SC 1865. More so, there has been non-compliance of the essentialities laid down under Section 164 Cr.P.C. by this learned Judicial Magistrate before recording the statement, certainly is a distressing feature for the prosecution. The very examination of this witness PW14 further undermines the prosecution case as the application moved by the police has not been proved on the record and the witness admits that there is no mention on the application who identified Bagicha Singh and there is no mention even in her certificate of this application upon recording the statement and there was admittedly no proof of his identity attached thereto, are matters which are much appalling for the prosecution. Thus, correlating Bagicha Singh and Raju is put to doubt.

Furthermore, the arguments that have been sought to be put forth on behalf of the State by Mr.Sullar, that on account of death of Bagicha Singh, this statement under Section 164 Cr.P.C. needs to be taken as dying declaration, certainly does not impress the Court. Firstly, on the ground that the original has not been brought before the Court in

this case nor proved through secondary evidence and even sad to note here that even death of Bagicha Singh is nowhere established on the records of this case. Section 32 of the Evidence Act by way of sub-section (1) ensures that statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question, only then such statements are relevant and it is not so in the present case before this Court. Neither there is any corroboration coming in respect of it or under what circumstances it was made as the same by the mere wording of this provision ensures that only the circumstances which may be relevant to prove a case of homicide or suicide, are relevant in terms of Section 32(1) of the Evidence Act and by all means, needs to be circumstances which have proximate relation to the actual occurrence, reliance for which can be placed upon '**Moti Singh and another vs. State of U.P.**' 1964 AIR (SC) 900. More so, as per the arguments of the learned State counsel, Bagicha Singh is alleged to have died on 13.02.2004 whereas he made the statement under Section 164 Cr.P.C. on 08.10.2002 and there is a gap of almost 15/16 months and therefore, by that means cannot be correlated to the circumstances leading to the alleged death of Bagicha Singh. Even applicability of

Section 33 of the Evidence Act cannot be made in such a situation. Thus, even this argument so put forth by the learned State counsel does not carry the day for them.

In the light of what has been observed herein, the very legal value of this statement of Bagicha Singh evaporates in the thin air on account of shoddy investigation as apparently the investigating agency appears to be in a state of confusion and more busy in boasting of its achievements to the media rather than putting themselves to the real task before it.

Though not argued, as it comes to the mind of this Court, right from the inception of the prosecution story, the victim is represented to be carrying the name of Raju when the prosecution claims that he was in fact Bagicha Singh. When the Court put a query to the counsel representing the State, he could not bring about any satisfactory explanation or evidence which could be legitimately taken as a piece of reliable evidence that the person so claimed to be Raju was in fact Bagicha Singh. Even going a little ahead of it, in its endeavour the investigating agency has forgotten totally to get Bagicha Singh medically examined to establish the fact that he was the person whose kidney has been removed in this case. There is nothing on record to substantiate the

fact that the person so alleged to be Bagicha Singh son of Ajit Singh had his kidney removed. The entire documents that have been brought on the record by way of Ex.PX and Ex.PY are clear pointers towards the fact that the same which pertains to the surgery in New Ruby Hospital, Jalandhar is in respect of one Raju. Thus, the lack of identification of the real donor of this kidney leaves many a questions unanswered.

The entire case of the prosecution rests solely on circumstantial evidence. Though in the process of evidence, Courts are supposed to ignore certain omissions and discrepancies and which are natural to criminal cases during the course of investigations, which rests solely on the caliber of the investigating agency and therefore, not much emphasis needs to be given to such shortcomings in the prosecution story. Reliance placed on '**Yogesh Singh vs. Mahabeer Singh & others**' **2016(4) RCR (Criminal) 753**. However, having regard to the fact that the evidence against the accused is more of circumstantial nature, since the principal witnesses of the prosecution have not come forward to support the case and in the light of well enshrined principle of law seeking support from '**Geejaganda Somaiah vs. State of Karnataka**' **2007(2) RCR (Criminal) 255**, taking note of the ratios of law laid down in various pronouncements that where a case rests squarely on

circumstantial evidence, the inference of guilt can be justified only when all the incriminating fact and circumstances are found to be incompatible with the innocence of the accused. The chain of events of these circumstances needs to be unbroken clearly pointing towards the guilt of the accused and therefore, needs to be consistent only with the hypothesis of the guilt of the accused persons and should not be inconsistent with his innocence.

