National Law University Delhi

Litigating Death Penalty Cases: A Consultation

Centre On The Death Penalty

Background Material

Agenda Note

The Centre on the Death Penalty has been litigating death penalty cases and conducting research around issues of the criminal justice system for the past four years. During the course of our work, we have encountered several significant issues that require the attention of the bar and the bench. This consultation brings together lawyers to reflect and deliberate on the criminal justice system and the administration of the death penalty, informed by our practice in the Supreme Court and High Courts, and also our experience in research projects on mental health, trial court sentencing and judges' attitudes towards the death penalty. The consultation is divided into the following four sessions:

Procedural and evidentiary issues in criminal litigation (Pages 2 to 12)

The first session deals with procedural and evidentiary issues in death penalty cases. Increasingly, convictions in death penalty cases use complex scientific evidence such as DNA, blood group analysis and electronic evidence. However issues such as the chain of custody, exemption to experts from testifying under Sec. 293 CrPC and the possibilities of tampering and planting of evidence remain unaddressed. The session also covers the practical aspects of litigating death penalty cases such as prison regulation and access and our experiences in light of the law on compulsion and the protection against self-incrimination.

Sentencing in death penalty cases (Pages 12 to 17)

The second session covers sentencing issues including the role of mitigation. The understanding of 'rarest of rare' in Indian cases is often contrary to the original meaning assigned to it in Bachan Singh. While the law requires circumstances of both the "crime" and "criminal" to be considered, often cases focus mostly on the crime. Factors related to the "criminal" are inconsistently applied. This session also discusses preliminary findings from the Judges Opinion Study and the Trial Court Sentencing Research Project being conducted by the Centre.

Mitigation in Death Penalty Cases (Pages 18 to 23)

The third session builds upon a comparative analysis of the process of mitigation in India and the United States. Recent directions of the Supreme Court and certain High Courts outlining the duty of the defense counsel during the sentencing stage have informed the steps undertaken by the Centre in building a practise of mitigation, with the aid of two mitigation investigators, who will be leading the session. Challenges faced in conducting a thorough mitigation investigation, and the role of the 'mitigation investigator' as a part of the defense team in death penalty cases are sought to be highlighted and solutions discussed. Through various instances faced and addressed in our work on mitigation, the session seeks to deliberate upon the path forward to ensure all mitigating circumstances are presented to courts.

Mental Health and Criminal Trial (Pages 24 top 33)

The final session covers issues of mental health vis-a-vis death penalty in India. The Supreme Court has acknowledged the importance of the mental health condition of the accused in its sentencing jurisprudence. However, jurisprudence is still underdeveloped in understanding mental health. Courts have also rarely looked into the intellectual functioning and cognitive development of the prisoner. This session aims to discuss the relevance of expanding the meaning of mental health beyond formalised categories in the context of mitigation in death penalty sentencing.

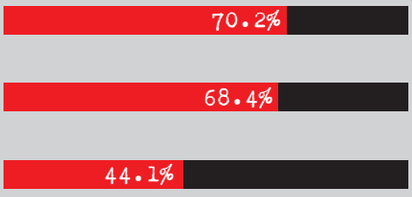
Access to Legal Representation

LAWYER-CLIENT INTERACTION

An overarching concern in virtually each death sentence case is the absence of lawyer-client meetings. The Death Penalty India Report (2016) observed that while in some cases private lawyers met the accused, it was most often only fleetingly in court and not in jail and nothing substantive was discussed. It was indeed shocking to find that in cases where the maximum sentence known to law is a very real possibility, there is minimal lawyer-client interaction.

American Bar Association: Guidelines for the Appointment And Performance Of Defense Counsel In Death Penalty Cases

Guideline 10.5:Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.



Prisoners, their trial court lawyers did not discuss their case details with them.

Prisoners never interacted with or even met their High Court lawyers.

Prisoners did not know the names of the lawyers representing them in the Supreme Court.

However these meetings are vital to obtain instructions. Many times the clients maybe incapable of giving coherent instructions and their competence to stand trial may have to be evaluated. The importance of meeting clients and its consequences for mental health evaluation was noted by the Supreme Court in *Durga Domar v. State of M.P.*[1] In this case, the accused was indigent and was represented by legal aid lawyers. The Supreme Court observed that the accused "perhaps, had no occasion to communicate to his counsel and consequently the counsel who had defended the case would not have had any occasion to ascertain the mental disposition of the accused either at the relevant time or during the succeeding periods. As this is a case where he is sentenced to death our judicial conscience compels us to get a medical report regarding his mental condition."

The client's version of the case needs to be factored in the defence arguments. Many facts which might not be on record but are nevertheless relevant for understanding the case are revealed during such interactions. In one case we handled, the High Court had sentenced the convict to death on the basis of circumstantial evidence. One of the circumstances against accused was the fact that "on the fateful night, the accused/appellant was the only male member in his house…[and] the possibility of entry by some stranger in the house of the accused/appellant is not there."

During a meeting with the accused it was revealed that the house he lived in was a single storeyed building and some outsider could easily scale the walls. A visit to the house confirmed these facts and gave us a much clearer picture of the location of the rooms in which the offence had taken place. This directly impacted the arguments advanced in the Supreme Court, which acquitted the accused and held that "The site map Ext.P-25 shows the house to be a single storey structure with a verandah and court-yard open to sky. Though the door of the house which opened in the *gali* was stated to have been bolted from inside, the rooms were not locked and the possibility of a person/persons other than the inmates of the house getting into the house cannot be ruled out."

[1](2002) 10 SCC 193

Without meeting the client and visiting the scene of crime, this argument could not have been advanced only by reading the case records. The accused is free today and leads a productive life working at a hospital.

Important mitigating factors can be elicited during interactions with the client which have to be presented during sentencing.[2] Clients can also be kept updated of the status of their cases in these meetings. Often prisoners who are literate and want to read their case records also cannot do so as they do not have access to the same. Furthermore, in our experience most clients are unable to accurately recall all information in the first meeting. It also takes multiple meetings for the clients to be able to trust the lawyers and communicate difficult and sometimes embarrassing facts about their case. Hence meeting clients regularly becomes especially important in death sentence cases.

