

(1969) 08 GUJ CK 0010
In the Gujarat High Court

Case No : Criminal Revision Application No. 145 of 1969

Patel Bechar Narsinh

APPELLANT

Vs

The State of Gujarat and Another

RESPONDENT

Date of Decision : 19-08-1969

Acts Referred:

Bombay Probation of Offenders Act, 1938 — Section 5(1), 6, 7(1), 7(2)
Criminal Procedure Code, 1898 (CrPC) — Section 439(6)
Penal Code, 1860 (IPC) — Section 53

Citation : AIR 1970 Guj 186 : (1970) CriLJ 1351 : (1970) 11 GLR 834

Hon'ble Judges : J.M. Sheth, J

Bench : Single Bench

Advocate : G.C. Patel, for the Appellant; J.U. Mehta, Hon. Asstt. Govt. Pleader and B.R. Shelat, for the Respondent

Judgement

1. This is a revision petition filed by the original complainant (first informant) against the order passed by the learned Judicial Magistrate, First Class, Mangrol, Mr. R.C. Shah, in Criminal Case No. 268 of 1968, releasing present opponent No. 2, Maiya Dolu Kar san, who was original accused No. 2 on probation of good conduct. Opponent No. 2 has been convicted of an offence punishable u/s 326 of the Indian Penal Code. He was ordered to be released on probation u/s 5(1) of the Bombay Probation of Offenders Act, 1938 (which will be hereinafter referred to as the Act), on furnishing a bond of Rs. 1,000/- for a period of one year with a solvent surety for the like amount to keep and maintain peace during the aforesaid period and to receive the sentence when called upon during the aforesaid period. This order was passed on 30th December, 1968.

2. Mr. G. C. Patel, learned Advocate appearing for the petitioner, submitted that the offence u/s 326 of the Indian Penal Code is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years, and is also liable to fine. Maximum punishment provided for such an offence being imprisonment for life, it was submitted by Mr. Patel that the trial Court has committed an error in giving benefit of Section 5(1) of the Act to

opponent No. 2. He, therefore, submitted that the order passed by the learned trying Magistrate, releasing Opponent No. 2 on probation of good conduct, be set aside and in lieu of it, proper and adequate sentence be passed.

3. Mr. J. U. Mehta, the learned Hon. Assistant Government Pleader, who appeared for Opponent No. 1 (State of Gujarat), supported the submissions made by Mr. Patel.

4. Mr. B. R. Shelat, learned Advocate (appointed) for Opponent No. 2 (accused No. 2) submitted that Opponent No 2 had a right to challenge the order of conviction recorded against him on facts in view of the provisions of Section 439, sub-section (6) of the Criminal Procedure Code (which will be hereinafter referred to as the Code). It is further contended by him that this Court cannot award sentence and the case should be remanded to the trying Magistrate for awarding proper and adequate punishment. It was further submitted by him that at any rate, the Court should not award punishment which is more than non-appealable sentence. It was also submitted by him that the provisions of Section 5(10) of the Act have application as the offence u/s 326 of the Indian Penal Code is not punishable with death or imprisonment for life; it being punishable with imprisonment for life, the provisions of Section 5(1) of the Act could be made applicable.

5. I will first consider the submission made by Mr. Shelat; whether the provisions of Section 5(1) of the Act would be made applicable in a case where the offence regarding which the order of conviction is recorded is punishable with imprisonment for life or imprisonment for any other term. The material part of Section 5(1) of the Act for our purposes reads;

"Notwithstanding anything contained in any enactment for the time being in force when-

(a) any male person is convicted of an offence not punishable with death or transportation for life, or..... if it appears to the Court by which the offender is convicted, that regard being had to the age, character, antecedents or physical or mental condition of the offender, or to the circumstances in which the offence was committed, it is expedient that the offender should be released on probation of good conduct, the Court may, for reasons to be recorded in writing instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not being less than one year and not exceeding three years as the Court may direct, and in the meantime to keep the peace and be of good behaviour."

6. The interesting question that arises for consideration is what is the meaning to be assigned to the words, "of an offence not punishable with death or transportation for life."