Applying this proposition of law to the case in hand, a close look at the very FIR Ex.PW20/A, which has been got recorded on the complaint/statement of said Bagicha Singh shows that in the month of February 2002 while he was in Golden Temple Amritsar, he came across Vicky and who had promised to teach him driving of vehicle and as they became friends, said Vicky is alleged to have taken him to Chandigarh and introduced him to appellant Suresh Kumar Sharma as his uncle and thereafter asked him that since his uncle was suffering from kidney ailment he needs a new kidney and even threatened the alleged donor and his family. The claim of the prosecution that aforesaid Bagicha Singh at the time of this occurrence in June 2002 was a minor, below 18 years of age and therefore, the onus lay heavily upon the prosecution to establish it so. What has come in the evidence in the cross examination of the

father Ajit Singh PW2 where he accepts that when Bagicha Singh left the house he was more than 18 years old and thus, by all means a major at the time of this occurrence. He also accepts that Bagicha Singh was born in village Madho Sidhwan and his date of birth is 16.01.1984, and therefore, 18 years at the time of this occurrence and which fact is corroborated from the school record Ex.DX/2 and accepts that he was having the vote. Another witness of the prosecution, PW3 Daljit Kaur, retired Headmistress of Govt. High School claims that as per the school record of Bagicha Singh, whose particulars have not been detailed by her in her examination in-chief, his date of birth is 30.12.1984 and proved it by means of Ex.PW3/A and shows that at the time of this occurrence he was around 18 years old, and thus, a major. She does not dispute that parents usually give dates as per their own wishes and choices. Though his age is shown to be 16 years in the ration card Ex.P3 proved by Ajit Singh PW2. The cross examination of PW3 reflects that she accepts that at the time of admission, they did not see the record of birth of Bagicha Singh and the fact that age shown in the school is on the basis of representation made by the parents at the time of admission. There are glaring discrepancies whereby this witness admits that there is no date on the endorsement Ex.PW3/D and the column Ex.PW3/C has been left

blank regarding admission of this Bagicha Singh, thus, not a worthwhile evidence to prove the age to the satisfaction of the Court. Therefore, the question of the alleged Bagicha Singh to be a minor at the time of this occurrence could not be satisfactorily proved by the prosecution by any means and rather all evidence in this direction is unreliable and of doubtful origin.

The most glaring defect that has come about at the trial is evident from page 52 of the impugned judgment whereby in paragraph No.69 the trial Court has placed reliance on Rule 4 sub-rule (9) of the TOHO Rules 1995. A close look at these rules shows that there was no Rule 4 sub-rule (9) of the TOHO Rules 1995 which are applicable to the case in hand and therefore, puts the impugned judgment in a bad light.

The other procedural defect which is quite material and has come up at the trial and certainly to the mind of this Court, is to the prejudice of the accused, who have been subsequently summoned by the aid of Section 319 Cr.P.C. and has never been argued from any of the sides, is the statement of PW1 Ajit Singh. After recording his examination in-chief while he was being cross examined on 31.08.2005, further cross examination was deferred as learned State counsel had moved an application under Section 319 Cr.P.C. and upon summoning of

additional accused, without freshly holding retrial, was allowed to be cross examined on behalf of the accused Dr.S.P.S. Grover and Dr.Arjinder Singh, as is evident from evidence recorded on 08.05.2008. When it is settled position of law, reference of which can be taken note of the ratio laid down in '**Brindaban Das & others vs. State of West Bengal**' (*supra*) that in such an eventuality retrial is to be undertaken which is totally amiss in the present case. Such a serious remiss certainly goes to the roots of the prosecution case, resulting in mistrial and this statement certainly does not carry any legal weight.

The other procedural aspect into this episode is sought to be projected through Dr. Prem Arora, Ex. Professor and Head, Medicines Department, Govt. Medical College, Amritsar who has been examined as PW4 and happens to be a member of this authorization committee and accepts that from 01.01.2002 to 31.08.2002 he remained Head of the Medicine Department and further accepts the fact that Professor and Head, Medicines Department is one of the constituents of the authorization committee and accepts that the said committee used to clear cases of kidney transplantation twice a month, and has enumerated the procedure whereby recipient and the donor used to be present before the authorization committee in normal circumstances and at the time of

approval, affidavit of the recipient and donor, investigation particulars of both of them, certificate of the operating surgeon and recommendation of the operating surgeon with recommendation of the hospital doing the renal transplantation were required, thus in itself, suggestive of the fact that the New Ruby Hospital, Jalandhar, of which Dr.Arjinder Singh, transplanting surgeon was on visitation along with his assisting transplanting surgeon Dr.H.S. Bhutani and Dr.S.P.S. Grover who happens to be owner-cum-Director of the said hospital, which happens to be a private limited company; had no role to play in identification of the recipient or the donor and have only to medically investigate the status of the recipient and the donor along with certificate of operating surgeon and recommendation of the operating surgeon with recommendation of the hospital doing the renal transplantation and it was the authorization committee which was supposed to verify these documents; are matters which bear out that not much significance can be attached to the role of these three appellants namely Dr.Arjinder Singh, Dr.H.S. Bhutani and Dr.S.P.S. Grover, who are not supposed to play any worthwhile role in grant of sanction for transplantation except their reports of the medical necessity.

