

## **HIGH COURT OF AZAD JUMMU AND KASHMIR**

*Criminal Appeal No.25/2024.*

*Date of institution 06.02.2024*

*Date of decision: 14.03.2024.*

1. Badar Munir S/o Gulab Khan Caste Mir R/o Ghan Chattar Tehsil and District Muzaffarabad.
2. Abdul Qayyum Mughal S/o Abdul Rehman Caste Mughal R/o Ambore Tehsil and District Muzaffarabad.
3. Aasim Khalid Awan S/o Khalid Awan R/o Ward No.12 Upper Chatter, Muzaffarabad.
4. Imtiaz Ahmed S/o Amar Siddique R/o Ward No.1 Mohallah Qasimabad District Bhimber.
5. Tehzib-un-Nisa D/o Muhammad Nazir Khan R/o Namooter Danna Tehsil and District Muzaffarabad.
6. Raja Mehmood Shahid S/o Raja Abdul Aziz Khan R/o Kalas Raingoli Tehsil Dhirkot District Bagh.

Appellants.

### **VERSUS.**

1. Saleem Akhtar Awan S/o Mir Muhammad Awan Caste Awan R/o Ghari Dupatta Awan Patti Tehsil and District Muzaffarabad.
2. Ibrar Azam S/o Muhammad Azam Caudhary R/o Ward No.1 Mohallah Rasoolpur colony District Bhimber.
3. Muhammad Idrees S/o Muhammad Siddique Mughal R/o Lodhiabad Chikar District Jhelum Valley.
4. Syed Shafat Hussain Shah S/o Ashraf Shah R/o Nandool Hattian Bala District Jhelum Valley.
5. Tavir Khan S/o Khani Zaman caste Pathan R/o Khanda Baila, Tehsil Hattian Bala District Jhelum Valley.
6. Muhammad Shahzad S/o Azad R/o Noseri Lodhiabad, Tehsil Hattian Bala District Jhelum Valley.
7. Feroz Din S/o Raja R/o Iamnian Tehsil and District Muzaffarabad.

8. Muhammad Imtiaz S/o Shafi Pathan R/o Lodhi Abad Tehsil Hattian Bala District Jhelum Valley.
9. Deputy Chief Prosecutor Azad Jammu and Kashmir Ehtesab Bureau, Muzaffarabad.

Real-respondents.

10. Tariq Riaz Mughal S/o Muhamad Ilyas R/o Langla Tehsil Hattian Bala District Jhelum Valley, presently Junior Clerk in the office of Assistant Commissioner, Hattian Bala District Jhelum Valley.
11. Muhammad Imtiaz S/o Muhammad Sharif R/o Khanda Baila Tehsil Hattian Bala District Jhelum Valley, presently Junior clerk in the office of Tehsildar, Hattian Bala (time) District Jhelum Valley.
12. Nadeem Hassan Raja S/o Raja Muhammad Farid Khan Caste Khakha Rajput R/o Noshera Tehsil and District Jhelum Valley, presently operation Manager and Manger Azad Jammu and Kashmir Bank (time) Hattian Bala Branch District Jhelum Valley.
13. Yasir Juanid S/o Bashir Ahmed Shaheen Caste Mughal R/o Gharthama District Jhelum Valley.
14. Gul Afsar S/o Muhammad Afzal Khan Caste Thakyal R/o Sarak Chinari Distrit Jhelum Valley.
15. Naseem Farooq S/o Muhammad Farooq Caste Mughal R/o Goharabad Tehsil Hattian Bala District Jhelum Valley.
16. Raja Ejaz Ahmed Khan S/o Raja Badar Hussain Khan R/o Chakothi Tehsil and District Jhelum Valley.
17. Aamir Manzoor S/o Muhammad Manzoor Qureshi R/o Kumikot Tehsil and District Muzaffarabad.
18. Abid Hussain S/o Hassan Ali Khan R/o Khatir Narr Chinari District Jhelum Valley.
19. Zahoor Ahmed S/o Muhammad Sharif Caste Sudhan R/o Dhani Baqalan Tehsil Hattian Bala District Jhelum Valley.
20. Fayyaz Ahmed Mughal S/o Sultan Akbar Mughal R/o Ghari Dupatta Tehsil and District Muzaffarabad.
21. Hanif Khokhar S/o Mian Khan Caste Khokhar R/o Dhani Chathyan District Jhelum Valley.
22. Sadheer Abbasi S/o Ghulam Jillani Abbasi R/o Khanda Baila Tehsil Hattian Bala District Jhelum Valley.

