
(2005) 12 SHI CK 0007
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 241 of 2003

Minunno Vancenzo

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 08-12-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 279, 279(1), 293, 313, 361
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 52, 52A(2)
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2006) CriLJ 2339 : (2006) 1 ShimLC 279

Hon'ble Judges : Lokeshwar Singh Panta, J; Abhilasha Kumari, J

Bench : Division Bench

Advocate : Anup Chitkara, for the Appellant; Som Dutt Vasudeva, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

Abhilasha Kumari, J.—This appeal is directed against the judgment dated 4th March, 2003 passed by the learned Sessions Judge, Kullu (Special Judge) whereby the appellant (hereinafter referred to as "the accused") has been convicted u/s 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereafter referred to as "the Act") and has been sentenced to undergo rigorous imprisonment for ten years and pay a fine of Rupees one lac and in default of payment of fine to further undergo imprisonment for one year.

2. The case set out by the prosecution against the accused is that on 24.2.2002 Inspector Shiv Chaudhary (PW-7) accompanied by ASI Kanshi Ram, HHC Shyam Lal (PW-6) and Constable Dalip Singh were present at Check Post, Bajaura for the purpose of checking the traffic. A bus bearing No. HP-01-1722 of "Satluj Travels" reached the said barrier at 5.30 P.M. This bus was stopped for checking and while checking the bus, the accused, who is stated to be an Italian National, was found sitting on Seat No. 24. His Passport was checked and found to be in order. The accused disclosed that he has put his luggage in the dicky of the bus.

The luggage of the accused, which was a sky blue briefcase, was taken out from the dickey of the bus and opened with a key produced by the accused in the presence of Driver Sarvan Kumar (PW-5) and the Conductor of the bus, who were joined as witnesses in the raiding party. From the briefcase of the accused, "Charas" in the shape of tablets and sticks, wrapped in polythene paper, was found concealed under the clothes. Thereafter, the accused, along with the briefcase and the witnesses, was taken to the Police Check Post, where the "Charas" was weighed and found to be 5 Kgs. Out of the recovered "Charas", two samples of 25 grams each were separated, packed and sealed with seal impressions of seal "H". The balance "Charas" was packed and sealed in a separate packet with the same seal. The NCB forms Ext.PW-4/A in triplicate were filled up as per procedure and the seal impression was retained. The case property, along with the sample parcels, was taken into possession qua memo Ext.PW-5/D, a copy of which was also given to the accused. Further, the accused was informed of the offence committed and the punishment provided under law for the same qua memo Ext.PW-5/C. The Ruka Ext.PW-7/A was sent to the Police Station, Kullu through HHC Shyam Lal where, on its basis, F.I.R. No. 102/2002 dated 24.2.2002 Ext. PW-3/B was entered by MHC Bhagat Ram (PW-3). The case property was produced before S.H.O: Sanjay Kumar by the empowered officer, who re-sealed the same and retained the sample seal Ext.PW-4/ A. He then deposited the case property with MHC Bhagat Ram (PW-3) who made entry in the Malkhana Register to this effect which is Ext.PW-3/A. The special report of the case, which is Ext.PW-1/A, was handed over by the empowered officer to Dy. S.P. who got it entered by his Reader Kanshi Ram (PW-1). On 26.2.2002 one sealed sample parcel was sent by MHC Bhagat Ram to Central Testing Laboratory (CTL) Kandaghat. On analysis vide report Ext.PW-4/F the contents of the sample were opined to be that of "Charas".

3. Further, it is the case of the prosecution that an application Ext.PW-4/C was moved by Inspector Sanjay Kumar to the Court of learned Chief Judicial Magistrate, Kullu along with inventory Ext.PW-4/C. The case property was produced in the Court and a representative sample was ordered to be drawn by the learned Chief Judicial Magistrate, Kullu, which was sealed with the seal of the Court. The remaining case property was handed over to the S.H.O. concerned. The Court issued certificate Ext.PW-4/D in this regard. The accused was chargesheeted for committing the offence u/s 20 of the Act. In his statement u/s 313 Cr.P.C. the accused has denied having committed the offence and claimed to be tried. No defence witness was examined.