It is especially problematic when defence counsel concede arguments without instructions. It is necessary that all legal arguments which are possible should be considered and no grounds except upon express instruction should be given up. In 2015 alone, several cases were decided wherein the Supreme Court passed the death sentence on the concession of the counsel appearing for the convict on the point of conviction. These factors severely prejudice the prisoner when seeking relief in an open court review hearing which is now a matter of right in death sentence cases according to the Constitution Bench decision in *Mohd. Arif v. Registrar, Supreme Court.*[3]

Another aspect in death penalty cases which requires specific instructions arises during sentencing. After the judgment in *Union of India v. V Sriharan*[4] the Supreme Court or the High Court can substitute the death sentence with imprisonment for life, or imprisonment in excess of 14 years, and put that category beyond the application of remission. In our experience some clients are unable to cope with the thought of having to spend their entire lives in prison and would rather face the death penalty. While it may not be an option for the accused to seek a particular sentence, as defence counsel we need to finely calibrate our sentencing arguments in a manner consistent with client instructions.

Why do lawyers not meet their clients in death penalty cases?

There are several reasons why lawyers would be reluctant to meet prisoners in jail.

- Fixed prison 'mulakat' timings which overlap with court timings.
- Some prisons have a rule which requires that information be given the previous day for a meeting with a prisoner or within a particular time (eg. before 8 a.m. while the 'mulakat' will only take place after 10 a.m.).
- The case may be going on in a place far away from where the prisoner is lodged.
- Death row prisoners are lodged in high security wards and not brought for interviews in time.
- No separate fees are provided for meeting the client. In many cases where private representation was available, it was seen that fees are charged lump-sum and not itemised or on a per appearance basis.
- Meetings are mostly unsatisfactory as there is wire mesh/bars between the prisoner and the lawyer or the room is noisy and involves a lot of waiting.
- Meetings usually are very limited and no more than 10 minutes a week may be given.

[2]See the section "Mitigation in death penalty cases".
[3](2014) 9 SCC 737
[4](2016) 7 SCC 1

Attorney Client Privilege

Another major hindrance to interacting with prisoners is the complete disregard for privacy and the privileged nature of communication. The prison manuals of various states, and now even the Model Prison Manual, 2016 expressly empowers the Superintendent to discontinue interviews. Only "private and domestic matters" are supposed to be discussed during prisoner interviews. In most interviews there are prison officials within earshot making it impossible for prisoners to report issues of maltreatment by prison officials. This atmosphere of surveillance affects the ability of prisoners to openly communicate during the interview. Also, all letters sent to and by prisoners are required to be censored. This leaves no adequate avenue for honest, direct and confidential communication between lawyers and their clients in prison.

A. PRE-TRIAL LEGAL REPRESENTATION

Article 22 of the Constitution, and section 41D CrPC recognise the right to meet a lawyer during interrogation. However, the Supreme Court has held that the State is obligated to provide a lawyer free of charge to an indigent accused, from the time they are first presented before the Magistrate.[6] However, despite these legal safeguards, representation at the pre-trial stage is very rare.

The consequences of not having a lawyer at the pre-trial stage are grave, as the prosecution's case is made significantly during this time with little to no objection to procedural violations. Under section 167 of the CrPC, a person arrested can be kept in police remand for no more than 15 days, and judicial remand for no more than 60 or 90 days, as the case may be. Significantly, in the first 15 days of arrest a person can be alternated between police and judicial custody upon orders of the magistrate, but on the expiry of 15 days, a person can only be detained in judicial detention.[7] Further, while the outer limits of the extent of remand permissible in law are provided under the section, it can only be granted once the prosecution provides sufficient explanation for seeking further time to investigate to the satisfaction of the court. The Supreme Court has reiterated time and again that in the case of police remand, it is an exception to the rule of judicial remand and must hence be allowed only in special circumstances for reasons judicially scrutinised and for such limited purposes only as the necessities of the case may require.[8] However, remand periods are extended routinely without the prosecution discharging the burden of establishing adequate grounds for why they require a person to be in remand, or court making sufficient enquiry to this effect. Cyclostyled remand orders from courts are a telling sign of the non-application of mind in extending remand.

In the absence of defense counsel, accused are often left with no means of challenging remand orders, and other procedural violations in the course of investigation. It is during this stage that the accused is interrogated and the case built by collection of samples for forensic testing, effecting recoveries under section 27 of the Indian Evidence Act, recording confessions etc. It is also at this stage that production before the Magistrate and medical examination are conducted. These are crucial stages to allege custodial torture or raising other issues about conditions of confinement. The absence of pre-trial representation irreparably harms the accused as police custody is routinely granted resulting in excesses in police custody.

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[5]See Model Prison Manual 2016, Chapter VIII : Contact with the outside world. available at: http://www.bprd.nic.in/WriteReadData/CMS/PrisonManualNew.pdf.
[6]Hussainara Khatoon & Ors (IV) v. Home Secretary, State of Bihar, Patna (1980) 1 SCC 98, paragraph 7; Khatri & Ors v. State of Bihar (1981) 1 SCC 627, paragraph 5; Mohammad Ajmal Mohammad Amir Kasab v. State of Maharashtra (2012) 9 SCC 1, paragraph 474.
[7]*CBI v. Anupam Kulkarni*, 1992 (3) SCC 141, para 13.
[8]*Satyajit Desai v. State of Gujarat*, (2014) 14 SCC 434, para 9.

__[redacted] Court

PS Case No. ____ dated __/__/2013

u/s 376/302 IPC

Heard both sides on the prayer of the I.O. who prays for police remand of all accds. namely

(i) ____[hand-written name]
(ii) ____[hand-written name]
(iii) ____[hand-written name]

for ___[handwritten number] *days. Heard. also on the bail petition filed by the accd(s) the allegation against the accused/ accused person(s) is U/s __/__/__/__/ of I.P.C. read with Section _____if the ____ Act.*

Heard the U.O. in box.

Perused the C.D. and the materials on record.

It is submitted by the I.O. that there is every change of recovery and also the improvement in the investigation.

Considering the nature of allegation and to detect the mastermind of the crime the prayer of the I.O. for P.C. as duly recommended by the superior officer is allowed for __[handwritten number] *days*

To __.__[handwritten numbers] 2012 for production of the accd. Person(s) from P.C. along with C.D.

The I.O. is directed not to inflict any kind of oppression either physical or mental upon the accd(s) during the P.C. and he is also directed to cause regular medical check-up of the accd. person(s) by the Govt. Medical officer on each interval of 48 hours and to collect the said medical papers and documents and to submit the same at the time of return.

In the facts and circumstances and considering the stage of investigation the prayer for bail is rejected.

Let a copy of this order by given to the I.O. for strict compliance.