23. Nasir Maqbool S/o Khawaja Maqbool R/o Hattian Bala Tehsil Hattian Bala District Jhelum Valley.
24. Azhar Mehmood S/o Wazir Khan R/o Khanda Baila Tehsil Hattian Bala District Jhelum valley.
25. Muhammad Shafique S/o Ghulam Muhammad Pathan R/o Khanda Baila Tehsil Hattian Bala District Jhelum Valley.
26. Muhammad Mumtaz S/o Muhammad Sharif caste Pathan R/o Khanda Baila Tehsil Hattian Bala District Jhelum Valley.
27. Muhammad Mushtaq S/o Ameer ullah caste Mughal R/o Lawasi Tehsil and District Muzaffarabad.
28. Muhammad Naveed S/o Muhammad Jameel R/o Hattian Bala Tehsil Hattian Bala District Jhelum valley.
29. Azad Jammu and Kashmir Ehtesab Bureau through Chairman Ehtesab Bureau, having his office at Lower Chatter Muzaffarabad.

...Proforma-Respondents.

### **CRIMINAL APPEAL**

***Before: Justice Sadaqat Hussain Raja, C.J***

**PRESENT:**

*Noshaba Iqbal, Advocate for the appellants.*

*Raja Muhammad Mushtaq, Advocate for respondent No.1*

*Sardar Jam Sadiq, Advocate for respondent No.2.*

*DCP for Ehtesab Bureau.*

**JUDGMENT:**

The captioned appeal has been filed under section 40(1) of Azad Jammu and Kashmir Ehtesab Bureau amended Act, 2001 read with section 561(A), Cr.P.C against the order passed by the learned Ehtesab Court No.1 Muzaffarabad on 29.01.2024, whereby,

applications filed by the private respondents were accepted and appellants were summoned as accused to face the trial in case titled “Ehtesab Bureau Vs. Tariq Aziz & others”.

Brief facts forming background of the instant appeal are that a complaint was lodged by Assistant Commissioner/Collector Land Acquisition Hattian Bala District Jhelum Valley through letter No.101-03/2017 on 24.03.2017 against private respondents No.1 & 2. Following this complaint, matter was investigated by the Ehtesab Bureau. After detailed investigation, The Ehtesab Bureau, submitted reference on 30.01.2019 against 24 persons implicated in a substantial embezzlement of huge amount through fraud and transfer of the funds in their accounts with the connivance of each other in which Bank officials and private persons related to respondents No.1 & 2 are also found guilty, whereas the appellants herein were found innocent. It is contended that this Court vide order dated 30.07.2017 ordered for detailed investigation from the appellants who remained DDO's during the period wherein respondents have allegedly made embezzlement of amount and after

detailed investigation, appellants were found innocent through subsequent report and the Ehtesab Bureau after detailed inquiry discharged the appellants under section 169, Cr.P.C. Subsequently, private respondents filed applications before Ehtesab Court No.1 for summoning the appellants to face the trial alongwith them, which was allowed by the said Court vide order dated 13.12.2023. Feeling aggrieved, appellants herein filed an appeal before this Court alongwith an application for interim relief. However, this Court denied the interim relief application vide order dated 18.12.2023, as such the appellants have challenged the same before the apex Court. The apex Court accepted the appeal and directed the learned trial Court to provide hearing opportunity to the appellants after obtaining objections on the application. The learned trial Court after hearing the parties accepted the application for summoning of the appellants vide order dated 29.01.2024, leading to this appeal.

Having considered the arguments of learned counsel for the parties and thoroughly reviewed the record of the case with utmost care.