4. For bringing home the guilt of the accused, the prosecution examined seven witnesses. Out of these seven witnesses, Sarvan Kumar (PW-5), HHC Shyam Lal (PW-6) and Shiv Chaudhary (PW-7) (Empowered Officer) are witnesses of the recovery. The remaining witnesses have provided the link evidence in the case in order to connect the accused with the commission of the offence.

5. We have heard the learned Counsel for the accused and the learned Additional

Advocate General for the respondent/ State at length and have also gone through the record of the case.

6. The learned Counsel for the accused has assailed the impugned judgment of conviction on the following grounds:

(1) The accused did not know the languages i.e. Hindi and English, in which the trial was conducted. Since no interpreter, as mandated u/s 279 Cr.P.C., was provided to the accused to explain to him the language of the Court, as such, the case needs to be remanded back for fresh trial after providing an Interpreter to the accused;

(2) The prosecution has failed to prove beyond reasonable doubt that the sample which was allegedly taken into possession from the accused was not tampered with;

(3) In the absence of production of the alleged "Charas" and the alleged briefcase and its keys before the trial Court, the prosecution cannot be said to have proved the alleged seizure of Charas from the possession of the accused. No reasons have been assigned by the prosecution for non-seizure of the brief case and its keys and as to what happened to the keys and as such an adverse inference must be drawn; and

(4) The prosecution has not proved beyond reasonable doubt that the case property that was produced before the learned Chief Judicial Magistrate was the same substance which was allegedly seized from the accused. Hence, link evidence is also missing.

Ground No. 1:

7. It has been contended by the learned Counsel for the accused that the accused being an Italian national, did not know either English or Hindi, and as such, he did not understand the implication of the proceedings against him and therefore, prejudice has been caused to him. Moreover, it is the requirement of Section 279(1) Cr.P.C. that "Whenever any evidence is given in a language not understood by the accused and he is present in the Court in person, it shall be interpreted to him in open Court in a language understood by him". The learned Counsel for the accused has stressed upon the word "shall" used in Section 279 Sub-section (1) and has contended that it was the mandatory requirement of this Section that an interpreter should have been provided to the accused so that he could have properly understood the purport of the proceedings against him. In support of this contention, the learned Counsel for the accused has drawn our attention to the statement u/s 313 Cr.P.C., wherein the first question reads as follows:

Question-1. Have you heard and understood the prosecution evidence, what have you to say?

Answer : Yes Sir.

It has been argued by the learned Counsel for the accused that the answer to this question has been typed whereas the answers to all the other questions put to the accused u/s 313 Cr.P.C. were hand written. Since this answer i.e. answer to question No. 1 was typed, it shows that it has been typed in advance and therefore, the accused had no opportunity to give his own answer, and it is strange how the other answers were recorded when the accused did not understand the English language. According to the learned Counsel for the accused, illegality has been committed in the conduct of the trial, inasmuch as no Interpreter was provided to the accused at the time of recording of the statements u/s 313 Cr.P.C. and the failure to appoint an independent Interpreter by the trial Court at the stage of recording of the prosecution evidence at the stage of explanation of charge and statement u/s 313 Cr.P.C. and answers thereof is in violation of the provisions of Section 279 Cr.P.C. In this view of the matter, the trial has been vitiated, being highly irregular. In support of this ground, the learned Counsel for the accused has relied upon the following case law:

(I) Shivnarayan Kabra Vs. The State of Madras, titled Shivanarayan Kabra v. State of Madras;

(II) AIR 1926 Cal 922 titled Ah Soi v. King Emperor; and

(III) AIR 1948 Lah 97 titled Ragzan Chhodop v. Emperor.

8. Referring to Shivanarayan Kabra's case (supra), it is a case u/s 361(1) Cr.P.C. which Section has now been amended and corresponds with Section 279 of the present Code of Criminal Procedure. In Paragraph-10 of the said judgment their Lordships of the Hon''ble Supreme Court have observed as follows:

10. We pass on to consider the next contention of the appellant that there was a breach of Section 361, Criminal Procedure Code which states:

361.(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language....

