

**IN THE HIGH COURT OF HIMACHAL PRADESH**  
**SHIMLA**

**Cr.MMO 111 of 2006**

**Date of decision: 30.04.2008**

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Rakesh Gautam.

Petitioner.

Versus

State of Himachal Pradesh

Respondent.

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*Coram*

**The Hon'ble Mr. Justice V.K.Ahuja, J.**

*Whether approved for reporting<sup>1</sup>? . No.*

**For the petitioner:            Mr. Kulbhushan Khajuria, Advocate.**

**For the respondent:        Mr. J.S.Guleria, Law Officer.**

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**V.K.Ahuja, J(Oral)**

The petitioner has filed the present petition against the order passed by the learned C.J.M., Kullu issuing notice of accusation to the petitioner under Section 338 IPC. The evidence in the case has not yet started. A perusal of the record shows that the petitioner had earlier also filed a petition and the said petition was decided by this court on 6.12.2005 by observing that at the time of framing of charge, the petitioner will be well within his right and at absolute liberty to urge before the learned trial Court, at or before the stage of the framing of the charge about the prosecution not being maintainable against him on the basis of pleas forming the subject matter of such a prayer. According to the petitioner these pleas were raised before the learned trial Court but these were not considered at the time of accusation and notice of accusation was issued to the petitioner under Section 338 IPC.

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Whether the reporters of Local Papers may be allowed to see the Judgment? Yes,

I have heard the learned counsel for the parties and have gone through the record.

The learned counsel for the petitioner has relied on the decision reported in **Jacob Mathew** v. **State of Punjab and another** (2005) 6 Supreme Court Cases 1, to show that in case of Medical Officers the matter should be dealt with by the Courts and a perusal of this decision shows that due to medical negligence a death had taken place and the Medical Officer was being tried under Section 304-A IPC. It is on the facts of that the Apex Court came to the conclusion that the appellant cannot be tried under Section 304-A since it was a case of non-availability of oxygen cylinder for which the hospital may be liable in tort and the Doctor cannot be proceeded against under Section 304-A IPC. The observations made were specific to the facts of that case.

A perusal of the record of the case shows that during investigation, the Investigating Officer had also taken the opinion of the concerned Medical Officer from P.G.I. Chandigarh and after considering the whole record, the learned trial Court had issued notice of accusation to the petitioner under Section 338 IPC. No findings can be recorded in this case until and unless the evidence has been led by the prosecution and all the pleas are raised by the learned counsel for the petitioner during the course of hearing. There is no material on record to give a finding that there is substance in the pleas raised by the petitioner.

From the above discussion, it is clear that there is no merit in the petition filed by the petitioner and he can raise all the pleas before the learned trial Court during the course of the hearing there. The parties are directed to appear before the learned trial Court on

20.5.2008 and the learned trial Court shall proceed with the case and try to dispose of the case at the earliest possible, preferably within a period of six months. While disposing of the petition, it is made clear that the above decision shall not be construed as expression of opinion affecting the merits of the case and the trial Court shall proceed in accordance with law. The petition is dismissed accordingly.

30<sup>th</sup> April, 2008  
(SDS)

(V.K.Ahuja),J.