A contemplate perusal of the record reveals that a reference was filed against the private respondents based on embezzlement of funds and after detailed investigation, private respondents were found guilty of the allegations leveled in the reference, however, during the proceedings, appellants herein who remained as DDO's were also summoned and investigated, but, later on they were discharged by the Ehtesab Bureau after detailed inquiry under section 169, Cr.P.C. The private respondents moved applications before Ehtesab Court No.1 Muzaffarabad for summoning of appellants for trial, which was allowed by the said Court. The primary issue which is to be resolved here that whether on the applications of accused-persons, co-accused, who have already been discharged by the investigating agency under section 169, Cr.P.C can be summoned?. It is noteworthy that an investigating agency under section 169, Cr.P.C is empowered to release an accused if he finds that the available evidence is insufficient, or lacks reasonable grounds to establish the connection of accused with the alleged offence. The main theme of this section is availability of sufficient or deficient evidence;

that is the test on which the investing Officer can only release under this section if no sufficient evidence is available. Although, the finding of the investigating agency to decide the fate of the case with regard to release of accused-persons are not binding upon the Court, but it would also be most unfair to drag an innocent persons into Court to face hardship of criminal trial. I have gone through the available record and observed that reference No.1 was filed before Ehtesab Court No.1 Muzaffarabad on January, 30<sup>th</sup> 2019 under sections 409, 406, 419, 468, 471, 201, 471, 109, APC and 10/11 of Ehtesab Bureau Act, 2001 and later on subsequent reference was filed on 29.09.2021 in the same offences, whereby private respondents have been arrayed as accused-persons. The learned trial Court proceeded with the case against the private respondents and after completion of prosecution evidence, statements of private respondents under section 342, Cr.P.C were also recorded. During the defense evidence on 06.12.2023, private-respondents moved an application for summoning of appellants herein, who have released by the investigating agency under section

169, Cr.P.C. No doubt, the learned trial Court is competent to summon any accused who have been released by the investigating agency. However, in this particular case, the trial Court, through the entire proceedings failed to access the necessity of the evidence, resulting to summon the appellants on their own merit, but rather on the application of the private respondents. During the defense evidence, the learned trial Court summoned the appellants which clearly reflect the lack of judiciousness on the part of Court. As previously discussed, it is for the trial Court to summon the accused-persons who have been released by the investigating agency and not on the application filed by the accused-private respondents. It is worthwhile to mention here that criminal proceedings are conducted under the umbrella of Criminal Procedure Code, 1898 whereby special chapter II has been provided for trial the case before Sessions Court. During the course of arguments the learned counsel for the private respondents queried the legal basis for the application submitted before trial Court to summon the appellants, however, the counsel for the private respondents as well



as the learned DCP Ehtesab Bureau failed to point out any section in this regard from the Criminal Procedure Code, 1898. Section 169, Cr.P.C speaks as under;-

**“169,Cr.P.C Release of accused when evidence deficient.** *If, upon an investigation under this Chapter, it appears to the officer incharge of the police station, or to the police officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or (send) him for trial.”*

In view of above provision of law, it is very much clear that investigating agency is empowered to release an accused under section 169, Cr.P.C and the wisdom has also been mentioned for the Court to take cognizance of the offence on such report for trial and no other mode has been provided to summon the accused who has already been released under section 169, Cr.P.C. Even in my view no remedy is available, except to file private complaint under section 200, Cr.P.C against the persons

who have already been released under section 169, Cr.P.C. Furthermore, it reflects from the record that the prosecution evidence has been recorded and statements of accused/private respondents under sections 265-D, Cr.P.C and 342, Cr.P.C have been recorded and trial Court did not pass any order to summon the appellants as accused for trial, however, on the application of accused (private respondents), the appellants were summoned by the trial Court which has no legal backing, using a non-legalistic approach. It may be stated here that as a criminal Court, trial Court is bound to act and to proceed under codified law provided on the subject. The learned counsel for the private respondents failed to refer any relevant provision of law or case law with regard to summoning of appellants on the application submitted by the co-accused (private respondents). Therefore, the impugned order of learned Ehtesab Court No.1 dated 29.01.2024 is legally unsound and unsustainable; therefore, the same lacks legal validity.

The crux of the above discussion is that, I accept this appeal and the impugned order dated 29.01.2024 passed by the learned Ehtesab Court No.1, Muzaffarabad

is hereby set aside and the proceedings initiated against the appellants in pursuance of the impugned order are also quashed.

Muzaffarabad:  
14.03.2024.

**CHIEF JUSTICE**

***Approved For Reporting***

**CHIEF JUSTICE**