A copy of this order be sent to the Court of ld. C.J.M., __[redacted] for his kind information.

Return the C.D.

To date.

Dict. And corrected by me.

C.J.M.

Signed.

Pre-typed remand order in the absence of a lawyer, rejecting a bail application which was never filed.

The first proviso to section 164 of the CrPC contemplates the presence of an advocate on behalf of the accused during the recording of a judicial confession. However, in the routine recording of judicial confessions, this and other safeguards under the provision are rarely followed in spirit. Additional safeguards have been established through judicial pronouncements interpreting this section to determine the voluntariness and veracity of statements so recorded. Confessions recorded after prolonged police custody,[9] delay in recording statements after the expression of the accused's interest to confess,[10] non-transference of the accused from police to judicial custody prior to the recording,[11] presence of police personnel at the time of recording the statement,[12] are some of the circumstances considered to militate against the "voluntariness" of judicial confessions.

Magistrates recording statements under section 164 of the CrPC are required to assess the circumstances under which the accused is making the confession,[13] and are severely curtailed by the absence of a defense counsel. The magistrate's determination of the voluntariness of a statement made is crucial, as otherwise, the bar under section 24 of the Indian Evidence Act will be attracted. Often it is only after the trial begins and the accused finally has access to a counsel is the compulsion behind the confession brought to light in the form of retraction statements. However, despite the burden of proving the voluntariness of a confession being on the prosecution, retraction statements are easily dismissed by courts for being merely an afterthought.[14] Further, delay in making retraction statements is read against the accused, whose opportunity to explain the circumstances of the confession under section 313 of the CrPC, for instance, is rendered meaningless.

Proving Compulsion & Self Incrimination

Article 20(3) states that no person accused of any offence shall be compelled to be a witness against himself. The rule against self-incrimination is entrenched as a fundamental tenet of fair trial guarantees and is recognised in the International Covenant on Civil and Political Rights. (Article 14(3)(g)). The Supreme Court in *State of Bombay v. Kathi Kalu Oghad*[15] while upholding the constitutionality of section 27 of the Indian Evidence Act held that a statement admissible under section 27 is not hit by Article 20(3) "unless compulsion had been used in obtaining the information." The ruling in *Selvi v. State of Karnataka*[16], clearly extends the bar on admissibility to confessions as also real evidence obtained from confessions.

Absence of admissibility challenges

Despite the constitutional protection under Article 20(3), and the combined effect of sections 24, 25 and 26 of the Indian Evidence Act on the manner of treating evidence obtained during police custody, challenges to admissibility of evidence on the ground of it being obtained through compulsion are rarely made. This is despite the fact that numerous studies have found that custodial torture is a common practise.[17]

97% Prisoners did not have a pre-trial lawyer as per Death Penalty India Report.

82.6% Prisoners claimed they were tortured.

78.3% Prisoners said they had confessed in police custody.

[9] *Nathu v. State of U.P.*, AIR 1956 SC 56, para 6.
[10] *Babubhai v. State of Gujarat*, (2006) 12 SCC 268, para 5-8.
[11] *Mohd. Jamil Nasir v. State of West Bengal*, (2014) 7 SCC 443, paras 27-30.
[12] *Dara Singh v. Republic of India*, (2011) 2 SCC 490, para 64.
[13] *Rabindra Pal v. Republic of India*, (2011) 2 SCC 490, para 64 and *Mohd. Jamiludin Nasir v. State of WB*, (2014) 7 SCC 443, para 21.
[14] For discussion on circumstances to be considered in accepting a retraction statement, see *Shankaria v. State of Rajasthan*, (1978) 4 SCC 453 and *State of Tamil Nadu v. Kutty*, (2001) 6 SCC 550.
[15] (1962) 3 SCR 10
[16] (2010) 7 SCC 263
[17] Malik, Saurabh. "Torture main reason of death in police custody". The Tribune. Archived from the original on 31 March 2009. Available at: <https://web.archive.org/web/20090303182313/http://www.tribuneindia.com/2007/20070313/punjab1.htm> Retrieved 01.11.2017; Asian Centre for Human Rights, "Torture in India 2011". Available at: http://www.achrweb.org/reports/india/torture2011.pdf; Human Rights Watch, '"Bound by Brotherhood" India's failure to end killings in police custody', available at: https://www.hrw.org/sites/default/files/report_pdf/india1216_web_0.pdf.

Proving Compulsion

In *Oghad*[18] the Supreme Court refused to draw an inference about all custodial statements, and held instead that it would be "open to an accused person to show" compulsion, virtually placing the burden of proof on the accused. However, the accused usually has no access to a lawyer or her family, and she cannot report or document the conditions of her detention. In this situation it is virtually impossible for the accused to prove that she was 'compelled to be a witness against herself.'

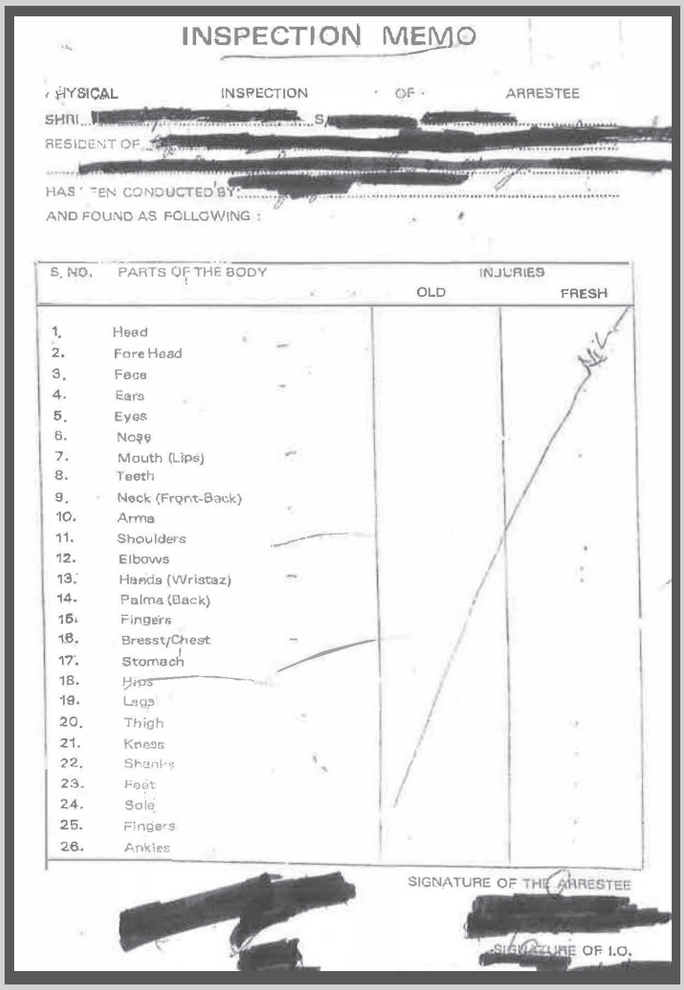
The absence of a lawyer and consequent violation of legal safeguards should be argued to be a relevant factor in assessing whether an accused was compelled. The existing documentation during police custody eg. medical examination reports should be sought and closely scrutinised for evidence of compulsion.