7. The material part of Section 53-A of the Indian Penal Code for our purposes,

reads:

"(1) Subject to the provisions of sub-section (2) and sub-section (3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to "imprisonment for life"."

In view of these provisions of Section 53-A we have to read "imprisonment for life" for the words "transportation for life" in Section 5(1) (a) of the Act.

8. In Section 497, sub-section (1) of the code, similar wording in regard to this material phrase is found. It reads:

"When any person accused of or suspected to the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life."

These words came to be interpreted by a Division Bench of the Bombay High Court in *Naranji Premji Vs. Emperor*, . Fawcett, J., speaking for the Division bench made the following observations:

"The first point taken by Mr. Jinnah in this application for bail is that in sub-section (1) of Section 497, Criminal Procedure Code, the words

"if there appear reasonable grounds, for believing that he has been guilty of an offence punishable with death or transportation for life."

Only cover offences punishable with death or in the alternative with transportation for life, such as cases of murder and of waging war under Sections 302 and 121, I.P.C., and that they do not include offences merely punishable with transportation for life. Although no authority has been referred to in the argument before us, there is, in fact, a ruling that does support Mr. Jinnah's contention, viz., *Mohammad Eusoof v. Emperor* AIR 1926 Rang 51. But that has been overruled by the Full Bench of the same Court in *Emperor v. Nga San Htwa* AIR 1927 Rang 205 (FB). In my opinion, this is a construction which cannot be adopted. If one refers to the definition of "warrant case" in Section 4(1) (w), Criminal P.C., it will be seen that it is defined as a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months. The legislature obviously does not there mean an offence which is punishable with those kinds of different punishments in the alternative, and they do not put the word "with" before "transportation" or before "imprisonment". Therefore, I do not attach any importance to the argument that in sub-section (1). Section 497 the word "with" does not appear before "transportation for life," and, therefore, the reference is merely to an offence which is punishable with death or in the alternative with transportation for life."

9. In *Emperor v. Mt. Janki* AIR 1932 Nag 130, Grille, Acting Judicial Commissioner, observes:

"The phrase "punishable with death or transportation for life" must be interpreted disjunctively and women convicted of an offence for which transportation for life is one of the punishments provided are eligible for release on probation u/s 562. The words "death or transportation for life", must be read as referring to offences the penalty for which provided by the Penal Code contains either death or transportation for life as one of the punishments awarded and not necessarily both."

The learned Acting Judicial Commissioner has referred to several provisions of the Code like, Sections 4(1) (w), 31 and 34 in support of his reasoning. I am in respectful agreement with it.

10. A Division Bench of Allahabad High Court in *State Vs. Sheo Shanker*, , has also taken the same view. The relevant observations made therein are

"The words "punishable with death or transportation for life", cannot mean "punishable with death or in the alternative with transportation for life". The plain meaning of the words "an offence not punishable with death or transportation for life" is "an offence not punishable with death or an offence not punishable with transportation for life."

Death or transportation for life must not be a punishment that can be legally inflicted for the offence; if death can be inflicted or if transportation for life can be inflicted, it is not "an offence not punishable with death or transportation for life" regardless of whether any other punishment can be inflicted either in the alternative or in addition to the punishment of death or transportation for life, as the case may be. Since the offence of Section 409, Penal Code is punishable with transportation for life or imprisonment and fine, the accused could not be released on probation of good conduct."

11. Same view has been taken by a Division Bench of Madhya Pradesh High Court in *Chetti Vs. State of Madhya Pradesh*, , observing

"Section 562 of the Criminal Procedure Code and Section 4(b) of the C.P. and Berar Probation of Offenders Act are an exception to the general scheme of punishments awardable under the Indian Penal Code and the Criminal Procedure Code. The phrase "not punishable with death or imprisonment for life" ought to be interpreted in its ordinary disjunctive sense. Its scope cannot be permitted to be expanded by giving a strained meaning, by reading it conjunctively. AIR 1932 Nag 130 was affirmed; AIR 1927 Rang 205 (FB) was relied on: AIR 1927 Nagpur 53 was not approved."