This material witness Dr. Prem Arora PW4 is though meandering on another case pertaining to donor Parkash son of Girdhari Lal, which has no relevance with the present set of accused appellants. The overall effect of his testimony is to nail Dr. O.P. Mahajan and Dr.Jagdish Gargi by identifying their signatures but accepts that Dr.Santokh Singh had also signed on the approval Ex.PW4/F. Why he was not made a party either as an accused or as an approver/prosecution witness, shows the lopsided investigation and the very intent of the same. The most important aspect of this procedure by the authorization committee comes from his admission as to the procedure being adopted by the authorization committee in according sanction whereby both of them produced their documents regarding transplantation of kidney and the authorization committee after satisfying itself issued consent letter/approval and thereafter made the parties get their transplantation from any referral hospital authorized by the Punjab Government. It is not the case of the prosecution by any of the witnesses why New Ruby Hospital was chosen or it was for a motivated cause and thus, the discretion vests with the individual to choose a particular hospital obviously on the basis of faith and competence of the surgery to be performed by them. This witness accepts that where the committee is not

satisfied with the documents produced by the donor and the recipient, it can reject the transplantation and did not point out even a single remiss in issuance of approval Ex.PW4/F in the present case by the authorization committee, are matters of much significance.

The procedure in the hospital, i.e. New Ruby Hospital, Jalandhar so adopted in such matters has been enumerated by DW1 Anjana from this hospital, who has detailed that Dr.Arjinder Singh and Dr.H.S. Bhutani were only to examine the patient and the donor regarding transplantation of kidney and after conducting the tests and ensuring that they were compatible, were sent for approval for kidney transplantation to the authorization committee, and that in this case approval Ex.PW4/F has been given in respect of Raju, the donor, and Suresh Kumar Sharma, the recipient, and has proved the advice rendered by Dr.Arjinder Singh as Ex.DW1/B and has also proved preparation of the video in this regard which was prepared by DW3 Ashok Kumar Photographer and is proved as Ex.D1 after playing the same in Court, as also the affidavits of the donor and the recipient as Ex.P4 and Ex.DW1/C, respectively. She accepts that she used to take interview in transplantation case after receipt of approval letter from the authorization committee and before transplantation of kidney, are matters of much

significance, and thus, is in itself suggestive that no malafide can be attributed to these appellants in this process of transplantation of kidney at their hospital.

More so, since admittedly during the course of submissions, as has been accepted by the two sides, New Ruby Hospital being a private limited company, if it had to be prosecuted, it ought to be prosecuted through its Managing Director and all the Directors ought to be accused in terms of Section 21 of the TOHO and which is totally missing in the present case singling out Dr.O.P. Mahajan for prosecution, certainly puts the Court on its guard as to malice behind this prosecution.

The deposition of DW2 SI Mangat Ram shows that at the relevant time, appellant Suresh Kumar Sharma was posted as Inspector in Telecom Haryana Police and no weapon had been issued to him at any point of time and therefore, the allegations that have cropped up in the investigations on the plea of Bagicha Singh that he was shown pistol by this accused, does not bear much fruit, especially when he was only a patient in an unstable state of health.

The most important evidence that has come in the defence, as has been pointed out on behalf of the appellant side, is the deposition of DW4 Rajinder Singh, SP-D (Rural), Jalandhar who while posted in the

special investigating team had conducted inquiry into the present matter and has reported on video filming prepared at that time in New Ruby Hospital whereby he held the doctors of the hospital to be innocent as there was a voluntary act between the donor and the recipient, and has proved the fact that he had recommended that no offence was made out.

The other defence witness is DW5 Karam Singh, Record Keeper of Prime Diagnostic Centre and Heart Institute, who has proved the fact that ultrasound was done on one Raju on 28.05.2002 Mark-A at their centre in Chandigarh and has proved signatures of the doctor who gave the report and thereafter DW6 Amit Kumar, Record Keeper, Medicos Centre, Chandigarh though accepts that the record pertaining to the test conducted on one Raju and which was conducted by Dr.Poonamjit Kaur of their centre which are dated 27.05.2002; followed by the testimony of Director of Medicos Centre Dr. Poonamjit DW13, who has proved the signatures on the test report as Ex.DW13/A to Ex.DW13/E. DW12 Dr.Uttampreet Singh (Managing Director of Prime Diagnostic Centre Chandigarh) proved the ultrasound test report of Raju as well as identified the signatures of Raju and Suresh Kumar on documents Ex.DW12/C and Ex.DW12/D. Deposition of DW14 Dr. Vijay Singh Rawat, then Radiologist in Fortis Heart Institute, Mohali is

regarding conduct of CT angiography of one Raju aged 21 years on 15.06.2002, who proved the same as Ex.DW14/A.