All pre-trial applications and other documents which may not be exhibited, must be sought for and closely scrutinised for indications of police excesses in custody.

In one case, the accused's father filed an application after police custody was granted saying that he met the accused who had round burn marks on his body caused by lit cigarettes. The Magistrate directed that the the application be "taken on record". 5 days later, while in police custody, a voluntary statement was made by the accused under section 27 of the Evidence Act leading to recovery of the victim's body.

The Law Commission has suggested that if there is any report of bodily injury on an accused, the inference must be one of custodial torture.[19] Although no statutory amendment has been made thereafter, such an inference could be argued under section 114 Indian Evidence Act.

Despite the constitutional right against self-incrimination, silence at the stage of the recording of statement under section 313 CrPC is now read as part of the chain of circumstances against an accused.[20]Alarmingly, when accused use the opportunity to explain that evidence was collected after compulsion, this evidence is routinely ignored by courts.



INSPECTION MEMO

PHYSICAL INSPECTION OF ARRESTEE

SHRI [redacted] S/

RESIDENT OF [redacted]

HAS BEEN CONDUCTED BY [redacted]

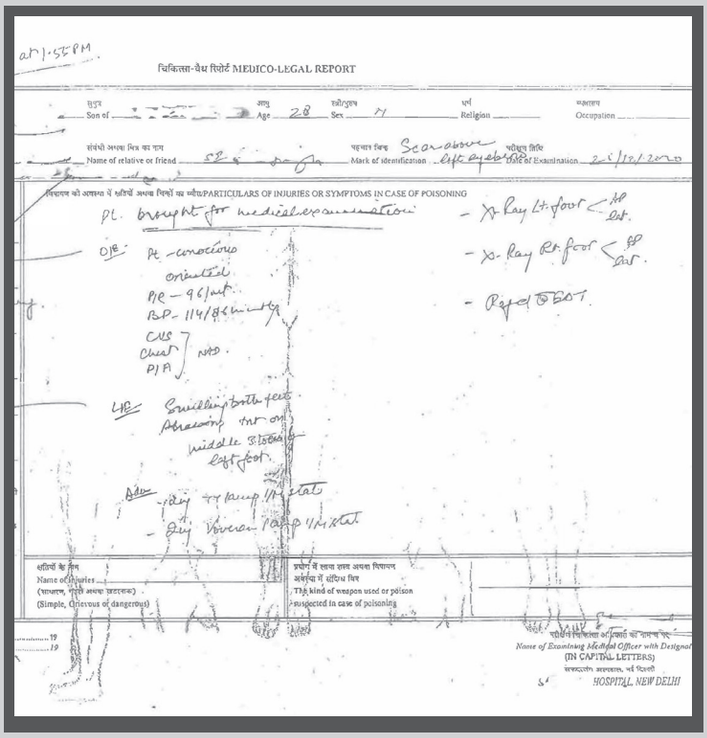
AND FOUND AS FOLLOWING :

S. NO.	PARTS OF THE BODY	INJURIES OLD	INJURIES FRESH
1.	Head		
2.	Fore Head		
3.	Face		
4.	Ears		
5.	Eyes		
6.	Nose		
7.	Mouth (Lips)		
8.	Teeth		
9.	Neck (Front-Back)		
10.	Arms		
11.	Shoulders		
12.	Elbows		
13.	Hands (Wristaz)		
14.	Palms (Back)		
15.	Fingers		
16.	Bresst/Chest		
17.	Stomach		
18.	Hips		
19.	Legs		
20.	Thigh		
21.	Knees		
22.	Shanks		
23.	Feet		
24.	Sole		
25.	Fingers		
26.	Ankles		

SIGNATURE OF THE ARRESTEE

SIGNATURE OF I.O.

Medical report of MA showing nil injuries at the time of arrest and later report showing "abrasions" a few after later during which time several recoveries made.



चिकित्सा-वैध रिपोर्ट MEDICO-LEGAL REPORT

Son of — Age 28 — Sex M — Religion — Occupation —

Name of relative or friend — Mark of identification Scar-above left eyebrow — Date of Examination 2.5/10/2010

PARTICULARS OF INJURIES OR SYMPTOMS IN CASE OF POISONING

Pt. brought for medical examination

O/E Pt. conscious oriented PR – 96/min. BP – 114/84 mm Hg CNS Chest P/A NAD

LE Swelling both feet Abrasion 1x1 cm middle 3rd Lt. foot

- X-Ray Lt. foot AP Lat.
- X-Ray Rt. foot AP Lat.
- Referred to Ortho

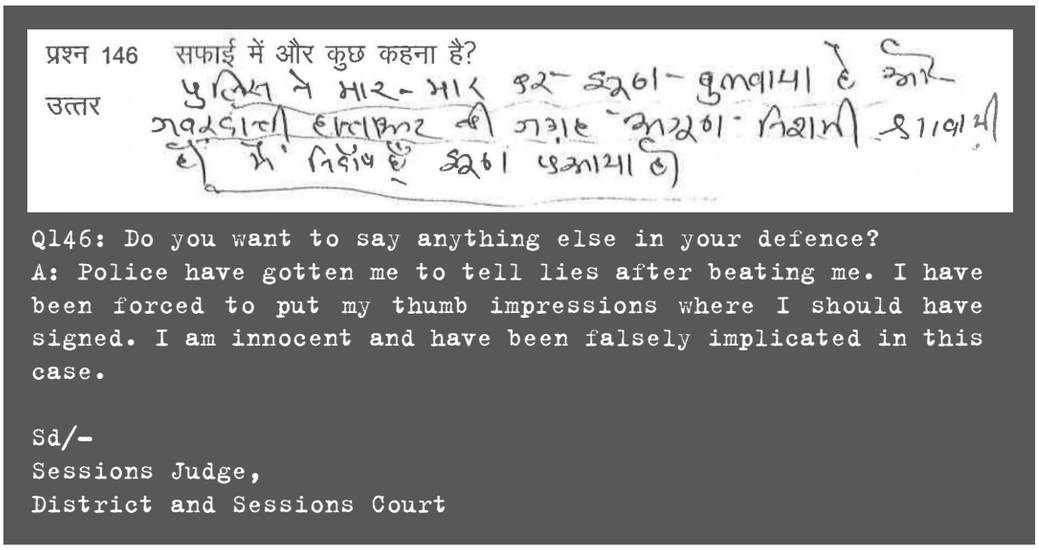
Name of Injuries (Simple, Grievous or dangerous)