It was said that the evidence of the prosecution witnesses was given either in Tamil or in the English language and the appellant did not know either of the languages and so he was not able to take part in the trial. Mr. Naunit Lal contended that there was a breach of the requirement of Section 361(1), Criminal Procedure Code and the trial was vitiated. We do not think there is any substance in this argument. Even if it is assumed that the appellant did not know English or Tamil the violation of Section 361(1), Criminal Procedure Code was merely an irregularity and it is not shown in this case that there is any prejudice caused to the appellant on this account. It is pointed out by the Sessions Judge

that the appellant did not make any objection at the time the evidence was given and it appears that he was represented by two eminent advocates - Sri V.T. Rangaswami Iyenger and Sri R. Krishnamoorthy Iyer - in the trial Court who knew both these languages and who would not have allowed the interest of the appellant to be jeopardized even to the smallest extent. In our opinion, the irregularity has not resulted in any injustice and the provisions of Section 537, Criminal Procedure Code are applicable to cure the defect.

9. In Ah Soi's case (supra), their Lordships have observed as follows:

That a witness who had taken an active part during the police investigation, who had given evidence in the committing Magistrate's Court on behalf of the prosecution, and who was found to be ready and willing to give evidence in the Sessions Court on behalf of the prosecution against a man who was charged with very serious offences under Sections 302 and 304, I.P.C., should have been chosen to act as an interpreter in the case is a procedure which has only to be stated to call forth the severe condemnation of the High Court; and retrial should be ordered.

10. Further, in Ragzan Chhodop's case (supra), in Paragraph-2 cited by the learned Counsel for the accused it has been observed that:

2. ... By the very nature of things, the interpreter must be a person other than the witness whose evidence is to be interpreted, otherwise, the procedure of appointing an interpreter would be nothing but a farce.

11. On the other hand, the learned Additional Advocate General has argued that the plea taken by the learned Counsel for the accused that the alleged irregularity of not providing an Interpreter to the accused is such that the case be remanded, has not been raised during the trial but only at the appellate stage. It has been argued that the accused knew sufficient English so as to understand the meaning of the questions put to him u/s 313 Cr.P.C. and also the purport and implications of the proceedings against him. The accused had himself engaged a Counsel who understood the proceedings. That the answer to Question No. 1 "Have you heard and understood the prosecution evidence, what have you to say?". "Answer: Yes, Sir" having been type written in itself is not indicative of any prejudice being caused to the accused since the accused has given his own answer to that question. Moreover, no such objection that the accused did not understand the language of the Court was taken at the time of trial or at the time of recording of the statements u/s 313 Cr.P.C. Had the accused, in fact, not understood the implications of the questions put to him, he would not have kept quiet during the recording of statements u/s 313 Cr.P.C. and during the trial. The learned Additional Advocate General further argued that no suggestion has been put to the Investigation Officer in cross-examination to the effect that the accused was not talking in English. It has come in the statement of Shyam Lal (PW-6) that the Investigating Officer talked with the accused in English. In addition. Sarvan Kumar (PW-5) has also stated in cross-examination

that the Investigating Officer talked with the accused in English. In this view of the matter, there is no violation of the provisions of Section 279 Cr.P.C. and the accused has suffered no prejudice so as to warrant the remand of the case for fresh trial.

12. The point for consideration which would arise is whether the accused was prejudiced by the failure to appoint an interpreter and whether the irregularity, as alleged by the learned Counsel for the accused, is of such a nature as to warrant the remand of the case for fresh trial after providing an Interpreter to the accused.

13. We have given our serious consideration to the rival contentions of the parties, the material on record and the law cited at the bar, and are of the considered view that the accused has not been prejudiced by the failure to appoint an Interpreter during the recording of the statement u/s 313 Cr.P.C. and during the trial. A perusal of the record of the case reveals that the accused has signed the statement u/s 313 Cr.P.C. in his own hand. Had he been prejudiced in any manner, he would not have done so and would have raised some sort of objection or indicated that he was unable to understand the proceedings. He has not raised any grievance to this effect before the trial Court. Moreover, a scrutiny of the original record reveals that the information regarding arrest was given to the accused by Inspector Shiv Chaudhary in the presence of witnesses vide Ext.PW-5/C dated 24.2.2002. This Exhibit bears the endorsement "I have been informed about my arrest. My arrest information be given to my Embassy at Delhi." This document bears the signatures of the accused. In addition, the seizure memo Ext.PW-5/G dated 24.2.2002 also bears the signatures of the accused. In the absence of any grievance or protest by the accused during trial, it can safely be inferred that he understood English and was aware of the implication of the proceedings against him.

