IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.23 of 2023

Arising Out of PS. Case No.-25 Year-2021 Thana- MAHILA PS District- Aurangabad

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Farid Khan, S/o Manjurulahak Khan, R/o Bantara, P.S.- Deokund, Distt- Aurangabad.

... ... Appellant

Versus

1. The State of Bihar
2. [redacted] Vill.- Bantara, P.S.- Devkund, Dist.- Aurangabad.

... ... Respondents

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Appearance :

For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mr. Prince Kumar Mishra, Advocate
Ms. Priyanka Kumari, Advocate

For the State : Mr. Abhimanyu Sharma, Addl.PP

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SOURENDRA PANDEY

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 07-10-2025

Heard learned counsel for the appellant and learned Additional Public Prosecutor for the State.

2. Despite service of notice on informant-Respondent No.2, she has chosen not to appear through any Advocate to contest this appeal.

3. This appeal has been preferred for setting aside the judgment of conviction dated 17.11.2022 (hereinafter referred to as the ‘impugned judgment’) and the order of sentence dated 21.11.2022 (hereinafter referred to as the ‘impugned order’)

passed by learned Additional District and Sessions Judge-cum-Special Exclusive Judge, POCSO, Aurangabad, Bihar (hereinafter referred to as the 'learned trial court') in G.R. POCSO and CIS No. 45 of 2021 arising out of Aurangabad Mahila P.S. Case No. 25 of 2021.

4. By the impugned judgment, the appellant has been convicted for the offences punishable under Section 376AB of the Indian Penal Code (in short 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act (in short 'POCSO Act'). By the impugned order, he has been ordered to undergo rigorous imprisonment for twenty years with a fine of Rs.10,000/- under Section 4 of the POCSO Act and in default of payment of fine, he shall undergo simple imprisonment for twelve months.

Prosecution Case

5. The prosecution case is based on the written application of the stepmother of the victim. In her written application (Exhibit '2'), the informant has alleged that her stepdaughter 'X' aged about ten years was living in village Bantara with her own maternal uncle (the appellant) aged about 55 years. It is alleged that her maternal uncle was sexually exploiting the victim 'X' for several months but the victim was not disclosing it to her being afraid of him. She has further alleged that when she

came to know about this from her daughter then the appellant started threatening her and her daughter to kill. She came to the police station with her daughter (X) and submitted the written application (Exhibit ‘2’) on 22.07.2021.

6. On the basis of the written application of the informant, Aurangabad (Mahila) P.S. Case No. 25 of 2021 dated 22.07.2021 was registered under Sections 376(AB) and 506 IPC as well as under Section 4 of the POCSO Act against this appellant. After investigation, Police submitted chargesheet bearing Chargesheet No. 30 of 2021 dated 376(AB)/506 IPC and Section 4 of the POCSO Act against the appellant. Thereafter, learned Special Judge vide order dated 29.09.2021 took cognizance of the offences punishable under above-mentioned Sections.

7. Charges were read over and explained to the appellant in Hindi to which he pleaded not guilty and claimed to be tried. Accordingly, vide order dated 17.11.2021, charges were framed under Sections 376 and 506 IPC and Section 4 of the POCSO Act.

8. In course of trial, the prosecution examined as many as six witnesses and exhibited several documentary evidences. The names of the prosecution witnesses and the exhibits are being shown hereunder in tabular form:-

List of Prosecution witnesses

PW-1	Victim
PW-2	Mother of the Victim
PW-3	Maternal Uncle of the Victim(Mausa)
PW-4	Maternal Uncle of the Victim (Mama)
PW-5	Dr. Anshu Priya
PW-6	Radha Kumari (I.O.)