DW7 Sarbjit Kumar, Junior Assistant from the office of Director, Research and Medical Education (DRME) has proved the authorization of New Ruby Hospital by way of certificate Ex.DW1/A and Ex.DW1/B; followed by the testimony of DW8 Bhupinder Singh, Accounts Clerk from the office of BDPO, who has proved voters list of Bagicha Singh son of Ajit Singh and proved the same as Ex.DW8/A and has detailed that in the list relating to year 2002 Bagicha Singh son of Ajit Singh is shown to be aged 19 years. DW15 Harbinder Singh, Statistical Assistant from the office of Civil Surgeon, Sirsa has proved that as per record of office, date of birth of Bagicha Singh son of Ajit Singh of Madho Singhana was 16.01.1984 and therefore, major at the time of occurrence, and has proved the same as Ex.DX/1. Since in the absence of any acceptable evidence worth credence, as not much reliance can be placed on school certificate which, as is the common knowledge, are normally not of much credibility and in view of the law laid down in **‘Ram Murti vs. State of Haryana’ 1970 AIR SC 1029**, the certificate of birth issued by the office of Civil Surgeon which is the designated Registrar of births and deaths, needs to be accepted and as per this

certificate proved by this witness DW15 by way of Ex.DX/1 date of birth of Bagicha Singh is shown to be 16.01.1984 and major by all means at the time of the occurrence. The remiss that is sought to be made by the learned trial Court in the impugned findings that it was produced at the far end of the trial, certainly does not carry much weight when it has been proved and can be done so in the defence evidence and which is the last element of the trial before arguments.

DW9 HC Nirmal Chand has only proved the fact that the records of the department were destroyed as per the rules and proved certificate to this effect issued by the SP as Ex.DW9/A. Karandeep Singh Bhullar DW10 then Tehsildar Jalandhar-II has testified having attested the affidavits of Raju and Suresh Kumar Sharma and proved them as Ex.P4 and Ex.DW10/A. The testimony of DW11 Rajesh Kumar Clerk does not carry much significance as he has only proved the destruction of records by certificate Ex.DW11/A.

It is well enshrined and settled law that evidence of defence witnesses is to be treated on equal footing as that of the prosecution witnesses. Reliance placed on '**Sanjay vs. State of Haryana**' 2005 (2) **RCR(Criminal)** 561. Though the golden principle of criminal jurisprudence places heavy burden on the prosecution on the principle of

beyond shadow of reasonable doubt, whereas the principle governing the defence evidence is **by mere preponderance of probabilities**, for which reliance is placed by this Court on **‘Sharad Biridhi Chand Sarda vs. State of Maharashtra’ 1984 (4) SCC 116**. Anjana DW1 though is the own employee of New Ruby Hospital Pvt. Ltd. and has proved on the record that from 26.10.2001 to 25.10.2004 by virtue of letter Ex.DW1/A the hospital was certified and authorized to perform kidney transplantation and subsequent letter dated 29.03.2010 extending this authorization by the Directorate of Research and Medical Education, Punjab, Chandigarh copy of which letter has been proved as Ex.DW1/B and Ex.DW1/C. Thus, by no means it can be taken that this hospital was not legally authorized and competent to perform surgeries of this nature and in the present case they had also received approval letter from the authorization committee. Furthermore, this witness has brought about that as per the procedure being adopted by their hospital, this witness used to interview the donor and recipient and video cassette used to be prepared regarding this and apparently was with a view to keep the records of the very bona fide of such a process for which the video cassette has been proved on the record by DW3 Ashok Kumar Photographer by way of Ex.D1. This cassette which was prepared on

17.06.2002 prior to this surgery and which was played before the trial Court and nothing tangible has come about to suggest that all was not well with this process being undertaken by the hospital and rather the learned State counsel accepts that this evidence certainly suggests the voluntariness and the consent being there between the donor and the recipient. Rather this witness has emphasized the fact, though not by any means under obligation, the hospital has ensured from the donor and the recipient if it was by own will and without pressure and threat and without any monetary consideration and rather the donor had stated that he was donating his kidney out of love and affection and even the consequences of this donation and surgical operation were cleared to the two sides though it was within the ambit of duties assigned to the authorization committee.

To the specific query of the Court, learned State counsel could not rebut that what could be the most suitable way of determining the identity of the donor when it is the documents produced before the hospital and the fact as has come in the testimony of DW1 Anjana that Dr.Arjinder Singh and Dr.H.S. Bhutani both appellants had examined the recipient and the donor before transplantation of kidney, and rather what is reflected from all this, though not established to the hilt by any legal

means, if at the most accepting the version of the State, there could be an element of impersonation on the part of the donor and the recipient, but learned State counsel could not bring forth any such evidence to satisfy the conscience of the Court, as the very question of identity of Bagicha Singh to be Raju has not been brought about by any evidence, and rather a suggestion has been put to her that Raju in fact was Bagicha Singh. She has proved from the files Ex.PX and Ex.PY as to the persons who were the donor and recipient in this matter before the hospital and where there is nothing to show the fact that Raju was in fact Bagicha Singh. More so, one cannot discern the fact that it is the own story of the prosecution that Vicky has got the hair of Bagicha Singh cut and therefore by this change of physical appearance, certainly makes the things all the more difficult to discern. This witness has already bailed out appellant Dr.S.P.S. Grover by stating that he was not a part of the surgery and was not a member of the team of surgery and therefore, how he is being connected with the surgical performance of the transplantation is anybody's guess, and if he is being sued in the capacity of being the owner of the hospital, then this case ought to be against all the owners/directors of this private limited company in terms of Section 22 of TOHO.