The kind of weapon used or poison suspected in case of poisoning

Name of Examining Medical Officer with Designation (IN CAPITAL LETTERS)

HOSPITAL, NEW DELHI

[18]State Of Bombay vs Kathi Kalu Oghad and Ors. 1961 AIR 1808
[19]Report No. 273, Law Commission of India, 2017
[20]For a recent discussion on the scope of s.313 CrPC, see Sanatan Naskar v. State of West Bengal, (2010) 8 SCC 249.



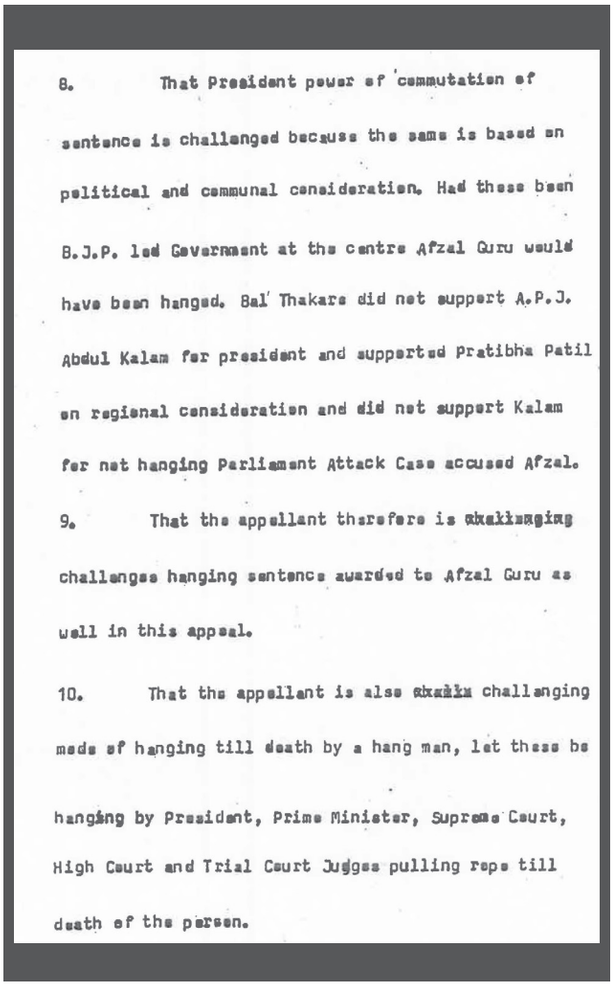
प्रश्न 146 सफाई में और कुछ कहना है?

उत्तर

Q146: Do you want to say anything else in your defence?
A: Police have gotten me to tell lies after beating me. I have been forced to put my thumb impressions where I should have signed. I am innocent and have been falsely implicated in this case.

Sd/-
Sessions Judge,
District and Sessions Court

On the contrary, the judicial trend has been to draw an inference against an accused if they are unable to offer an explanation to all the circumstances against her during the recording of her statement. It is imperative to rectify this erroneous reading of section 313 statements, and ensure that the accused's explanation of torture is considered to be relevant in judging the evidence before the court.



8. That President power of commutation of sentence is challenged because the same is based on political and communal consideration. Had these been B.J.P. led Government at the centre Afzal Guru would have been hanged. Bal Thakare did not support A.P.J. Abdul Kalam for president and supported Pratibha Patil on regional consideration and did not support Kalam for not hanging Parliament Attack Case accused Afzal.

9. That the appellant therefore is ~~xkaxkaxgxing~~ challenges hanging sentence awarded to Afzal Guru as well in this appeal.

10. That the appellant is also ~~xkaxkx~~ challenging mode of hanging till death by a hang man, let these be hanging by President, Prime Minister, Supreme Court, High Court and Trial Court Judges pulling rope till death of the person.

Appreciation of scientific evidence

Scientific evidence is considered clinching evidence of the culpability of the accused and its use is encouraged as part of modern investigative techniques. It is often taken by judges and lawyers at face value without questioning its underlying basis. Issues like the lack of safeguards in collection, handling, storage and testing of samples, dispensing with oral testimony of scientific analysts, and the credibility of the science itself are questions which are rarely raised or answered by courts.

ABA Guidelines: Guideline 4.1 B: The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them. Counsel should have the right to have such services provided by persons independent of the government.

CHAIN OF CUSTODY AND EFFECT ON FORENSIC EVIDENCE

Courts have noted that in cases involving biological evidence the concept of chain of custody needs to be established, which covers the the complete record of biological evidence from the place of its extraction and up to its presentation in the Court and its complete

documentation at every stage.[21] The Supreme Court held in *State of Rajasthan v. Daulat Ram*[22] that the entire chain of evidence from the point of its seizure, collection of samples, its preservation, deposition and preservation and till the time it reaches in the hand of analyst, has to be proved beyond reasonable doubt by unimpeachable evidence.

The *malkhana* records seldom form a part of the evidence and there is no documentary trail of witnesses and documents showing the movement of the sample. Samples are often forwarded to the governmental laboratory marked with the names of the accused and victims, brief summary of facts including details of offence, thereby making the process prone to bias and false reporting, especially in the case of the samples getting contaminated, or returning a negative finding, or getting mixed or other accidents may occur.[23] However, no cases have been reported in India where error in handling of samples has affected the outcome of the case. However, in other countries, such errors have led to acquittals, specially in cases of mix-up of DNA samples in sexual offence cases. As a safeguard against such ambiguity with respect to the handling of samples, some foreign jurisdictions have held that evidence from a DNA analysis expert must be accompanied by evidence as to the sources of the samples and the procedures for obtaining the DNA profiles.[24]

There are no statutory procedural safeguards for scientists to ensure error-free unbiased analysis, and no public guidelines and accountability standards for handling of samples. The lack of knowledge amongst trial court lawyers regarding various processes involved in complex forensic techniques such as 'DNA fingerprinting' leads either to a silent concession to no expert being produced in court under section 293 or ineffective cross examination of the expert. The absence of the expert as a prosecution witness deprives the accused of the opportunity to being effectively cross-examined.