List of Exhibits on behalf of Prosecution

Exhibit ‘1’	Signature of the victim on 164 CrPC statement
Exhibit ‘2’	Writing and Signature on the written application
Exhibit ‘3’	Medical Examination Report of the Victim
Exhibit ‘4’	Writing and Signature on the Formal FIR
Exhibit ‘5’	Writing and Signature of the endorsement on written application
Exhibit ‘6’	Identity Card of the Victim
Exhibit ‘7’	Aadhar Enrollment Certificate

9. Thereafter, the statement of the appellant was recorded under Section 313 of the CrPC. He took a plea that he is innocent and has been falsely implicated in this case due to land dispute and demand of Rs.30,000/-. The defence examined two witnesses but has not adduced any documentary evidence. List of defence witnesses is mentioned in tabular form hereunder:-

List of Defence Witnesses

DW-1	Maternal Uncle of the Victim
DW-2	Co-villager of the Victim

Findings of the Learned Trial Court

10. Learned trial court, after analysing the evidences available on the record found that the accused has committed rape upon the victim by putting *dupatta* in her mouth. Learned trial court found that the statement of the victim has been supported by the mother of the victim (PW-2) as well as PW-4 and PW-5.

11. Learned trial court found that the Doctor (PW-5) has assessed the aged of the victim between 16-17 years at the time of examination of the victim. PW-5 has stated that sexual assault cannot be denied and in the medical examination, it has been found that the victim has undergone sexual intercourse for more than one time. Learned trial court found that the victim has been sexually assaulted by her maternal grandfather (appellant).

12. Learned trial court, after considering the direct and documentary evidences available on the record, came to a conclusion that the prosecution has proved it's case beyond all reasonable doubts and accused has been failed to rebut the presumption under Section 29 of the POCSO Act. Hence, learned trial court found and held the appellant guilty for the offence punishable under Section 376-AB IPC and Section 4 of the POCSO Act.

Submissions on behalf of the Appellant

13. Learned counsel for the appellant submits that there is a delay in lodgement of FIR, which remains unexplained, and the FIR does not mention the specific date, time and place of occurrence which casts serious doubt on the very basis of the prosecution case. It is further submitted that the statement of the victim recorded under Section 164 Code of Criminal Procedure (in short 'CrPC') is different than the version as stated in FIR, further the medical report does not corroborate with alleged occurrence.

14. It is submitted that there has been non-examination of certain crucial witnesses, which has seriously affected the prosecution case. Likewise, the neighbours of the informant, who were specifically named in various depositions and could have been important independent witnesses to corroborate the occurrence, were also not examined. Learned counsel submits that it is important to note that not a single independent witness has been produced by the prosecution.

15. Learned counsel submits that no clothes of the victim, allegedly worn at the time of the incident, were ever seized or subjected to forensic examination. Moreover, the appellant was

not medically examined as mandated under Section 53A of the CrPC, which is a statutory requirement in cases of this nature.

16. With regard to the ocular testimony of the victim, learned counsel submits that her version suffers from serious inconsistencies. The manner of occurrence as deposed by the victim is materially different from what was alleged in the FIR as well as in the statement of the informant. It is significant that she did not disclose any date, time or manner. Furthermore, there are evident improvements in her deposition when compared with her statement recorded under Section 164 CrPC. The informant has been confronted about the money transaction and monetary dispute, which was denied but not justified and disproved.

17. These material contradictions, omissions and admissions create serious doubt about the veracity of her testimony, the prosecution has failed to corroborate the case beyond reasonable doubt, the impugned judgment is bad and non-sustainable in the eyes of law.

18. It is submitted that the appellant is cousin maternal uncle of the informant with whom the informant was pursuing for share of her mother in the ancestral land as per Muslim Custom. The younger son of the appellant had given Rs. 30,000/- to the

informant for studies of her son which he was demanding. For all these reasons, the appellant has been framed in this case.

Submissions of the State

19. This appeal has been contested by learned Additional Public Prosecutor for the State. Learned Additional Public Prosecutor for the State submits that in this case the learned trial court has properly analysed the evidences of the prosecution witnesses and rightly convicted the appellant for the offences. Learned Additional Public Prosecutor for the State submits that the impugned judgment needs no interference.

Consideration

20. Having heard learned counsel for the appellant and learned Additional Public Prosecutor for the State as also on perusal of the trial courts records, we have found that in this case the FIR has been registered on the basis of a written information submitted by the stepmother of the victim girl who has been examined as PW-2. In her written application (Exhibit ‘2’), PW-2 has alleged that her stepdaughter ‘X’ aged about ten years was living in her village Bantara with her own maternal uncle (the appellant) aged about 55 years. PW-2 has alleged that her maternal uncle was sexually exploiting the victim ‘X’ for several months but the victim was not disclosing it to her being afraid of him. She

has stated that when she came to know about this from her daughter then the appellant started threatening her and her daughter to kill. She came to the police station with her daughter (X) and submitted the written application (Exhibit ‘2’).