It would be worthwhile to refer here that the own police officer DW4 SP Rajinder Singh, then SP-D (Rural), Jalandhar was entrusted with the inquiry of this case and has categorically stated in his deposition that during inquiry, he had found Dr.Arjinder Singh, Dr.H.S. Bhutani and Dr.S.P.S. Grover to be innocent though the subsequent witnesses of the police department including DW9 HC Nirmal Chand and DW11 Rajesh Kumar, Clerk had testified that the official records of the police department was destroyed as per rules after certain period of time and thus, could not see the light of the day at the Court, and have brought on record letter Ex.DW11/A to this effect. Similar is the stand of DW5 Karam Singh, Record Keeper of Prime Diagnostic Centre and Heart Institute and DW6 Amit Kumar, Record Keeper, Medicos Centre, Chandigarh.

Thereafter, DW12 Dr. Uttampreet Singh, Managing Director, Prime Diagnostic Centre, Chandigarh; DW13 Dr. Poonamjit Director of Medicos Centre, Chandigarh and DW14 Dr. Vijay Singh Rawat, then Radiologist in Fortis Heart Institute, Mohali have themselves proved the documents Ex.DW12/A to Ex.DW12/D; Ex.DW13/A to Ex.DW13/E and Ex.DW14/A and established the fact that all these tests were conducted on the donor and the recipient on medical advice from their respective

centres on different dates and occasions, are rather illustrative of the fact that the donor and the recipient had been freely moving about carrying on various tests at different places at different points of time and thus, the story of alleged Bagicha Singh to be kidnapped, coerced or pressurized, certainly is something which is hard to digest in the light of this very evidence, which has remained unrebutted even in the arguments of the learned State counsel. Therefore, applicability of offence under Sections 367, 368 and 506 IPC certainly does not come about in the case of the prosecution. How the learned trial Court has drawn this conclusion, is more of preposterous presumption than of actual evidence before it.

The arguments of the two sides over the mode of investigations and violation of the provisions of Section 22 of the TOHO whereby a complaint ought to have been filed by the appropriate authority needs to be dealt with comprehensively. It is not in any manner put to dispute that at the very coming to light of these allegations in the procedure being adopted in transplantation of kidneys to various persons which has been classified as kidney scam, the very first FIR was got registered by way of FIR No.101 dated 21.09.2002 and in which, as is there and sufficiently discussed, statement of Bagicha Singh under Section 164 Cr.P.C. Ex.PW14/1 was got recorded by the learned Judicial

Magistrate on 08.10.2002. It is worthwhile to refer here that at that juncture, the present FIR had not come about though the allegations were there at the time of recording of the statement under Section 164 Cr.P.C. which were there in the first FIR. Why instead of carrying on the investigations in the first FIR along with the allegations which constitute the present FIR as well, investigations were not taken to a logical conclusion and rather the authorities have digressed to complicate the things all the more by taking evidence simultaneously in one and the same investigations and thus, conducting the things and thereafter, splitting it into two different FIRs?

Since the allegations in both the cases are of similar nature, a series of transactions during the course of same very events, there ought to be one FIR rather than another FIR coming out and digressing for what is there at the very onset of the investigations leading to the registration and investigations in the first case. This Court seeks support from **Amitbhai Anilchandra Shah's case (ibid)** relied by Mr.Preetinder Singh Ahluwalia for the defence; **'Hardeep Singh's case and 'Suo Motu vs. State of Gujarat' (ibid)** for which support has been taken on behalf of his client by Mr.A.P.S. Deol; **'N. Ratnakumari vs. State of Odisha' (ibid); 'B. Muthuraman @ Balesubavramanian**

Muthuraman vs. State of Jharkhand’ (ibid); ‘Suresh Kumar @ Bobby vs. State of Punjab’ (ibid); ‘M/s Pepsico India Holdings (Pvt.) Limited vs. State of U.P.’ (Writ Petition No.8254 (MB) of 2010, decided on 08.09.2010 by High Court of Judicature at Allahabad, Lucknow Bench); ‘Dr.Arvind Pal Singh Gambhir and another vs. State of Punjab and others’ (ibid); ‘Dr. Ashok Kashyap vs. State of Haryana’ (ibid); ‘Dr. Tejinder Pal Singh Multani vs. State of Punjab and another’ (ibid); and ‘Sharat Babu Digumarti vs. Government (NCT of Delhi)’ (ibid) relied by Mr.R.S. Rai; and ‘Rajinder Kumar Chibbar vs. Assem Baksh’ (ibid); ‘State of Bihar vs. Murad Ali Khan and others’ (ibid) and ‘Central Bureau of Investigation vs. State of Rajasthan & others’ (ibid) by Mr.K.S. Nalwa. They have also sought to challenge the permissibility of FIR in the light of mandate of Section 22 of the TOHO.