12. H. Hombe Gowda, Officiating C.J. of Mysore High Court in *The State of Mysore Vs. Saib Gunda and Others*, , has taken a similar view, observing;

"The provisions of Section 4 are not applicable to a case where a person is found

guilty u/s 326, Penal Code inasmuch as the maximum sentence prescribed for the offence is imprisonment for life."

13. A Single Judge of Orissa High Court, in Jogi Nahak Vs. The State, , has taken a similar view, observing:

"The provision for punishment in Section 394, Penal Code for imprisonment for life or imprisonment for ten years and fine cannot be read conjunctively so as to mean that it provides an alternative sentence for the offence concerned. Hence, where the accused is convicted u/s 394, Penal Code, the accused cannot be given the benefit of the provisions of Section 4 or 6 of the Probation of Offenders Act and released on probation of good conduct, on the ground that the offence did not provide for punishment for imprisonment for life."

14. Taking into consideration the wording of Section 5(1) of the Act and the aforesaid decisions, it is evident that the learned Magistrate has committed an error in giving opponent No. 2 the benefit of releasing him on probation of good conduct. The reasoning adopted in these decisions, in my opinion, is quite correct. Furthermore, I am bound by the decision of the Bombay High Court, the decision being given before the date of bifurcation.

15. I will now consider the submission made by Mr. Shelat for opponent No. 2, that in view of the provisions of Section 439(6) of the Code, he has a right to challenge the order of conviction on facts and he has a right to show cause against his conviction. Section 439 of the Code deals with High Court's powers of revision. Sub-section (2) of it states:

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

Sub-section (1) of it reads:

"In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence."

Sub-section (6) of it reads:

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause be entitled also to show cause against his conviction."

We have to read these sub-sections (2) and (6) of Section 439 of the Code in conjunction. Sub-section (2) of it contemplates issue of a notice to the accused before any order to his prejudice is being passed. It contemplates that he should be given an opportunity of being heard either personally or by a pleader in his

own defence before any order is passed to his prejudice. In the instant case, such a notice has been given to opponent No. 2 and the notice has been served. An Advocate is also appointed for him and is heard.

16. A short, but interesting question that arises is whether the present case will be covered to sub-section (6) of Section 439 of the Code. The wording of that sub-section (6) clearly indicates that the accused is entitled to show cause against his conviction when an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced. It, therefore, means that the Legislature has given him an opportunity to challenge his conviction when a notice has been given to him to show cause why his sentence should not be enhanced. In the instant case, no notice has been given to opponent No. 2 to show cause why his sentence should not be enhanced. The notice has been given to him as to why this order of releasing him on probation of good conduct should not be set aside, the order being illegal and invalid and pass sentence in lieu of it.

17. The interesting question, therefore, that arises is whether it can be said that this is a case of enhancement of any sentence passed by the Court recording the order of conviction and releasing opponent No. 2 on probation of good conduct.

18. Section 53 of the Indian Penal Code which falls in Chapter III relating to punishments, enumerates different punishments provided in the Indian Penal Code. It reads:

" "Punishments" - The punishment to which offenders are liable under the provisions of this Code are.-

First - Death;

Secondly - Imprisonment for life;

Thirdly - Repealed by Act No. 17 of 1949:

Fourthly - Imprisonment, which is of two descriptions, namely-

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly - Forfeiture of property;

Sixthly - Fine."

That Section 53 of the Indian Penal Code does not indicate that this order of releasing opponent No.2 on probation of good conduct was an order inflicting any punishment.

19. We will now consider the relevant provisions of Sections 5 and 7 of the Act I have already quoted the material part of Section 5(1) of the Act. The wording of it clearly indicates that when the Court comes to the conclusion that in view of the conditions specified in that sub-section (1) of Section 5 of the Act, the

offender should be released on probation of good conduct, the Court has to record reasons in writing and the Court instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period not being less than one year..... That wording clearly indicates that in such a case, the Court, after recording the order of conviction, postpones the passing of sentence, meaning thereby, postpones inflicting of any punishment and instead of passing any order of sentence, the Court directs that he should be released on his entering into a bond with or without sureties to appear and receive sentence when called upon during such period not being less than one year but not exceeding three years as the Court may direct and in the meantime, to keep peace and be of good behaviour. It is, therefore, evident that when such an order of releasing on probation of good conduct is passed, there is no order of sentence passed. No punishment is visited upon him. On the contrary that order is postponed. It could not, therefore, be said that any order of sentence was passed or any punishment was visited upon the accused as contemplated by Section 53 of the Indian Penal Code.