21. On perusal of Exhibit ‘2’, it appears that the same has been written by Shakil Ahmad Khan (PW-3) who is the husband of the elder sister of the informant (PW-2).

22. It is evident from Exhibit ‘2’ that the age of the victim ‘X’ has been disclosed as ten years. The victim was examined under Section 164 CrPC before a learned Magistrate, her statement under Section 164 CrPC is available on the record but only signature of the victim girl ‘X’ has been marked Exhibit ‘1’ thereon. The learned Magistrate who recorded her statement has not been examined in this case. We have noticed on going through the statement under Section 164 CrPC that the learned Magistrate has simply recorded that he had asked few basic questions to the victim to test her mental ability and voluntariness and after getting satisfied, her statement was recorded. The kind of questions put to the victim has not been recorded by the learned Magistrate.

23. We have further noticed that in her statement under Section 164 CrPC, the victim has disclosed for the first time the place of occurrence which is said to be the ‘Gaushala’. According

to her, the accused used to take her to the house in which cows are kept and sometimes he was also taking her to the orchard to commit wrong act with her. She alleged that after committing wrong act he used to give her 10-20 rupees and in the name of taking her on a visit, he had taken her to Gaya where she was kept in a house for the whole night.

24. As regards the age, the prosecution has not brought any evidence on the record. The victim (PW-1) has stated in paragraph '11' of her deposition that she was studying in Class V in a school but she was not aware of the date of birth recorded in the school. She did not remember her age when she was admitted in the school. The I.O. (PW-6) had not collected any evidence with regard to the age of the victim. She had not even recorded the statement of the brother and sister of the victim, though, according to PW-2, they were residing in the same house. In absence of any date of birth certificate from the school first attended by the victim (X), the only document which remains on record with regard to the age of the victim is the medical examination report (Exhibit '3') and (Exhibit '3/1') which have been proved by the doctor Dr. Anshu Priya (PW-5). In her statement, the doctor has stated that a Medical Board was constituted by Dr. Vikash Kumar, D.S., Sadar Hospital, Aurangabad. The Members of the Board were Dr. Anshu

Priya, Dr. S.M.S. Maqbool and Dr. Mukesh Kumar. The general examination of the victim showed that she was average built, was afraid at the time of examination and not answering properly each question. There was no injury over back, lips, hands and thigh. The local examination revealed that labia majora and minora were intact. No urethral injury. No anal injury, hymen ruptured, introitus admits two loose finger. The Board also conducted dental examination of the victim (X) and in this regard the report given by Dr. S.M.S. Maqbool showed 14/14, 28 teeth present and on the basis of the dental examination, the Board Members decided that the age of the victim girl was approximately 16 to 17 years old. In her cross-examination, PW-5 has stated that the hymen of the victim was not recently ruptured. There was no sign and symptom of recent sexual intercourse with the victim. She has deposed that hymen may be ruptured due to several type of injury. In paragraph ‘16’ of her deposition PW-5 has stated that the report suggests two loose finger admits which means she had undergone to sexual intercourse more than one time. She has stated that if any forceful sex is committed then there would be chances of injury sustained on the body of the victim. In paragraph ‘12’ of her deposition she has stated that 28 teeth in the mouth may be found in a person of age of 19 to 20 years.