It is well enshrined proposition of law that if at the most new facts have come about, it was well within the powers of the investigating agency to have resorted to the provisions of Section 173(8) Cr.P.C. Furthermore, as has come about in the submissions of the defence side, whereby they have sought to create a doubt over the very motive for SP(City) to carry on the investigations under his supervision whereby

reliance is sought to be placed on Ex.PW12/A, which is a letter purported to have been made on behalf of the Government of Punjab whereby investigations of cases registered regarding transplantation of human organs at Amritsar were ordered to be investigated under the supervision of Additional Director General of Police (Law and Order), Punjab, Sh.A.A. Siddiqui, almost two months after registration of the present FIR. By another quirk of fate, though not proved on the record but is placed at page No.439 of the trial Court record, is a notification issued on behalf of the Government of Punjab, Department of Medical Education and Research (Health-III Branch) which is dated 06.06.2003 under the signatures of Principal Secretary to Govt. of Punjab, Department of Medical Education and Research, whereby they have sought to undo the violation that has come about for non compliance of the mandatory provisions of Section 22 of the TOHO. It needs to be reiterated here that the challan in this case, as per the records and arguments, has been initially presented and the Court has taken cognizance of the same on 16.03.2003. SP (City-I) who was supervising the investigations, as is apparent from his letter Ex.PW10/C dated 18.11.2002 addressed to the Director, Research and Medical Education, Punjab Chandigarh, had sent a letter, which the learned State counsel has sought to project as

authorization under Section 22 of the TOHO and the last line of the same deserves to be reproduced to lay emphasis, which reads as follows:

“... .. The same may not kindly be treated as a formal official letter. The undersigned is supervising the investigation of the cases and this letter is being written in course of investigation.”

The same reflects that it was not to be treated as formal official letter. How and for what reasons the Additional Director General of Police (Law and Order) Punjab was kept out of the loop in the supervision of the investigations which as per the own admission of the SP(City-I) was conducted by him, leaves many a question unanswered, especially in the light of serious remises that have been pointed out in the discussions, rather are clear pointers towards how such a serious matter, which has repercussions on the entire society, was left to fend for itself. Though on the strength of letter dated 06.06.2003, the State has sought to appoint the appropriate authority under Section 22 of the TOHO by giving powers to the police officers of the rank of **“Inspector”** and **“Deputy Superintendent of Police”**, but sad and strange enough, the initial investigations which initiated on 13.10.2002 were by SI Gurmej Singh who has been examined as PW5 and thereafter by PW7 SI Charanjit Singh, PW8 Vishva Mittar and PW9 Arun Kumar. None of

whom are proved to be of the requisite ranks so enumerated in the above said notification and thus, another serious violation of Section 22 of the TOHO. To the mind of this Court, rather it was an attempt to salvage out the serious remiss of not following the provisions of Section 22 of the TOHO. The authorities have chosen the way to undo the bar by such a belated resortation.

The manner in which the documents have been exhibited, the trial conducted, even illegible documents were exhibited which did not form part of the evidence pertaining to the present case, especially Ex.PW4/A, Ex.PW4/C, Ex.PW4/E and remaining in oblivion by the Court that most of the important witnesses were resiling, Court could have put questions to them and proceeded against them for these acts of theirs turning hostile, are matters which pains this Court of the casual approach even at the trial.

From the ratios cited above, it all permeates that filing of second FIR regarding series of same transactions regarding similar offences, certainly is violative of Articles 14, 20 and 21 of the Constitution of India and that TOHO being a special Act the provisions of it shall prevail over the general law i.e. Code of Criminal Procedure; and therefore, the Court cannot take cognizance of an offence based on

an FIR and by virtue of Section 22 of the TOHO, a private complaint ought to have been filed which ought to have been treated and processed in terms of Sections 200 and 204 of the Cr.P.C. To further add to the woes of the prosecution, since none of the official witnesses who investigated the case and the failure of the Court to treat it as a complaint case being not by appropriate authority, the cognizance certainly to the mind of this Court was wholly barred and thus, the trial in itself stands vitiated resulting in a mistrial. As is conceded by the two sides, the interpretation of TOHO and its provisions have been well laid down by their Lordships of the Hon'ble Supreme Court in case of **Jeewan Kumar Raut (supra)**, which reads as follows:

“12. TOHO is a special Act. It deals with the subjects mentioned therein, viz., offences relating to removal of human organs, etc. Having regard to the importance of the subject only, enactment of the said regulatory statute was imperative. TOHO provides for appointment of an appropriate authority to deal with the matters specified in Sub-section (3) of Section 13 thereof. By reason of the aforementioned provision, an appropriate authority has specifically been authorized inter alia to investigate any complaint of the breach of any of the provisions of TOHO or any of the rules made thereunder and take appropriate action.

