

may be had to the youth, character, and antecedents of the offender, and the section applied on those grounds.

I accordingly, maintaining the conviction, alter the nature of the sentence, and make an order under section 562 of the Code of Criminal Procedure.

I direct that accused enter into a personal bond of Rs. 100 with two sureties of Rs. 100 each, and that upon his doing so he be released, and for a period of one year undertake to appear and receive sentence when called for, and in the meantime to keep the peace and be of good behaviour. I give him one week within which to carry out this order. Upon the order being carried out, the bail under which he at present stands will be discharged.

1902

 EMPEROR
 v.
 BIRCH.

REVISIONAL CRIMINAL.

 1902
 March 17.

Before Mr. Justice Blair.

EMPEROR v. WAZIR AHMAD.*

Act (Local) No. 1 of 1900 (Municipalities Act), section 147—Bye-laws of Municipality—Continuing breach—Recurring fine—Imposition of fine in advance.

Held that where, as in section 147 of Act No. 1 of 1900 (Local), it is directed that a breach of some law may be punished with a fine of a certain sum per diem so long as the breach continues, it is not competent to the Court to impose such fine in advance whilst sentencing an offender in respect of the original breach; but there must be proof of the continuing breach having been committed. *Ram Krishna Biswas v. Mohendra Nath Mozumdar* (1) followed.

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Agra. The facts out of which the reference arose are fully stated in the order of the Sessions Judge, which was as follows:—

“The applicant in this case applied to the Municipality for permission to construct a house. With his application, dated June 25th, 1901, he put in a plan which showed that he proposed to leave a space of 1½ feet between the wall of his house and the kachcha drain which separated it from the public road. Building according to the plan was permitted, except that permission was

* Criminal Reference No. 142 of 1902.

(1) (1900) I. L. R., 27 Cal., 565.

1902

EMPEROR
v.
WAZIR
AHMAD.

refused for the construction of two flights of steps at the sides of the house bridging the drain.

“As the applicant did not himself propose to bring the wall right up to the edge of the drain, there was, of course, no need for any express written order that he should leave a space, and no such order was consequently passed. However, in contravention of his own plan he carried his front wall forward right up to the edge of the drain. For this he was prosecuted under section 147 for omitting to comply with the conditions, subject to which permission was given him by the Board under the power conferred on it by chapter 7 of the Municipal Act, and fined Rs. 25 with a fine of Rs. 2 per day, for every day during which, after 35 days from the date of the conviction, the building remained unaltered, and not in accordance with the plan.

“For the applicant it is contended that he did not omit to comply with any written directions which the Board could lawfully pass, that he ought to have been served with a notice to alter the building under section 87(5), against which he might have appealed to the Commissioner and got him to stay prosecution with reference to section 152 of the Act, and that the order for a recurring fine was illegal at that stage of the case.

“With regard to these contentions, I think it is correct that the applicant did not omit to comply with any express written condition or direction as to the strip between the wall and the drain. But when a person is given permission to build according to a plan which he has himself put in, it is clear that it must be understood that a condition of the permission is that the building should be according to the plan. It is absurd to suppose that a man may get a building sanctioned according to a plan and then build anything he likes. Section 87(5) provides that the bond may require the building to be altered or demolished. But this is permissive, not mandatory, and I find nothing in the law which requires that such a notice shall be issued before a person can be prosecuted under section 147. It is possible that a Municipal Board may think it sufficient to get a man punished for his contempt of public authority, and not think it worth while to put him to the trouble and expense of making considerable alterations. To take the present case, it is probably a

matter of little consequence to the Board whether the applicant's wall comes up to the drain or not. But, as a matter of principle, and to prevent all sorts of tricks and encroachments, the Board is entitled to expect that people should adhere to their plans. I think, therefore, that the applicant, having been permitted to build according to a plan, has been very properly fined for building in contravention of that condition.

“With regard to the recurring fine, section 147 provides that in the case of a continuing breach a further fine may be imposed for every day, after the date of the first conviction, during which the offender is proved to have persisted in the disobedience or omission. In the similar case of *Ram Krishna Biswas v. Mohendra Nath Mozamdar* (1), it has been held that the order for the payment of the daily fine was illegal, inasmuch as it was an adjudication in respect of an offence which had not been committed when the order was passed. From this it would appear that the Municipal Board, if they want to have the applicant subjected to a daily fine for persisting in his omission to comply with the condition of the permission, will have to wait for a reasonable time, and then institute a fresh prosecution with this object.

“I accordingly submit the record to the Hon'ble High Court, with a recommendation that the order for a recurring fine should be set aside.”

Upon this reference being laid before the Court, the following order was passed :—

BLAIR, J.—The order for payment of so much fine per day so long as the building continues to stand is illegal. The addition of such an order is premature. There must be proof of a continuing offence before the jurisdiction of a Magistrate to make such an order arises. That portion, therefore, of the order will be set aside. I am supported in this view by the decision of the Calcutta High Court in *Ram Krishna Biswas v. Mohendra Nath Mozamdar* (1).

(1) (1900) I. L. R., 27 Calc., 565.