25. We have noticed from the evidence available on the record that the trial court has not determined the age of the victim in this case. Learned counsel for the appellant has placed before us the judgment of the Hon'ble Delhi High Court in case of **Court on its own Motion vs. State of NCT of Delhi vs. State of NCT of Delhi (Crl. Ref. 2/2024 judgment dated 02.04.2024) reported in 2024 SC OnLine Delhi 4484** and the judgment of Hon'ble Supreme Court in case of **Rajak Mohammad vs. State of H.P.** reported in **(2018) 9 SCC 248** to submit that as regards determination of age of the victim, the judicial pronouncements on the subject have made it clear that plus/minus two years is required to be given to the age assessed by a doctor in medical examination. In such circumstance, the upper extremity of the age of this victim would be about nineteen years. This is what has been suggested by the defence to PW-1 specifically in course of her cross examination in paragraph '35' of her deposition. We find much force in the submissions of learned counsel for the appellant. In this case, in view of the settled judicial pronouncements on the subject, we have no hesitation in recording that the prosecution has failed to prove the basic fact as to the age of the victim in order to bring this case in the ambit of the POCSO Act. The medical age as

assessed if considered along with the judicial pronouncements on the subject, the victim would be found major.

26. We have also noticed that regarding the place of occurrence the prosecution case is quite inconsistent. While in the written information (Exhibit '2'), the place of occurrence has not been disclosed, in 164 CrPC statement, the victim has stated that she was being subjected to wrong act in *gaushala* and in orchard but when she deposed in course of trial, she has stated that while she was trying to pluck the mangoes in the orchard, the wrong act was committed with her. She has not stated in her examination-in-chief that she was subjected to any wrong act either in the *gaushala* or in the house of the appellant. She has stated that the appellant had taken her on a visit to Gaya but except that no other occurrence had taken place. In her cross-examination, she has stated that the appellant was committing wrong act with her every day only in the orchard in the afternoon and nowhere else. The informant (PW-2) has, however, stated in her evidence that the appellant was committing wrong act with PW-1 in his *gaushala* but when the I.O. (PW-6) went to verify the place of occurrence, she was given a different place of occurrence and this time it is said to be the house of the appellant. In paragraph '5' of her deposition, the I.O. (PW-6) has stated that the place of occurrence

of this case is the house of the appellant. We, therefore, find that the prosecution is totally inconsistent and vacillating even with regard to the place of occurrence.

27. This Court has noticed that in course of trial the victim has been examined as PW-1. Her age is recorded as ten years in the deposition but the trial court has not at all tested her competence as required in case of a child witness. In the case of **P. Ramesh vs. State represented by Inspector of Police** reported in **(2019) 20 SCC 593**, the Hon'ble Supreme Court has reiterated the test which is required to be conducted in order to examine the competence of a child witness. We reproduce paragraphs '13' to '16' hereunder for a ready reference:-

> "**13.** Section 118[3] of the Evidence Act, 1872 deals with the competence of a person to testify before the court. Section 4[4] of the Oaths Act, 1969 requires all

3. "**118.** ***Who may testify***.—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

4. "**4.** ***Oaths or affirmations to be made by witnesses, interpreter and jurors***.—(1) Oaths or affirmations shall be made by the following persons, namely:
(*a*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;
(*b*) interpreters of questions put to, and evidence given by, witnesses; and
(*c*) jurors:
Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.
(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties."

witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The rule was stated in *Dattu Ramrao Sakhare* v. *State of Maharashtra*[5], where this Court, in relation to child witnesses, held thus : (SCC p. 343, para 5)"

> "*5*. … A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in *Wheeler* v. *United States*[6], wherein it was held thus : (SCC OnLine US SC para 5)

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5 (1997) 5 SCC 341 : 1997 SCC (Cri) 685]

6 1895 SCC OnLine US SC 220 : 40 L Ed 244 : 159 US 523 (1895)

> "*5*. … While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. *This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath*. As many of these matters cannot be photographed into the record the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous." (Emphasis supplied)

15. In *Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat*[7], this Court held thus : (SCC pp. 67-68, para 7)

> "*7. … The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of*

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7 (2004) 1 SCC 64 : 2004 SCC (Cri) 7. Subsequently, relied upon in Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565 : (2009) 1 SCC (Cri) 454

the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness." (Emphasis supplied)

16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (*i*) understand questions put as a witness; and (*ii*)

> give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto.[8] A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner[9]. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