20. Section 7 of the Act reads:

"(1) Notwithstanding anything contained in the code except in cases in which the offender has pleaded guilty, or where the order is passed by the High Court, an appeal shall lie from an order of conviction in every case in which an order is passed u/s 4 or 5 to the Court to which appeals ordinarily lie under the Code."

A perusal of the wording of this sub-section (1) of Section 7 of the Act clearly indicates that by not passing an order of sentence and by postponing the order of punishment, the accused is not in any way prejudiced. Even though no order of sentence is passed and he is released on probation of good conduct, he has been given a right to appeal from an order of conviction and such appeal is to be filed to the Court to which such appeals ordinarily lie under the Code.

21. Sub-section (2) of Section 7 of the Act reads-

"The Appellate Court or the High Court in the exercise of its powers of revision may pass any such order as it could have passed under the code, or may set aside an order u/s 4 or 5 and in lieu thereof pass sentence on such offender according to law."

This sub-section (2) makes it quite clear that this Court is entitled to set aside such an order in exercise of its powers of revision, and is further entitled in lieu thereof to pass sentence on such offender according to law. No doubt, that power vested in this Court is circumscribed by a proviso added to it. That proviso reads:-

"Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted."

This Court cannot inflict punishment higher than the punishment that could have

been inflicted by the Court by which the offender was convicted. This is another safeguard to protect the interest of the offender as the powers of this Court are curtailed and this Court cannot award punishment higher than the punishment that could have been awarded by the Court by which the offender was convicted. This Court, in revision, is entitled to set aside such order and in lieu thereof, it is empowered to pass sentence on such offender according to law. It further indicates that the order that was passed by the trying Magistrate, namely, releasing Opponent No. 2 on probation of good conduct was not an order of sentence. An order of sentence was postponed. If such an order was not warranted by law, this Court can set aside that order in the exercise of its revisional powers and this Court, in lieu thereof, can pass sentence on such offenders according to law. What this Court, therefore, does is awarding sentence according to law in lieu of the order passed, namely the order of releasing the offender on probation of good conduct. It could not, therefore, be said that this Court, while exercising this power vested in it under this sub-section (2) of Section 7 of the Act in the exercise of its revisional powers, is enhancing sentence. As no sentence was awarded by the trying Court, there could not be any question of enhancement of sentence. What this Court does is that the Court finds that this order of releasing the offender on probation of good conduct is illegal, it being not warranted by law and in lieu thereof passes sentence on the offender according to law. No doubt, while passing that sentence, the Court has to keep the aforesaid proviso in mind, as the powers of this Court are curtailed by that proviso. There being no question of enhancement of sentence, provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. That being the position, opponent No. 2 has no right to be heard in regard to the order of conviction passed against him.

22. It was contended by Mr. Shelat that this would be against the principles of natural justice. If the accused had been awarded even a nominal sentence and this Court had issued a notice for enhancement of sentence, the accused would have been in a position to challenge this order of conviction in view of the provisions of Section 439, sub-section (6) of the Code. In the instant case, the trying Court did not find necessary even to award a nominal sentence to opponent No. 2 and thought that it was fit case to release the offender on probation of good conduct. When this Court is trying to set aside that order in the exercise of its revisional powers, and is awarding him substantial sentence, he cannot challenge conviction. If the interpretation placed by Mr. Patel and Mr. Mehta is accepted, the result would be that such a person will not have any right to be heard against his order of conviction. The Legislature could have hardly contemplated such a result.

