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to try it himself. The facts are not altogether on all fours with the case before us, but the true principle which, in our opinion, governs the case was laid down by the learned Judges in the judgment in that case (at p. 231 of the Report) in the following terms:—"His (*i.e.* the District Judge's) power of transfer under section 25 had been exhausted when the suit was originally withdrawn from the Court of the Subordinate Judge, so even if section 25 were applicable to a case remanded under section 562 (we think it is not applicable,) that section does not empower the District Judge to retransfer the case to the subordinate Court from which it had been withdrawn." This decision by anticipation seems to govern the present case. We find, however, that the question has been expressly decided in a case in the Bombay High Court, in which the facts were on all fours with those of the present case, namely, in the case of *Sukharam v. Gangaram* (1), in which case it was held that when a District Judge made an order to retransfer a case to the original subordinate Court, "the order of retransfer was *ultra vires*, and should be discharged." We think, therefore, that upon the language of the section of the Act, and upon the authorities cited above, the order of retransfer in this case was clearly wrong. We therefore must allow this application, and cancel the order of the District Judge, and direct him to retain the case upon his own files for trial. Seeing that the order of retransfer was made by the learned Judge of his own motion, we make no order as to costs.

*Application allowed.*

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 March 11.

## APPELLATE CRIMINAL.

*Before Mr. Justice Know.*

EMPEROR v. BIRCH.\*

*Criminal Procedure Code, section 562—First offender—Powers conferred by section 562 exercisable by a Court of appeal—Criminal Procedure Code, section 523(d).*

*Held* that the powers conferred by section 562 of the Code of Criminal Procedure upon a Court by which a first offender is convicted, are by virtue of section 423(d) of the Code, exercisable by the High Court sitting as a Court of appeal.

\* Criminal Appeal No. 109 of 1902.

(1) (1889) I. L. R., Bom., 654.

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IN this case the appellant was convicted of an offence under section 471 of the Indian Penal Code and sentenced to three months' rigorous imprisonment. The facts found against him were, that he, having applied for the post of Secretary to the Municipal Board of Jhansi, supported his application by the production of what purported to be a copy of a certificate granted to the appellant by "S. W. Harding, Commissioner," the said copy being a forgery. Against this conviction and sentence the appellant appealed to the High Court.

Mr. *R. K. Sorabji*, for the appellant.

The Government Pleader (*Maulvi Ghulam Mujtaba*), for the Crown.

KNOX, J.—The accused has been convicted of an offence under section 471 of the Indian Penal Code. He has been sentenced to three months' rigorous imprisonment. Of the serious nature of the offence there can be no doubt.

The learned Magistrate who convicted the accused said not one word too strong in his judgment about the nature of the offence. He adds, however, that in consideration of the youth of the accused (for he is only twenty years of age), and that he is apparently of a respectable family, and from his appearance seems rather weak than deliberately criminal, he proceeds to pass a sentence which would have been a light sentence for an offence under the section under which the accused was convicted.

Taking all the learned Magistrate had said into consideration, it appeared to me that this was a case to which the provisions of section 562 of the Code of Criminal Procedure were intended to apply. It was necessary, however, to be satisfied that matters, which had not been proved before the Magistrate, should either be proved or admitted in this Court, *i.e.* that the accused was one against whom no previous conviction could be proved, and that his character and antecedents were of such a nature as to authorize a Court to avail itself of this section. Time was accordingly given to both sides. The learned Government Pleader represented that he was satisfied that the evidence forthcoming as to character and antecedents of the offender would be quite sufficient, and he therefore did not propose challenging this point. He, however, contended that section 562 was a section of which

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this Court could not avail itself when sitting as a Court of appeal; also that the offence was an offence punishable with imprisonment for more than two years. Lastly, he contended that the offence was not a trivial one. Dealing with the second objection first, he maintained that the offence of which the appellant was convicted was in reality an offence falling within the provisions of section 466 of the Indian Penal Code. There is no doubt that the act of the accused is one which was far-reaching, and might have involved him in very serious results. I have, however, to deal with the following circumstances:—(1) that he stands before me convicted of an offence under section 465 read with section 471; (2) that there has been no application before me to enhance the sentence, and that, on the other hand, the only argument before me has been that if the learned counsel for the appellant had pressed for the reduction of sentence, the learned Government Pleader had been instructed not to oppose such application.

I take the offence as it stands, an offence punishable with not more than two years' imprisonment. Regarding the third objection, it has already been dealt with to a very great extent in what I have just said. It is very fortunate for the accused that what was done was so quickly discovered, and the matter did not reach further. There remains the first objection, which is not so easy to decide. Taking into consideration all that has been argued before me, I am still of opinion that the new provisions inserted in section 423, clause (d) are sufficiently ample to enable me to deal with the case and to apply the provisions of section 562. In a case before the Bombay High Court (that case is to be found in the Bombay Law Reporter, Vol. II, p. 817\*), the learned Judges read the section in the way I propose to read it, *i.e.* that where no previous conviction is proved against an offender, and the offence is one under the Indian Penal Code punishable with not more than two years' imprisonment, regard

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[\* *Queen-Empress v. Tukaram Chima*. But in this case the sole question before the High Court was whether the powers conferred by section 562 could be exercised by the convicting Court in the case of a person of the age of 40 years, *i.e.* whether under that section the first offender with a past good character and antecedents must necessarily be also a "youth". The question whether the High Court as a Court of appeal could use the section was not in issue.—*Ed.*]

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.

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## REVISIONAL CRIMINAL.

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 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

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\* Criminal Reference No. 142 of 1902.

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