Section 293 CrPC and the right of confrontation of the accused

Section 293 CrPC creates an exceptional situation as a report prepared by certain government experts (S. 293(4)), can be 'used as' evidence, thereby removing the requirement for court testimony and cross examination. The Court has discretion to "summon and examine" such an expert. However, due to poor quality of representation, these reports are often unchallenged, and expert witnesses under S.293, are not examined. While there have been instances wherein during confirmation proceedings, High Courts have allowed applications by the accused to remand the matter to examine experts,[25] in most cases, the non-appearance of the forensic expert is not challenged even at the appellate stage.

This violates the principles of fair trial and the accused's right to confront witnesses speaking against him. Section 293 CrPC which requires that 'all evidence' taken in the course of the trial to be taken 'in the presence' of the accused. The Calcutta High Court in *Ananta Singh*[26] opined that Section 293 (erstwhile Section 354) is akin to the confrontation clause under the sixth amendment of the US Constitution. 'The opportunity to defend himself by testing the veracity of witness through cross-examination'[27] has also been read into this section.

While undoubtedly section 293 CrPC exists, it is the Court's duty to come to independent conclusions notwithstanding expert opinions and give primacy to its 'endeavour to find the truth,'[28] in deciding whether or not to exercise its jurisdiction under section 293 CrPC. A distinction must be drawn between a "report" and an "opinion" of the expert. While a report contains the result of the examination or analysis, and may be admissible under section 293 CrPC, the opinion given on interpreting the report is not protected under section 293 CrPC.[29]

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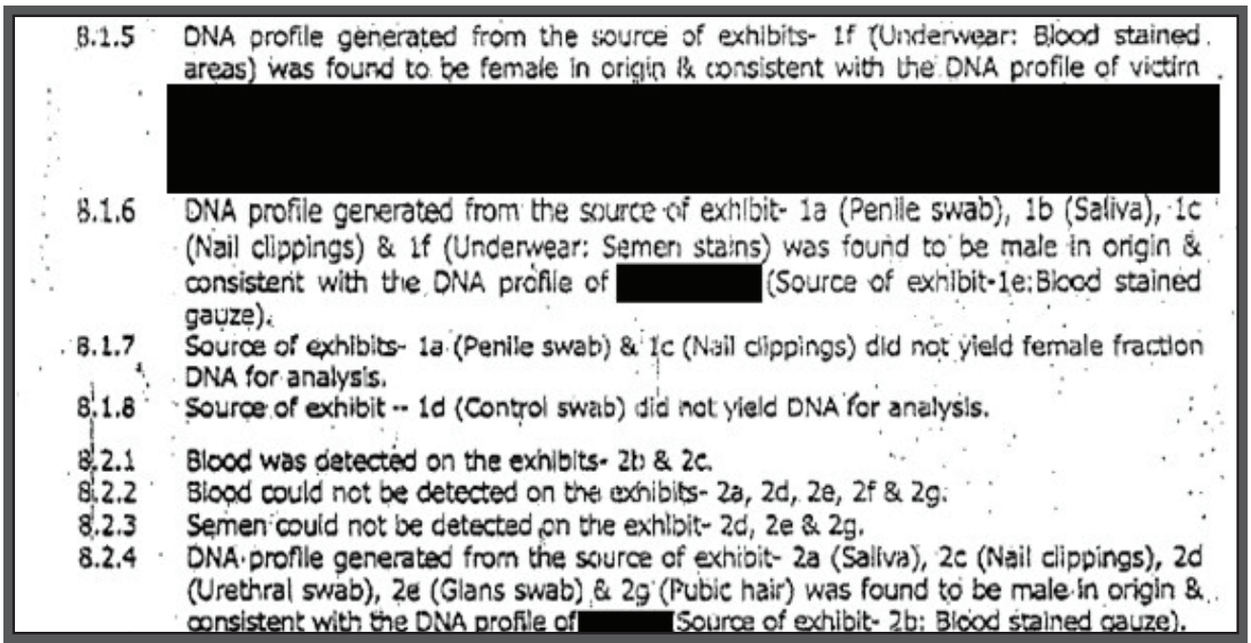
[21]2004 Cr.L.J 2992 (2995); See Vinay Kumar vs. State 2012 SCC OnLine Del 3375.
[22]Ibid.
[23]Indian Express, "An Express RTI Application: At top lab, 12 viscera samples 'thrown' away in scientists' row" June 23, 2015, New Delhi/Hyderabad. Available online at: http:// indianexpress. com/ article/ india/ india-others/ an-express-rti-application-at-top-lab-12-viscera-samples-thrown-away-in-scientists-row/.
[24]R v. Loveridge, EWCA Crim 734 (2001) [England & Wales Court of Appeal].
[25]Parasuram Patra v. State of Orissa, 2007 (1) OLR 233 and Ramabhai Icchabhai Chauhan v. State of Gujarat, CRA No. 44 of 2001, decided on 28.02.2001.
[26](1972) Cr. I LJ. 3
[27]Sukhanraj vs. State of Rajasthan AIR 1967 Raj 267.
[28]Nageshwar Shri Krishna Ghobe vs. State of Maharashtra (1973) 4 SCC 23.
[29]See State of Gujarat v. Shantaben AIR 1964 Guj 136.



8.1.5 DNA profile generated from the source of exhibits- 1f (Underwear: Blood stained areas) was found to be female in origin & consistent with the DNA profile of victim [redacted]

8.1.6 DNA profile generated from the source of exhibit- 1a (Penile swab), 1b (Saliva), 1c (Nail clippings) & 1f (Underwear: Semen stains) was found to be male in origin & consistent with the DNA profile of [redacted] (Source of exhibit-1e:Blood stained gauze).

8.1.7 Source of exhibits- 1a (Penile swab) & 1c (Nail clippings) did not yield female fraction DNA for analysis.

8.1.8 Source of exhibit -- 1d (Control swab) did not yield DNA for analysis.

8.2.1 Blood was detected on the exhibits- 2b & 2c.

8.2.2 Blood could not be detected on the exhibits- 2a, 2d, 2e, 2f & 2g.

8.2.3 Semen could not be detected on the exhibit- 2d, 2e & 2g.

8.2.4 DNA profile generated from the source of exhibit- 2a (Saliva), 2c (Nail clippings), 2d (Urethral swab), 2e (Glans swab) & 2g (Pubic hair) was found to be male in origin & consistent with the DNA profile of [redacted] Source of exhibit- 2b: Blood stained gauze).