13. The Appropriate Authority, subject to exceptions provided for in TOHO, thus, is only authorized

to investigate cases of breach of any of the provisions thereof, whether penal or otherwise. Ordinarily, any person can set the criminal law in motion. The Parliament and the State Legislatures, however, keeping in view the sensitivity and/or importance of the subject, have carved out specific areas where violations of any of the provisions of a special statute like TOHO can be dealt with only by the authorities specified therein.

<i>XXXX</i>	<i>XXXX</i>	<i>XXXX</i>
<i>XXXX</i>	<i>XXXX</i>	<i>XXXX</i>

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.”

This Court in a Division Bench view in **‘Hardeep Singh and another vs. State of Haryana and another’ (ibid)** has laid down the proposition that in a situation of commission of cognizable offences under the special Act, TOHO in the present case or the old Act, report under Section 173 Cr.P.C. along with the complaint of an appropriate authority can be filed in the Court, however cognizance would be taken only qua the complaint that has been filed in accordance with the special Act. Similar view was expressed in the case of **‘Sharat Babu Digumarti vs. Govt. of NCT Delhi’ 2017(1) RCR(Criminal) 196.**

Hon’ble the Apex Court in the case of **‘Institute of Chartered Accountants of India vs. Vimal Kumar Surana and another’ (2001) 1 SCC 534**, has laid down the proposition that if the trial Court comes to a conclusion of the allegations which constitute one or more offences, then it shall proceed against the party in accordance with law under the special Act as well as general law but cognizance of offence under the special Act, if so provided to be by a complaint, can only be taken if a complaint is made under the relevant provisions.

Reverting back to the instant case, though the allegations in the first FIR and offences are similar in nature, this Court is of the view and in line with the arguments put forth by the learned State counsel

which is based on ‘**P.Sreekumar vs. State of Kerala**’; ‘**Nirmal Singh Kahlon vs. State of Punjab**’; ‘**Upkar Singh vs. Ved Parkash**’ and ‘**Babubhai vs. State of Gujarat**’ (ibid) that the cognizance so taken by the trial Court in respect of the offences under various Sections of the Indian Penal Code certainly was permissible and FIR in respect of the same certainly lies, though there ought to be a complaint for enabling it to take cognizance under the provisions of TOHO. Thus, it leads to the conclusion that the efforts of the State to fill in the lacuna in this case by resorting to authorizing certain police officers of the rank of “**Inspector**”/“**Deputy Superintendent of Police**” to be appropriate authority is certainly not strict adherence to the provisions of Section 22 of the TOHO, does not help their case in any manner and rather casts a serious dent in their case, as at that very time of submission of challan and investigation, there was no such authorization to the investigating officers to investigate the offences under the TOHO Act and the Rules, and even at that point of time the authorization, which has come about subsequently, had not seen the light of the day and therefore, they had no such locus-standi to investigate the matter under TOHO though for the offences under IPC there was no bar. Since provisions of Section 22 of

TOHO are mandatory and thus, non-fulfillment of the same renders the entire proceedings invalid from its very inception.

The other serious remiss is the material inability of the investigating agency to collect necessary evidence against the accused for the commission of offences under the IPC. Though needle of suspicion certainly is there but the same does not satisfy the requirements of the criminal jurisprudence which cast a heavy burden on account of the case being based on circumstantial evidence beyond the shadow of reasonable doubt. There is no element of any criminal conspiracy which could be gathered from the evidence detailed and discussed above. No doubt, the donor and the recipient along with Vicky had sought to attain a sinister design but on account of lack of evidence against the recipient, the collusion of various doctors/appellants in its attainment before this Court, certainly does not attract commission of offence of criminal conspiracy.

The other offences for which appellants have been convicted pertain to the commission of offence under Sections 367/368 IPC which pertain to kidnapping/abducting in order to subject the person to grievous hurt or slavery and also for wrongfully concealing or keeping in confinement, kidnapped or abducted person. But as has been discussed above, to prevent its repetition there is no reliable evidence to bring about

the fact that the donor was ever kidnapped and rather the evidence suggests that he has been roaming about freely from the date he accosted Vicky at Golden Temple Amritsar till he was operated upon and therefore, attraction of these offences certainly does not bear out. As is there the element of criminal intimidation to the donor by any of the accused could not see light of the day as there is no evidence on record to that effect.

The other offence under the IPC for which some of the accused have been charged pertains to the offence of cheating by personation under Section 419 IPC, and cheating and dishonestly inducing delivering of property punishable under Section 420 IPC. No complaint has come about from the authorities before whom personation is alleged to have been undertaken nor there is any such evidence that is forthcoming in this case. In the light of the evidence detailed and discussed above, the prosecution has not been able to establish that the person namely Raju was one and the same person as Bagicha Singh and he has been made to impersonate by the accused. The authorization committee and the hospital authorities, apparently as per the evidence, were admittedly not known to the donor and the recipient and could not by any means adjudge their credentials and the only semblance of

evidence which they could secure was the duly sworn attested affidavits by an Executive Magistrate. On their part, the authorities have ensured fulfillment of the then prevalent provisions of law and the learned State counsel could not point out any such remiss on their part in not following the procedure laid down under the then existing provisions of TOHO Act and Rules. More so, on one hand the prosecution claims and alleges that the donor was kidnapped/abducted and then how the element of cheating to part with the kidney came about, rather are self-contradictory stands further muddling the story of the prosecution. The conviction under Section 467, 468 and 471 IPC which deals with forgery of valuable security, forgery for the purpose of cheating and using as genuine a forged document, but none of the victims of such allegations has come forth to testify it so, nor any witness has been examined by the prosecution to establish the commission of offence of forgery and this lack of evidence certainly is another disturbing trend in the manner of investigations.