14. In A.H. Soi's case cited by the learned Counsel for the accused, (supra), a witness who had taken active part during the police investigation and who had given evidence on behalf of the prosecution against the accused therein had been chosen to act as an Interpreter. The facts of the present case are entirely on a different footing and this judgment is not at all applicable to the same. In Ragzan Chhodop's case (supra), a person knowing the Spiti language was provided an Interpreter who was also a witness in the case and it was held by the Hon'ble Court that by the very nature of things the Interpreter must be a person other than the witness whose evidence is to be interpreted, otherwise the procedure of appointing an Interpreter would be nothing but a farce. In the case in hand, it is not the contention of the learned Counsel for the accused that a person who is a witness has been appointed as an Interpreter, therefore, the ratio of this case also will not be applicable to the facts and circumstances of the present case. In Shivanarayan Kabra's case (supra), Para-10 of which has already been reproduced hereinabove, their Lordships of the Hon'ble Supreme Court have observed that the accused in that case was represented by two

eminent Advocates in the trial Court who knew both English and Tamil and would not have allowed the interest of the accused to be jeopardized. This judgment has also been relied upon by the learned Additional Advocate General who has contended that the accused has not been prejudiced since he was represented by Counsel who understood both Hindi and English would not have allowed the interest of the accused to suffer. The learned Additional Advocate General has also cited Pappan Narayanan Vs. Kerala State, , Paragraph-17 of the said judgment reads as follows:

17. The evidence of the doctor, PW-9 was recorded in English, apparently the language in which it was given. At the bottom of the deposition there is the usual rubber-stamp certificate signed by the Judge to the effect that the evidence was read over and interpreted to the witness and admitted by him to be correct. It is argued that it must be inferred from this that the evidence of this witness was not interpreted to the accused as required by Section 361(1) of the CrI. P.C., and the decision in Mathai Thommen Vs. State, , is relied upon for saying that when, as in this case, the pleader defending the accused is not a pleader engaged by him but one engaged for him by the Court, shelter cannot be taken u/s 361(2) on the score that the evidence was given in a language understood by the pleader.

Our attention has not been drawn to any rule which requires that the fact that the evidence given in a language not understood by the accused has been interpreted to him should be certified in the deposition itself, and there seems to be no basis for the inference that in this particular case it was not. That the accused cannot follow English is again a matter to be inferred; and, in any case, though the accused has submitted an elaborate memorandum of appeal he has not complained that he was unable to follow the evidence of the doctor. That apart, in the circumstances of the present case, where the defence was one of alibi, we fail to see what conceivable prejudice the accused could have suffered even if he did not quite follow what the doctor said.

The decision relied upon on behalf of the accused was rendered on very special facts. There the plea was one of private defence. The doctor's evidence in chief-examination was favourable to this plea, and it was only as a result of questions put to him by the Court that answers were elicited to provide the basis for its rejection. And, in the memorandum of appeal, a specific ground was taken that the evidence of the doctor having been given in English, the accused was unable to follow it or to cross-examine the doctor effectively.

15. A bare reading of Section 279(1) Cr.P.C. makes it very clear. Section 279(1) Cr.P.C. reads as follows:

279. Interpretation of evidence to accused or his pleader.--(1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(Emphasis supplied)