DNA report containing only the opinion.

Issues of reliability for specific kinds of forensic evidence

BLOOD GROUP ANALYSIS

Blood group analysis can be deficient or misleading if the analysis does not produce a conclusive finding on the blood group, including the Rhesus factor (i.e. +ve or -ve). In *Prakash v. State of Karnataka*[30], the Supreme Court held that the determination of blood group on the accused alone could not be sufficient to show that it is the blood of the deceased, as the same is shared by millions of people. However, in several other cases, mere detection of human blood or blood of a particular group has been relied upon.

DNA FINGERPRINTING

DNA analysis has been suggested to be 100% reliable by expert witnesses in a recent death penalty case and even hailed as 'perfect science'.[31] However, the process of DNA extraction and comparison requires several subjective analyses after identification of one person's DNA. Further, the adoption of the method in India by investigative agencies has been based on a false assumption regarding the universal nature of the test.

RELIANCE UPON STR ANALYSIS AND ABSENCE OF A DNA BANK IN INDIA

A common method for DNA analysis is the Short Tandem Repeat ("STR") process, generally accepted the world over as the standard method of DNA analysis. STR denotes any short, repeating DNA sequence, which is polymorphic (uniquely identifiable) to a person. Normally, specific loci (out of several options of loci) on the chromosome (normally 13, 15, 17 loci) are identified for a specific population for which the STR analysis has to be undertaken. After identifying the specific loci which can be used for uniquely identifying DNA for the set of population, the relevant loci can be used for STR analysis.[32] However, such a study has not been undertaken for parts of the Indian population.

In STR analysis, the number of repeats of genetic sequence is to be determined by an expert, and this number is referred to as an allele, which comes in pairs at each locus. On determining the alleles at the identified loci, an allele table is drawn up, which is the DNA sequence of a person. The probability of two randomly selected individuals having the same alleles can only be determined by the number of

[30](2014) 12 SCC 13

[31]Pantangi Balarama Venkata Ganesh vs. State of A.P. 2003 Cr LJ 4508 (AP).

[32]Donald E.Riley, "DNA Testing: An Introduction For Non-Scientists An Illustrated Explanation", Scientific Testimony, available at: http://www.scientific.org/tutorials/articles/riley/riley.html.

alleles and their frequency in a population. A suitable set of identifying loci for a population of U.S.A. may not identify persons in an Indian population with the same probability. The adaptation of loci identified in other jurisdictions has led to DNA procedure in investigations in India being less reliable. A determination of the accuracy of the currently adopted identifying loci can only be made with a DNA bank, not available in India.[33]

ODONTOLOGY REPORTS

While forensic odontology has been used for the purpose of age-identification, the technique was first used in a capital punishment case of rape and murder, raising several issues. The usage of probabilistic science with an unspecified probability of accuracy can set a problematic precedent. Bite-mark analysis has been criticized in scientific forums for being inaccurate, and recently state bodies such as the Texas Forensic Science Commission[34] have created a moratorium on the use of forensic odontology in criminal cases till scientific evidence affirms the accuracy of the method and ordered a review of all cases relying upon the method. A 2009 report by the National Academy of Science found "no evidence of an existing scientific basis for identifying an individual [through bite mark comparison] to the exclusion of all others."[35]

The U.S. Supreme Court in *Daubert vs. Merell Dow Pharmaceuticals*[36] held that 'expert opinion' must be both relevant and reliable. Factors such as whether the theory can and has been tested, the theory's error rate, peer review and publication regarding the theory, and general general acceptance in the scientific community were considered relevant factors for determining reliability. Such a scrutiny of forensic odontology by the Indian judiciary, is crucial to determine the admissibility of forensic odontology as evidence, which does not have a scientifically proved rate of error, and does not have general support in the scientific community.[37] A similar case of inaccurate forensic techniques is presented by the erstwhile reliance upon "microscopic hair analysis" for decades in criminal cases in the U.S., until recent admission by investigating authorities that the state funded 'microscopic hair analysis' unit gave flawed testimony in almost all trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000.[38]

Electronic evidence and the law after *Anvar v. Basheer*

Section 65-B, Evidence Act, provides a special procedure for electronic records, following the principles of secondary evidence. Most significantly, this requires that the electronic record under sub-sections (2) and (4) include a certificate required signed by a "responsible official position".

However, the despite the law coming into effect, the procedure envisaged in Section 65B remained largely unimplemented. It was held not to affect the validity of the evidence in *Navjot Sandhu v. State of NCT. of Delhi*[39], wherein the Supreme Court held that there is no bar to adducing secondary evidence under the other provisions of the Evidence Act in case the certificate under Section 65B is not filed as long as the responsible person made a statement during his deposition that the record was accurate.

In 2014, in *Anvar vs. P.K. Basheer*[40], the Supreme Court held that the provisions of sections 65A and 65B of the Evidence Act created special law that overrides the general law of documentary evidence. The Court therefore disqualified oral evidence to

[33]S.K.Verma (Centre for Cellular and Molecular Biology , Hyderabad) and G.K.Goswami (Central Bureau of Investigation Academy, Ghaziabad), "DNA Evidence: Current Perspective and Future Challenges in India", Forensic Science International (2014), available at: https://www.ncbi.nlm.nih.gov/pubmed/24967868.
[34]"In a Landmark Decision, Texas Forensic Science Commission Issues Moratorium on the Use of Bite Mark Evidence." Innocence Project. N.p., 05 Apr. 2016. Web. 14 Dec. 2016. http://www.innocenceproject.org/in-a-landmark-decision-texas-forensic-science-commission-issues-moratorium-on-the-use-of-bite-mark-evidence/.
[35]"Summary." National Research Council. 2009. Strengthening Forensic Science in the United States: A Path Forward. Washington, DC: The National Academies Press. doi: 10.17226/12589. Available here: https://www.nap.edu/read/12589/chapter/1].
[36]209 U.S. 579 (1993)
[37]Lithwick, Dahlia. "The FBI Faked an Entire Field of Forensic Science." Slate Magazine. N.p., 22 Apr. 2015. Web. 14 Dec. 2016. <http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/fbi _s_flawed_forensics_expert_testimony_hair_analysis_bite_marks_fingerprints.html>.
[38]Lithwick, Dahlia. "The FBI Faked an Entire Field of Forensic Science." Slate Magazine. N.p., 22 Apr. 2015. Web. 14 Dec. 2016. <http://www.slate.com/articles/news_and_politics/jurisprudence /2015/ 04/ fbi_s_flawed_forensics_expert_testimony_hair_analysis_bite_marks_fingerprints.html>.
[39](2005) 11 SCC 600
[40]AIR 2015 SC 180

admit secondary documentary evidence such as electronic records. The judgement in *Anvar* created an ambiguous status for pending trials where electronic evidence had already been recorded without a Section 65B certificate, and also for trials which culminated before the judgement in *Anvar* was pronounced.