Furthermore, the other offences for which the accused appellants have been convicted is under Sections 18 and 19 of the TOHO Act. Section 18 of TOHO pertains to punishment for removal of human organ without authority. It is not the case that the hospital i.e. New Ruby

Hospital Jalandhar was not appointed in such capacity by the appropriate authority and had acted on the requests of donor and the recipient and it is therefore, highly debatable how the hospital and its medical staff and the doctors associated with it could be hauled up for violation of this very provision. Section 19 of TOHO provides punishment for commercial dealings in human organs. Sad enough, to the very specific query of this Court during the course of arguments, learned State counsel could not point out even an iota of evidence that there has been exchange of money and it was on payment, a human organ was given by the donor to the recipient, or any of the acts of the negotiation or arrangement attributed to the accused whereby there was an invitation/offer for such a sinister design and therefore, the conviction by the Court below even under these provisions of TOHO is certainly not supported by any evidence on the record.

The Court, in its endeavour to do justice and in ensuring that the ends of justice are met, is to ensure that it does not fall prey to mere seriousness of the allegations and heinousness of the offence but has to also adjudge the credibility, reliability and veracity of the substantive evidence before it to make out if a clear-cut proven case of commission

of an offence is made out or not and should not go merely by the public concerns for it.

From the entire evidence that has been detailed and discussed in the foregoing paragraphs, there has been total indifference shown in the investigations of this case and there is no semblance of evidence having ever been collected to satisfactorily bring on the records, orally or documentarily, that Raju whose name is depicted in the records of the New Ruby Hospital of having undergone kidney transplant, was actually Bagicha Singh and both these names are of one and the same person. Furthermore, the onus which lay heavily upon the prosecution to prove that the complainant at the time of the alleged occurrence, was a minor, has also not been discharged and the date of birth certificate proved as Ex.DX/1 in view of the law laid down in '**Ram Murti vs. State of Haryana**' (**ibid**) needs to be accepted, by which at the time of occurrence, so called Bagicha Singh, who Ajit Singh claims was his son, was in fact a major and therefore, it cannot be accepted, as is sought to be argued by the learned State counsel, that a minor was taken away from the lawful guardianship/kidnapped against his wishes and consent, under coercion and pressure, and was forced to part with his organ and thus, being a major was of adequate understanding and throughout this period

having wandered from place to place getting tests done, is itself suggestive of the element of voluntariness in this entire allegations. Therefore, in the light of the same, in the absence of any cogent and reliable evidence of credible nature, none of the appellants can be correlated for committing any such offence for which they have been charged and convicted. It is very well discussed that by virtue of Section 22 of the TOHO, only a complaint lies and not an FIR and therefore, the FIR cannot replace a criminal complaint for which process under Sections 200 and 204 of the Cr.P.C. has been prescribed and which needs to be mandatorily followed, which is amiss in the present offences under TOHO.

Lastly, as has been held in the foregoing paragraphs, the statement under Section 164 Cr.P.C. recorded in another case much prior to the registration of the present case, cannot be legitimately taken to be a piece of evidence in the present FIR. Thus, all these questions are answered against the State.

How the learned trial Court in the impugned findings in para 50 (sic-page 37) has drawn the conclusion that the affidavits of donor and recipient are fake, without any legal evidence, when neither any expert to this effect has been examined nor there is any primary direct evidence

and is only on hearsay of prosecution witnesses. The impugned findings from page 37 to page 39 have heavily relied on statement of PW2 Ajit Singh who even in his earlier deposition as PW1 has based his knowledge on what he was told by his son and invariably was never a part of it. Furthermore, the conclusions of learned trial Court at page 45 to 47 of the judgment under challenge are more based on self-assumptions and presumptions rather than on legal acceptable evidence. Since life and personal liberty of an individual is at stake it was the bounden duty of the Court to base its conclusions on some impeccable, legal evidence which is beyond any doubt. But in the present case, it has failed in this endeavour.

The impugned findings, in light of the foregoing discussions and the serious shortcomings and their cumulative effect, certainly suffer from illegality and perversity and thus, need to be set aside by way of acceptance of all these appeals. Thereby, the judgment of conviction is set aside and the above appeals stand allowed.

(FATEH DEEP SINGH)
JUDGE

October 17, 2018

rps

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No