

proceeding to another date under Rule 4 does not imply that a party to that proceeding must appear on that date and if he does not appear, the appeal could be dismissed in default of appearance. Under that rule, a proceeding stands adjourned to the next date of a working day for the limited purpose of the Court fixing the next date of hearing and for ascertainment of that date by the parties or their counsel. If either the parties or their counsel do not appear on the date, to which a proceeding stood adjourned under Rule 4 to the next date, the Court even in the absence of appearance on behalf of the parties or their counsel on that date has got to fix another date as the date of hearing and to issue a notice to the parties or their counsel intimating to them about the next date of hearing fixed by the Court. Moreover, it was as a result of note recorded by the Reader of the Court on March 28, 1970, that the appeal stood adjourned to March 30, 1970. It is the Presiding Officer of the Court, who had to pass an order on March 30, 1970 fixing thereafter a date of hearing in the appeal. No such order was passed. There is no warrant for the appeal being dismissed in default of appearance on behalf of the appellant on March 30, 1970. The order passed by the lower appellate Court dismissing the appeal on March 30, 1970 is not maintainable.

(4) For the foregoing reasons, I allow the appeal and set aside the order of the lower appellate Court dismissing the appeal in default of appearance on behalf of the appellant. The case is remanded to that Court to decide it according to law. There will be no order as to costs.

(5) The counsel for the parties have been intimated that the parties or their counsel shall put in appearance before the lower appellate Court on May 21, 1971.

R. S. G.

REVISION CRIMINAL

Before S. S. Sandhawalia, J

THE STATE,—Petitioner

versus

RAGHBIR SINGH,—Respondent.

Criminal Revision No. 148-R of 1968.

April 30, 1971.

The Probation of Offenders Act (XX of 1958)—Section 11(2)—Right of appeal under.—Whether available to the State—Code of Criminal Procedure

The State v. Raghbir Singh (Sandhawalia, J.)

(Act V of 1898)—Section 439—State not availing the right of appeal—Whether can resort to revision proceedings.

Held, that the language of sub-section (2) of section 11 of the Probation of Offenders Act, 1958, is in unqualified terms. In the absence of any specific restriction, what particularly deserves notice is the non-obstante clause excluding the provisions of the Criminal Procedure Code in the context of the right of appeal granted by this section. It makes no limitation whatsoever by which it can be suggested that such a right is limited to the accused person alone and is not to be available to the prosecutor. Hence the prosecuting State has a statutory right and remedy by way of appeal under section 11(2) against the order passed under sections 3 and 4 of the Act. (Para 5)

Held, that revisional jurisdiction under section 439, Criminal Procedure Code, is discretionary. If the State which has a statutory right and remedy by way of appeal, does not exercise the same, it cannot be allowed to have resort to revision proceedings, both on general principles and also on the specific provisions of section 439(5) of the Code. (Para 5)

Case reported under section 438 of the Criminal Procedure Code, by O. P. Sharma, Additional Sessions Judge, Gurgaon, Camp at Narnaul with his letter No. 280 dated 19th August, 1968, for revision of the order of Shri R. C. Jain, Judicial Magistrate 1st class, Charkhi Dadri, dated 1st September, 1967 releasing the respondent on probation.

HARI MITTAL DISTRICT ATTORNEY, for the petitioner.

P. S. DAULTA AND V. G. DOGRA, ADVOCATE, for respondent.

INDERJIT SAYAL, ADVOCATE, for surety.

JUDGMENT

SANDHAWALIA, J.—(1) Whether the prosecuting State can move an appeal to the Court of Session against the judgment of the trial Magistrate passed under sections 3 and 4 of Probation of Offenders Act is the primary question which falls for determination in this criminal revision.

(2) Raghbir Singh respondent was brought to trial on a charge under section 9 of the Opium Act before the Judicial Magistrate, Ist Class, at Charkhi Dadri. Though in the first instance, the respondent had pleaded not guilty to the charge, however, during the course of the recording of the evidence of P.W. 1, he voluntarily offered to make a confession which was recorded. Basing itself on the plea of guilt, the trial Court recorded a conviction but for

reasons recorded in the judgment accorded the benefit of sections 3 and 4 of the Probation of Offenders Act to the respondent. Consequently he was directed to be released on furnishing a personal bond in the sum of Rs. 1,500 for a period of one year from the date of the order and further was directed to remain under the supervision of the District Panchayat Officer, Narnaul, for a period of one year.