In my opinion, this argument is not well founded. In a case where this Court is exercising its revisional powers u/s 439 of the Code, to enhance the sentence awarded, the offender has been given a statutory right under sub-section (6) of Section 439 of the Code to challenge the order of conviction. In a case like the instant case, when this Court is exercising its revisional powers u/s 439 of the

Code. In view of the provisions of sub-section (2) of Section 7 of the Act, this Court has got power to set aside such an order of releasing the offender on probation of good conduct and it has got further power to pass sentence according to law in lieu thereof. If the legislature really intended to give any statutory right to the accused that he should be heard against the order of conviction, the legislature could have very well made such provision in Section 7 of the Act. The legislature has not made any such provision. This Court has not to make the law. It has to interpret the law as it is. If there is any such grievance, appeal should be to the legislature and not to the Court. In my opinion, there being no question of any enhancement of sentence, the provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. This conclusion of mine gets support from several decisions which I will presently refer to.

23. In *Re: Varadaraja Padayachi*, , Horwill, J., has observed:

"Where an illegal order u/s 562 is passed by a Magistrate and on appeal the Sessions Judge affirms the conviction but refers the case to the High Court as to the sentence the case should not be regarded as one for enhancement of the sentence, entitling the accused to agitate findings of fact."

It is true that detailed reasons are not recorded in that decision to support the aforesaid reasoning.

24. In *Emperor v. Miro Ghulam Hussain* AIR 1939 Sind 339, the pertinent observations made are:

"The learned Advocate who appeared for this Miro, who is a young man of, as the Magistrate says, about 25 years of age, claimed to be heard on the merits of the case, because he said that u/s 439 (6), Criminal P.C., he could show, in case of enhancement of a sentence, cause against the sentence itself. But we do not see how it can be said here that we are enhancing a sentence or acting u/s 439 (6) because the enhancement of a sentence presumes there is a sentence to be enhanced, but u/s 562, Criminal P.C., it is clear that what is done is done in lieu of sentence."

After quoting the wording of Section 562 of the Code which is substantially similar to the wording of Section 5(1) of the Act, it is observed:

"so it is clear to us that u/s 562, Criminal P.C., when an accused is released on probation of good conduct no sentence is passed by the Court. Therefore, when, as u/s 562(3) we are entitled to do, we set aside an order and pass a sentence in lieu thereof, it cannot be said that we enhance a sentence within the meaning of Section 439 (6), Criminal P.C., and however unfair this may appear to the learned Advocate, we are here to interpret the law and not to make it. Therefore, we are not prepared to hear the learned Advocate upon the merits of the case, though we have heard him on all matters material to the question before us, that is the passing of a sentence of imprisonment in lieu of the order passed by the

Magistrate u/s 562, Criminal Procedure Code."

25. A Division Bench of Rajasthan High Court, in *Sarkar Vs. Jalamsingh*, , has observed;

"When an accused is released u/s 562(1) on probation of good conduct on sentence is passed by the High Court. Therefore, when a case is referred to High Court for passing a sentence u/s 562(3), the case is not one for enhancement of sentence within the meaning of Section 439(6) entitling the accused to show cause against the conviction."

In my opinion, the reasoning adopted in these decisions is correct, if we hear in mind the wording of the relevant provisions of section 439 of the Code and that of Sections 5 and 7 of the act and the provisions of Section 53 of the Indian Penal Code.

26. Mr. Shelat, in support of his argument, relied upon a decision of the Saurashtra High Court in *United State of Saurashtra v. Koli Ganga Kana* (1949) 2 Sau LR 48. That decision lends support to my conclusion that the benefit of Section 562 of the Code cannot be given to the accused who has been convicted of an offence which is punishable with transportation for life. So far as the second question is concerned, no doubt, that decision lends support to the argument advanced by Mr. Shelat. The observations made at pages 51 and 52 are as under:

"The other question, i.e., the one under which the accused-opponent would be entitled to show cause against his conviction is a more important one, and the learned Government Pleader has pointed out two cases in support of his contention that the accused has no such right. He refers us to a Sind decision reported at page 339 in AIR 1939, Sind and another reported at In Re: *Varadaraja Padayachi*, . Both the Courts have held that in a case u/s 562 accused has no right to show cause against his conviction. With great deference to their Lordships who decided both these cases, we have to observe that we are unable to agree with the narrow view of the law that they have taken. The ratio decidendi in those cases is that the case in question is not a case of enhancement of the sentence and hence the provisions of section 439 which enable the accused to show cause against his conviction do not operate in favour of the accused who has not been sentenced at all. Technically speaking, their Lordships may be right, but such a construction of Section 439 offends against the principles of natural justice, and in our opinion, such a construction would be both too technical and too narrow. To illustrate our point of view it amounts to this that a person who has been barely convicted and not sentenced is on a worse footing than a person who has been sentenced, and given an inadequate sentence; or to be more clear as to what we mean, such an interpretation would react very unfavourably against those persons who are convicted and dealt with u/s 562. The result in such a case will be that a person who has been let off with a binding over order against him and who naturally would be under a sort of

confidence that in case in future he behaves better, there is no apprehension of any sentence whatsoever, would be taken by surprise by an order from the High Court calling upon him to appear before it and receive conviction. To give an arithmetical illustration, if when the unit of sentence already inflicted is 1, 2, 3 etc., and if the same is sought to be enhanced to 4, 5, 6 etc., the person has a right to show cause, while if the unit of the sentence is zero and is yet sought to be substituted by any other arithmetical figure, he has no right to show cause against his conviction. This works as an absurdity. Moreover, on a careful perusal of Section 439 which has ample safeguards for the benefit of those accused against whom no order could be passed to their prejudice would be naturally deprived of those benefits which do exist in their favour as the section stands."

With due deference to the learned Judges of the Saurashtra High Court, I may say that the reasoning advanced does not appeal to me. When the language of the relevant sections does not admit of any ambiguity and the language clearly indicates that such a right is given to the offender only when a notice has been issued by this Court for enhancement of sentence, it will not be proper for this Court to take any such factors into consideration as has been done by the Saurashtra High Court and interpret the provisions of Section 439 of the Code in that manner when the language does not justify such interpretation. As said in the aforesaid Sind decision the Court has not to make the law. It has to interpret the law as it is. There being no question of an enhancement of sentence, as no sentence was awarded by the trying Magistrate, the provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. As said by me earlier, if there be any such grievance, as has been suggested in this Saurashtra decision, there should be an appeal to the legislature and not to the Court. I am, therefore, of the view that in such a case, the accused is not entitled to show cause against his conviction.

27. The submission made by Mr. Shelat that this Court cannot award sentence and the case should be remanded to the trial Court for awarding sentence as it was that Court which had recorded the order of conviction, in my opinion, is not well founded. His argument was based on the ground that if the order of sentence is passed by the trying Magistrate, he will get a right to appeal against that order of sentence and wherein possibly, he will be again entitled to challenge the order of conviction. In my opinion, this argument cannot be accepted as a correct argument. The reason is that Section 7(2) of the Act clearly indicates that the appellate Court or the High Court in the exercise of its powers of revision is entitled to set aside an order u/s 4 or 5 and in lieu thereof pass sentence on such offender according to law. The legislature has clothed this Court with such powers. The only restriction placed upon the powers of this Court is that it shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted. It is, therefore, not necessary to remand the case to the trial Court for awarding sentence.

28. It has been lastly submitted by Mr. Shelat that this Court could only award

the sentence which would be a non-appealable sentence. This argument is without any basis. The provisions of sub-section (2) of Section 7 of the Act clearly indicate that this Court has been empowered to pass sentence according to law. The only restriction is that this Court cannot pass a sentence higher than the sentence that might have been awarded by the trying Magistrate. It is significant to note that the offender has been given a right to appeal against the order of conviction even though sentence awarded was not passed, and he was released on probation of good conduct. It is, therefore, evident that he has not been prejudiced in any manner in regard to his right of appeal, as no sentence was awarded by the trying Magistrate and was released on probation of good conduct.