This Section envisages that when the accused is present in Court in person and evidence is given in any language not understood by him, it shall be interpreted to him in open Court in a language understood by him. Meaning thereby that it is at that stage that he shall have to communicate to the Court his inability to understand the proceedings. The grievance regarding not understanding the language should come from the accused himself or his Counsel, so as to bring into play the provisions of Section 279(1) Cr.P.C. as to appointment of an Interpreter who can interpret the evidence to him in open Court in a language understood by him. The accused, at no stage during the trial on evidence has raised this objection. Nor did he demand that an interpreter be provided therefore, it is necessarily implied that he was in a position to understand the English language and the proceedings of the trial Court. In the ordinary course of human behaviour, no person accused of an offence as serious as the one for which the accused was being tried, would keep quiet and let the trial conclude without any demur, had he not understood the proceedings and the resultant implications. It is not the case of the defence that he is illiterate and uneducated. Being an Italian National travelling in India, he can be said to be intelligent enough to realize the seriousness of the offence and the sentence for it under the law. This contention, therefore, cannot be accepted. Taking into consideration the rival contentions, the case law cited, the evidence and the material on record, it cannot be said that there is any violation of Section 279 Cr.P.C. or that the accused has been prejudiced by not appointing an interpreter so as to warrant the remand of the case for fresh trial. The accused has voluntarily appended his signatures on the statements recorded u/s 313 Cr.P.C., the information regarding arrest Ext.PW-5/C and the seizure memo regarding recovery of 5 Kgs. of "Charas" from the brief case of the accused. Moreover, it has come in evidence, as already discussed hereinabove, that the accused talked with Investigating Officer in English and no suggestion has been put to the Investigating Officer that the accused did not know English. This ground is answered accordingly.

GROUND NO. 2 :

16. It was contended by the learned Counsel for the accused that the prosecution has failed to prove beyond reasonable doubt that the sample which was allegedly taken into possession from the accused was not tampered with and that the bulk of the case property was not connected to the sample. In support of this contention, it has been argued that Constable Dalip Kumar (PW-2) has not stated during his evidence that when the sample was carried to the Central Testing Laboratory (CTL) Kandaghat, the specimen impressions of seals "H" and "T" were also carried by him and handed over to the Laboratory. The learned Counsel for the accused has argued that in the absence of specimen impression of seals separately taken, it was not possible for the Laboratory to compare whether the seals found on the sample packet tallied with the specimen sent separately and since no person from the Laboratory was examined and the

report was tendered in evidence u/s 293 Cr.P.C., hence, it was for the prosecution to prove its case beyond reasonable doubt which, it has failed to do. Moreover, the seal used by PW-7 (Investigating Officer) was not handed over to an independent witness and there was every possibility that the seized substance could have been tampered with at any time before the same was handed over to the S.H.O. The burden of proof to prove beyond reasonable doubt that such a possibility did not arise by handing over the original seal used in sampling to some independent witness after the impressions of seal have been taken on the seized articles was for the prosecution to prove beyond reasonable doubt and the same has not been discharged. It was further contended that there is no link evidence regarding the safe custody of the seal. Reliance was placed on the evidence of Sarvan Kumar (PW-5) Driver of the bus who states that the police has not given him any seal. In support of the above contentions, the learned Counsel for the accused has placed reliance on *Rajesh Jagdamba Awasthi v. State of Goa* 2004 (4) Cri 347 which is a Division Bench Judgment of the Hon''ble Bombay High Court. In this case 100 grams of "Charas" was recovered from the shoe on the right foot and 115 grams from the left shoe of the appellant. There was a discrepancy regarding the weight of the seized substance sealed in envelopes on the spot and the weight of the envelopes received by the Laboratory. The Hon''ble Bombay High Court held that the discrepancy could not be said to be minor or liable to be ignored and since the seal as well as the packets were in the custody of the same person there was possibility of the seized substance being tampered with.

17. In the case in hand, there is no such discrepancy in weight, therefore, the ratio of the case will not be applicable to the facts and circumstances of the present case.

18. In *State of Rajasthan v. Gurmail Singh* 2005 SCC Cri 641, the Malkhana Register was not produced to prove that the seized articles were kept in the Malkhana and further no sample of the seal was sent along with the sample to the Excise Laboratory Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Besides this, the link evidence adduced by the prosecution was not found to be satisfactory.

19. The facts of this case are totally different from those of the present case. In *Gurmail Singh's* case (supra), the important link evidence adduced by the prosecution was not satisfactory and there were loop holes in the prosecution case. However, in the present case there is ample evidence on record to prove that the sample which was taken into possession from, the accused was intact and not tampered with. Therefore, the ratio of *Gurmail Singh's* case will also not be applicable and will not advance the case of the learned Counsel for the accused.

20. It has further been argued that the seal used by PW-7 was not handed over to an independent witness and if the seal was available with PW-7 (Investigating Officer), it was possible for him to tamper with the seized substance at any time.