(3) The State did not file any appeal against the order above-said but moved the Court of Sessions by way of revision for getting the order above-said set aside. The matter came up before the Additional Sessions Judge and for the reasons recorded, he has made the recommendation that the punishment awarded to the respondent should be enhanced to six months' rigorous imprisonment.

(4) The reasons given by the learned Additional Sessions Judge are not without considerable merit. However, an objection to the competency of these revision proceedings has been mainly pressed on behalf of the respondent by Mr. V. G. Dogra. It is argued that under section 11(2) of the Probation of Offenders Act, the State, if it felt aggrieved by the order of the trial Magistrate was entitled to file an appeal for challenging the same. Nevertheless it did not avail of this statutory remedy and moved the Court of Session by way of revision. It was hence contended that by virtue of the provisions of section 439(5) no revision was competent at the instance of a party who was entitled to file an appeal. Reliance on behalf of the respondent was placed on *Nongthombam Kanhai Singh v. Rajkumar Bhaskar Singh and another* (1) and *Arakhita Behera and others v. Bhikari Behera* (2).

(5) On behalf of the State Mr. Mittal has only faintly contended that the State was not entitled to file an appeal and hence the revision proceedings alone were competent. The relevant provision of the Probation of Offenders Act is in the following terms:—

“11. (1) notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other Court when the case comes before it on appeal or in revision.”

(1) A.I.R. 1964 Manipur 20.

(2) I.L.R. 1968 Cuttack 223.

The State v. Raghbir Singh (Sandhawalia, J.)

(2) Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the court to which appeals ordinarily lie from the sentences of the former Court.

(3) * * *

(4) * * *

* * *.”

The language of sub-clause (2) quoted above appears to be in unqualified terms. In the absence of any specific restriction, what particularly deserves notice is the non-obstante clause excluding the provisions of the Criminal Procedure Code in the context of the right of appeal granted by this section. It makes no limitation whatsoever by which it could be suggested that such a right was limited to the accused person alone and would not be available to the prosecutor. I deem it unnecessary to elaborate the matter further on principle as it appears to me to be fully covered by the decision of the Division Bench in *Baidanath Prasad v. Awadhesh Singh and others* (3). The Bench after a detailed examination of the rival contention went even further and held that apart from the prosecuting State even the complainant would be entitled to prefer an appeal in these circumstances. It has been laid down in the following terms :—

“In any view of the matter, since the language of sub-section (2) of section 11 is comprehensive, flexible and unrestricted as to the person who can prefer an appeal there is no justification for confining a right of appeal only to the convicted person or even to the State when the State is conducting the prosecution, but it must be taken that the privilege of filing an appeal on the narrow question of propriety of an action under section 3 or 4 of the Act is conferred upon the complainant as well.”

An identical view has also been expressed in *Nongthombam Kanhai Singh's case* (1). I am hence in respectful agreement with the views lucidly expressed by the Division Bench of the Patna High Court. It

(3) A.I.R. 1964 Patna 358.

follows, therefore, that in the present case the petitioning State of Haryana had a statutory legal remedy by way of appeal against the order of the trial Magistrate. It did not avail of that remedy and in such a situation the bar of section 439(5) of the Code of Criminal Procedure may well be attracted as has been laid down in *Arakhita Behera and others v. Bhikari Behera* (2). An argument was sought to be raised on behalf of the State that in the present case now the recommendation has been made by the Additional Sessions Judge, and this would exclude the attraction of the principle under section 439(b). An answer to this contention is well provided in the order of Chief Justice R. L. Narasimham in *The State v. K. Lachman Murty and another* (4), where repelling such a contention he laid down as follows :—

“The question ultimately turns on this; who is the person who has set the provision of the Code in motion for the purpose of interfering with the order of acquittal? If that person happens to be one of the parties to the judgment, it is immaterial whether that party moved the High Court direct, or through the Sessions Judge or the District Magistrate, as the case may be.”

It is undisputed that the revisional jurisdiction under section 439, Criminal Procedure Code, is discretionary. The petitioning State which had a statutory right and remedy by way of appeal had not exercised the same. On general principles and also on the specific provisions of section 439(5) a party who has a right of appeal cannot be allowed to have resort to revision proceedings. I am hence disinclined to interfere at the instance of the State in the present case and would consequently decline the reference.

B. S. G.

(4) A.I.R. 1958 Orissa 204.