29. All the submissions made by Mr. Shelat fail. The last question that survives for consideration is what is the proper and adequate sentence that should be awarded to opponent No. 2 who has been convicted of an offence punishable u/s 326 of the Code. The nature of injury, the weapon used and the part selected for causing injury, are important factors to be taken into consideration.

30. Dr. Raval, Ex. 19, had examined injured Bhagwanji soon after the incident at about 9-30 p.m. on 7th October, 1968. The incident had taken place at about 8-30 p.m. He found the following injury:

"(1) Oblique incised wound 3" x 1/2" x bone deep on the middle of the head, fracture suspected."

The injury could be caused by a sharp cutting instrument. He is corroborated by the certificate, Ex. 20, given by him.

31. Dr. Mankad, Ex. 21, attached to Junagadh Civil Hospital, had examined injured Bhagwanji on that very night at about 11-00 p.m. According to him, the patient was serious. He was admitted in the hospital. Arrangement was made also for recording the dying declaration.

32. Dr. Sitapara, Ex. 24, in charge of Male Surgical Ward, Junagadh Civil Hospital, states that injured Bhagwanji was admitted in his ward and patient was referred to the Surgeon, and as per the advice. X-ray was taken on 8th October, 1968. It was taken by Dr. R. C. Popat. There was fracture of skull of the right parietal frontal region. That X-Ray plate has been produced at Ex. 26. The injured was treated by this doctor from 7th October, 1968 to 4th November, 1968.

33. Dr. Popat has been examined at Ex. 30. He has stated that he found fracture of the skull of the right parietal frontal bone on taking X-ray. It was not a minor one. He is corroborated by the documents, Exs. 25 and 26.

34. Dr. Sitapara, Ex. 24, has also deposed that the injury was deep to the brain and hence the injured had an attack of paralysis. The other cause might be of cerebral tension. The injury was caused to Bhagwanji when Bhagwanji asked the accused not to beat one Ambalal with an axe. Taking into consideration these circumstances, it is a case which would undoubtedly require awarding of

substantive sentence of imprisonment.

35. The learned trying Magistrate has observed in his judgment that the accused is a young man. His age appeared to be 25 years. According to him, the accused had no bad antecedents and he did this act in anger. Taking into consideration those circumstances in favour of the accused and other circumstances referred to above, I think that sentence of one year's rigorous imprisonment and a fine of Rs. 125/- for the offence punishable u/s 326 of the Indian Penal Code, would meet the ends of justice. Mr. Mehta fairly stated that this sentence would meet the ends of justice, especially in view of the fact that the learned trying Magistrate had given a benefit of releasing opponent No. 2 on probation of good conduct. The revision petition, therefore, succeeds.

36. The order regarding payment of fine is made, keeping in mind that compensation of Rs. 125/- was awarded to injured Bhagwanji. That amount was to be paid by opponent No. 2 to that injured person by way of compensation. That order has been probably passed by the learned trying Magistrate keeping in mind the provisions of Section 6 of the Act as the order regarding releasing opponent No. 2 on probation of good conduct is set aside. It will not be proper to maintain that order of compensation. It is true that notice had not been given to the injured person regarding this revision petition. If out of the fine that be recovered, Rs. 125/- are ordered to be paid to injured Bhagwanji, injured Bhagwanji will not be prejudiced in any manner. Furthermore, taking into consideration the seriousness of the offence committed by opponent No 2, sentence of one year's rigorous imprisonment and sentence of fine of Rs. 125/- and in default of payment of fine, to undergo two months' further rigorous imprisonment, would meet the ends of justice.

37. The revision petition is allowed. The order passed by the learned trying Magistrate releasing opponent No. 2 on probation of good conduct and the order awarding compensation of Rs. 125/- to injured Bhagwanji are set aside and in lieu thereof, opponent No. 2 (Original accused No. 2) is sentenced to suffer one year's rigorous imprisonment and to pay a fine of Rs. 125/- and in default of payment of fine, to undergo two months' further rigorous imprisonment for the offence punishable u/s 326 of the Indian Penal Code.

38. Out of the fine, if recovered, Rs. 125/- are ordered to be paid to the injured (Bhagwanji). Rule is made absolute.

39. Revision allowed.