21. Per contra, the learned Additional Advocate General has argued that there is sufficient evidence on record of persons who have handled the recovered substance so as to connect the sample with the bulk of the substance taken into possession and also to prove that the sample has not been tampered with. In support of this contention, he has referred at length to the statement of the Investigating Officer (PW-7) who has clearly stated that the briefcase from which the "Charas" was recovered was opened by the accused with his keys in the presence of the witnesses i.e. Driver Sarvan Kumar and Conductor Harbans Singh. and on opening the said briefcase, "Charas" in the shape of tablets and sticks wrapped in polythene were found concealed under the clothes. Thereafter, the accused along with the brief case were taken to the Police Station Bajaura, along with witnesses where, on weighing the said "Charas" it was found to be 5 Kgs. Two samples of 25 grams were taken and put in empty cartons of Cigarettes and the remaining "Charas" was , packed and sealed with nine impressions of seal "H". The samples were also sealed with seal "H", each carrying three seals of "H". He has further stated that the three packets of "Charas" along with NCB Form, along with accused were produced before the S.H.O. and the sample seals were also produced. This witness has proved the NCB Form and his signatures and seal impression "H" on the said form. Reliance has also been placed on the statement of S.H.O. (PW-4) who re-sealed the case property. This witness states that the sample packet of "Charas" was sealed with the seal of Chief Judicial Magistrate and handed over to the MHC for safe custody. He has also proved the certificate Ext.PW-4/D issued by the learned Chief Judicial Magistrate, Kullu and identified his signatures thereupon. Further, Bhagat Ram (PW-3) has also categorically stated that the case property was not tampered with. This evidence has remained unshaken. No suggestion has been put to these important prosecution witnesses that the case property produced before the learned Chief Judicial Magistrate had no connection with the bulk seized substance and apart from the bare argument of the learned Counsel for the accused there is no evidence to this effect. The evidence of the prosecution witnesses, mentioned hereinabove, is credible and trustworthy and there is no reason to disbelieve the same. In this view of the matter, it cannot be said that the prosecution has failed to prove beyond reasonable doubt that the sample which was taken into possession from the accused, was tampered with.

Ground No. 3:

22. The learned Counsel for the accused has further argued that the seized substance i.e. "Charas" was not produced before the trial Court and neither was the brief case, from which the "Charas" is stated to have been recovered and its keys so produced. As such, it cannot be said that the seizure of "Charas" was from the possession of the accused. No reason has been assigned for the non-production of the briefcase and the keys and an adverse inference must be drawn against the prosecution.

23. A scrutiny of the record reveals that an application u/s 52-A(2) of the Act for

disposal of the seized Narcotic Drug was filed in the Court of the learned Chief Judicial Magistrate, Kullu by the S.H.O. Police Station, Kullu and that was the reason why the case property was not produced before the trial Court. However, the contention of the learned Counsel for the accused that there was no evidence that the "Charas" was seized is not tenable since there is a detailed inventory dated 24.2.2002 of the case property which is Ext.PW-4/C bearing the F.I.R. number. This amply proves that the case property, as described above i.e. 5 Kgs. of "Charas", was recovered from the brief case of the accused. Moreover, Ext.PW-4/D is a certificate issued by the learned Chief Judicial Magistrate, Kullu to the effect that two white cloth parcels in case F.I.R. No. 112/2002 dated 24.2.2002 u/s 20 of the Act of Police Station, Kullu having been sealed with eight seals were produced before him and the seals were found to be intact. Moreover, the learned Chief Judicial Magistrate, Kullu has drawn one representative sample of 25 grams separately which was weighed in his presence and sealed with eight seals of "CJM" being the case property, and the rest of the contraband was put in another parcel and sealed with eight similar seals of "CJM" which bears his signatures and the date. The non-production of the briefcase and the keys thereof are not material flaws and do not belie the seizure of the contraband in the face of the credible evidence, both direct and supporting and other material on record already referred to. Therefore, it cannot be said that the contraband "Charas" was not seized from the exclusive and conscious possession of the accused.