28. We have also noticed that in paragraph '21' of her deposition PW-1 has stated that she had not shown the place of occurrence to Daroga Ji, her mother had shown the place of occurrence but after how many days the place of occurrence was shown was not known to PW-1. She remained silent on this question. She did not remember that after how many days of the occurrence she had met Daroga Ji and she also did not remember that at which place Daroga Ji had interrogated her. This witness was suggested by the defence that the appellant, who is the maternal grandfather of the victim, had a land dispute with the

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8 *Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat*, (2004) 1 SCC 64 : 2004 SCC (Cri) 7

9 Sarkar, *Law of Evidence*, 19th Edn., Vol. 2, Lexis Nexis, p. 2678 citing *Director of Public Prosecutions* v. *M*, 1998 QB 913 : (1998) 2 WLR 604 : (1997) 2 All ER 749 (QBD)

stepmother of the victim, this witness said that her stepmother had never told her about any land dispute between the appellant and her stepmother.

29. This Court has further noticed from the evidence of PW-2 that the victim is said to be mentally weak. PW-2 herself says so in her deposition. If it is so, it was all the more incumbent for the prosecution to disclose it at the outset so that her mental condition could have been examined by a doctor before recording of her deposition. This has to be understood with reference to the observations of the learned trial court as recorded in paragraph '31' of the deposition of the victim (PW-1) where the trial court had noticed that the victim used to laugh like a child and sometimes was doing some act which were not normal.

30. We have also noticed that in this case PW-2 had first gone to Devkund Police Station with her full brother Ayyaz Hassan (PW-4). There an application was written and the same was submitted on which signature of her brother Ayyaz Hassan was also taken along with her signature. She has stated in paragraph '11' of her deposition that she along with her brother Ayyaz Khan and one lady Constable had gone to Mahila Police Station from Devkund Police Station but in paragraph '12' of her

deposition she has stated that she had got written second application in Mahila Police Station through her brother-in-law Shakil Ahmad (PW-3). About her first application, which was brought by the lady Constable from Devkund Police Station to Mahila Police Station, she has stated that she can file the same but in course of trial she did not bring it on record. It is thus an admitted position in this case that the first application which was written and submitted in Devkund Police Station has been later on withheld by the prosecution. The defence has suggested in paragraph '13' of the deposition of PW-2 that in the first application the name of this appellant was not written and there was no allegation of rape, therefore, the same has been withheld. To this Court, therefore, it appears that suppression of the first version of the prosecution case would prove fatal to the prosecution and the very authenticity and genuineness of the First Information Report of this case would become doubtful and blemished.

31. We have also noticed that in this case, the defence has examined two witnesses. DW-1 is Nasir Khan who is the eldest son of the appellant. He has given evidence in consonance with the pattern of cross-examination on behalf of the defence. He has stated that how and for what reason the present case has been

lodged. He has brought the proof of payment of Rs. 30,000/- by the youngest son of the appellant to the son of the informant (PW-2) to help him in his studies and it has come in his evidence that on demand of the said money back, the informant falsely implicated this appellant who is the brother of the mother of the informant and this has also been done because she was looking for a share in the property with the appellant, through her mother. In this regard, the evidence of the former Mukhiya (DW-2) is also on the record. The trial court has apparently missed out on all these defence evidences which were required to be equally considered.

32. On overall analysis of the entire evidence on the record, we find that in this case, the prosecution has not only failed to prove the basic foundational facts to attract Section 29 of the POCSO Act, the accused has been able to demonstrate the contradictions and material inconsistencies in the prosecution evidence as also by bringing defence evidence on the record that the prosecution case cannot be said to be beyond all reasonable doubts. The presumption of innocence still remains even in the cases under the POCSO Act and we are of the opinion that the trial court has committed grave error in convicting the appellant on the strength of the materials on the record.

33. In result, we set aside the impugned judgment and order of the learned trial court and acquit the appellant, giving him benefit of doubt.

34. The appellant is said to be in custody, hence he is ordered to be released forthwith, if not wanted in any other case.

35. The appeal is allowed.

36. Let a copy of the judgment along with the trial court records be sent down to the learned trial court.

(Rajeev Ranjan Prasad, J)

(Sourendra Pandey, J)

Rishi/-

AFR/NAFR	
CAV DATE	
Uploading Date	10.10.2025
Transmission Date	10.10.2025