Ground No. 4:

24. Lastly, it has been argued by the learned Counsel for the accused that the prosecution has not proved beyond reasonable doubt that the case property that was produced before the learned Chief Judicial Magistrate was the same substance which was allegedly seized from the accused. Further, that the link evidence to this effect is also missing. It has been argued that as per the case of the prosecution, on the bigger packet containing the bulk of the seized substance which weighed 4.950 Kgs., nine seals of impression "H" were affixed by PW-7 (Investigating Officer) Inspector Shiv Chaudhary and six seals of impression "T" were put by S.H.O. Inspector Sanjay Kumar, whereas in the inventory prepared u/s 52 of the Act it was specifically mentioned that the bulk packet was containing 9/9 seals of impression "H" and "T" and in the certificate Ext.PW-4/D issued by the learned Chief Judicial Magistrate, Kullu the packets stated to have been sealed with eight seals instead of the original nine of impression "H" and six of impression "T". Further, the description of the seals was not given. He has further argued that Inspector Shiv Chaudhary (PW-7) has stated in evidence that the remaining "Charas" packet was sealed with nine impressions of seal "H" whereas Inspector Sanjay Kumar (PW-4) has stated that he re-sealed the smaller packets with seal bearing impression "T" by putting three seals and bigger packet with six seals. The thrust of the arguments of the learned Counsel for the accused is that this discrepancy and variation in the number of seals shows that the packet containing the contraband was tampered with. In support

of this contention, the learned Counsel for the accused has relied upon State of H.P. v. Hanacho @ Stewart Latest HLJ 2004 (HP) (DB) 642. In this case also the case property was disposed of by invoking the provisions of Section 52 of the Act. However, in this case the prosecution had failed to prove that the case property was correctly described in the inventory so as to connect it with the case property seized. Neither did the certificate issued by the Magistrate show that the case property produced before him was in fact the seized case property. Moreover, the description of the case property having the distinguishing marks/seal impressions had not been described in the inventory or in the certificate issued by the Magistrate. The important link evidence was also missing and there were flaws in maintaining the NCB Form. The totality of these circumstances persuaded the Hon"ble Division Bench of this Court to dismiss the appeal filed by the State of Himachal Pradesh. It is well settled that each case must turn upon its own facts and law cannot be applied mechanically. Looking to the facts and the material on record, in the present case there is no such lacunae. The inventory of the case property Ext.PW-4/C and the certificate issued by the learned Chief Judicial Magistrate Ext.PW-4/D do not suffer from any infirmities of the kind that were found in the case cited above. Therefore, the ratio of that case will not be applicable to the facts and circumstances of the present case.

25. In Sachin Sharma v. State of H.P. Latest HLJ 2005 (HP) 1102 also the case property was not produced in the Court and the certificate issued by the Magistrate had not been established to pertain to the substance which was alleged to have been recovered from the accused. This Court held that in view of the findings that the primary evidence i.e. the case property had been withheld and the alternative primary evidence i.e. a certificate of the learned Chief Judicial Magistrate, Lahaul and Spiti having not been connected with the allegedly recovered stuff, the case of the prosecution was not established beyond reasonable doubt. This case also turns upon its own facts and the case of the accused herein is not advanced by relying upon this judgment since in the present case, the alternative primary evidence i.e. the certificate of the learned Chief Judicial Magistrate Ext.PW-4/D clearly connects with the seized substance i.e. the "Charas" recovered from the briefcase of the accused.

26. The other case law cited by the learned Counsel for the accused i.e. Sohan Lal v. State of Punjab 1998 DC 460 which is a Division Bench Judgment of the Hon"ble Punjab & Haryana High Court and Kashi Sah v. State of Bihar 2001 Dru Cas 63 which is a judgment of the Hon"ble Single Judge of the Patna High Court, do not help the case of the accused herein. In Sohan Lal's case (supra), the case property had not been produced in the Court at the time of the trial and the trial Court accepted the explanation that it has been destroyed as it had been lying at the open Court yard of the Police Station. In Kashi Sah's case (supra) also the case property was not produced in the Court and there was no evidence as to what happened to the rest of the quantity of the opium after one gram was sent to the Forensic Laboratory.

27. In view of the detailed inventory and the certificate of the learned Chief Judicial Magistrate, Kullu and the other reliable evidence on record, these two judgments will not be helpful to advance the case of the accused and are distinguishable from the facts of the present case.

28. The learned Additional Advocate General has argued that the case stands fully proved against the accused. A variation in the number of seals and non-production of the specimen seal during the course of the trial does not lead to the inference that the entire seizure and recovery is wrong and illegal or that the trial is vitiated. In support of this contention, a reference has been made to *Jauni Ram v. State of Himachal Pradesh* 2005(1) Shi LC. 54, in which a Division Bench judgment of this High Court in *Him Giri @ Hardev Giri v. State of H.P.* 2003 (2) Shim. LC 350 has been relied upon. In *Him Gin's* case (supra) it has been held that the production of seals and its specimen impressions at the trial is not the requirement of law but only a circumstance to re-enforce the prosecution evidence and in case there is other cogent and reliable evidence like contemporaneous records supported by confidence inspiring evidence of witnesses, such non-production will be rendered inconsequential. Therefore, mere non-production of the specimen seal during the course of the trial cannot lead to the inference that the entire seizure and recovery is wrong and illegal. The Hon'ble Division Bench of this High Court in *Jauni Ram's* case (supra), has also dealt with the discrepancy and variations in the seals and has come to the conclusion that in the absence of material on record or any suggestion having been put to the witnesses that the samples have been tampered with, the accused cannot contend that the packets have been tampered with. In the present case also the situation is somewhat similar. There is clear, cogent and reliable evidence on record that the samples were intact and no suggestion in cross-examination has been put to the prosecution witnesses that the case property has been tampered with. A mere discrepancy in the evidence of witnesses as to the number of seals, whether nine in number or six in number, as pointed out by the learned Counsel for the accused, cannot in itself override the other contemporaneous evidence. It is a fact that the recovery of the seized substance took place on 24.2.2002 and the evidence of the witnesses i.e. PW-4 was recorded on 1.8.2002 and of PW-7 was recorded on 10.10.2002 i.e. after afflux of six months in the case of PW-4 and eight months in the case of PW-7. Human memory is fallible and minute details may fade from memory. A mere discrepancy in the statements as to the number of seals is not a material one and will not vitiate the factum of recovery of the contraband in the face of the overwhelming material on record to connect the recovery of the seized "Charas" with the accused.

29. The learned Additional Advocate General has also cited *Piara Singh Vs. State of Punjab*, which is a Full Bench Judgment of the Punjab & Haryana High Court, Paragraph-12 of which reads as follows:

12. That the law does not visualize a plethora of seals with every Investigating

Officer to be handed over to non-officials after their use and to remain in their custody for an unlimited or unspecified period is otherwise manifest when viewed from another angle as well. It was conceded by the learned Counsel for the petitioner that in the varied gamut of the statute and the Rules in this context there is no specific provision that each Investigating Officer must be officially provided with a large number of individual and personal seals which alone would make it possible for them to comply with the stand taken by the learned Counsel. In fact the admitted stand before us was that even though the relevant instructions do provide for the articles in the investigating kit of the Police Officials but herein also there is no requirement of any official seal. It is plain that there is no provision of either providing a large number of personal official seals to the Investigating Officer or further that these should be handed over to private persons for an unspecified period of time. Therefore, the statutory provisions seems to be a clear pointer to the contrary to what is sought to be advocated on behalf of the petitioners by their learned Counsel.

30. He has further argued that it was a case of chance recovery of a huge quantity of 5 Kgs. of "Charas", which could not possibly have been planted on the accused and since the accused himself produced the key to his briefcase, it cannot be said that the "Charas" was not in the exclusive and conscious possession of the accused. Moreover, it cannot be said that the police had any enmity against the accused and neither has it been stated so by the defence. In this view of the matter, the accused has rightly been sentenced and convicted.

31. We have given our thoughtful consideration to the grounds set up and the arguments advanced by the learned Counsel for the parties and have minutely scrutinized the evidence on record. In view of the reliable, cogent and confidence inspiring evidence of the prosecution witnesses and the other corroborative evidence, which has already been discussed hereinabove in detail, we find that the accused has rightly been convicted and sentenced. Therefore, there is no merit and substance in this appeal and the impugned conviction and sentence does not call for any interference by this Court.

As a result, this appeal is dismissed.