In *Harpal Singh @ Chhota Vs. State Of Punjab*,[41] the Apex Court held that the absence of a certificate under Section 65B(4) renders the electronic evidence inadmissible. The Court therefore applied the *Anvar* standard to a case wherein the FIR registered in 2008, prior to *Anvar*. While in *Harpal Singh*, disregarding of electronic evidence did not affect the outcome of the appeal, for several other trials which had concluded before *Anvar*, this judgement seems to indicate a strict compliance to the certificate requirement under Section 65B(4) immediately from the date of the amendment.

However, the Supreme Court in *Sonu v. State of Haryana*[42] made a distinction between 'inherent admissibility' of evidence and its 'mode of proof' and held that electronic evidence without a certificate is not inherently inadmissible. Failure to object to the admission of the evidence by the defence was held to preclude the convict from raising this objection at the appellate level. Recently, in the case of *Dr. Nupur Talwar v. State of UP & Anr.*[43], the Allahabad High Court, citing the judgments in *Anvar* and *Sonu* held that certain call detail records were not admissible evidence as they were not accompanied by a certificate under Section 65-B. The Court held that the finding in *Sonu* would not be applicable in this case as the prosecution was aware of the defect of the absence of a certificate under Section 65-B and failed to cure it. It was clarified that the legal principle expounded in *Sonu* was on the basis of the prosecution having to be given a notice which can then be cured at the time of marking of the documents. While in *Sonu* the convict raised the defence of the inadmissibility of evidence for the first time in the Supreme Court, in this case, when the prosecution sought to place the certificate on record at a belated stage, the convict had opposed it and the Court had dismissed the plea to place it on record.

In one case, the Call Detail Records are filed through an application after statement under section 313 CrPC of the Accused is recorded. There is no further evidence or additional statement recorded, nor is there any certificate under section 65-B of the Evidence Act. The High Court while relying on it for conviction says that call detail records, which is electronic evidence is admissible under section 65-B of the Evidence Act.

Sentencing in Death Penalty Cases

Judges' Opinion Study and the Trial Court Sentencing Project

BIFURCATION OF A TRIAL

The Code of Criminal Procedure 1973, bifurcates a trial into the conviction and sentencing stages and requires sentencing judges to give special reasons if they choose the death sentence over life imprisonment as the appropriate punishment.[44] The object behind the legislation is to ensure that a just and suitable punishment is imposed after the accused has had enough opportunity to gather evidence on the question of sentence. Information such as age, socio-economic condition[45], criminal antecedents[46], etc. will have a bearing on the question of sentence. It is for this reason that a sentence pronounced on the same day is unlawful.[47]

THE 'RAREST OF RARE' TEST

While upholding constitutionality of the death penalty, the Supreme Court, in the case of *Bachan Singh v. State of Punjab*[48] developed a sentencing

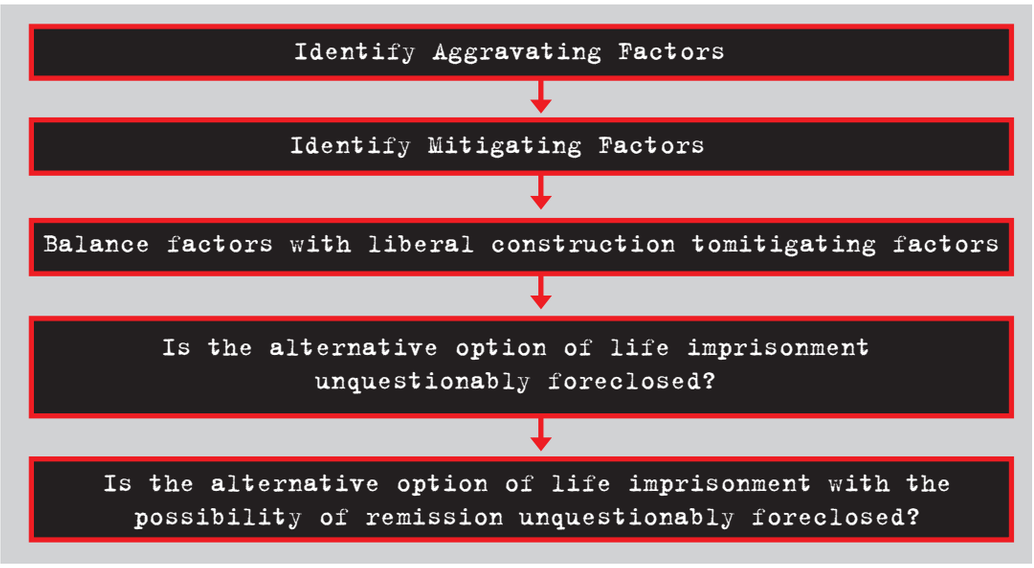
[41]Criminal Appeal No. 2539 of 2013; Judgment dated 21.11.2016.
[42]Criminal Appeal Nos. 1416 of 2013, 1652 of 2014, and 1653 of 2014; Judgment dated 18.07.2017.
[43]Criminal Appeal Nos. 293 of 2014 and 294 of 2014; Judgment dated 12.10.2017
[44]Code of Criminal Procedure 1973, Section 235(2), states that if the accused is convicted, the judge shall hear the accused on the question of sentence, and then pass sentence on him according to the law.
[45]Mulla & Anr v. State of U.P (2010) 3 SCC 508; Kamleshwar Paswan v. UT Chandigarh (2011) 11 SCC 564; Sunil Gaikwad v. State of Maharashtra (2014) 1 SCC 129.
[46]Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775
[47]Allaudin Mian v. State of Bihar AIR 1989 SC 1546
[48]AIR 1980 SC 898

framework for judges to follow when deciding between life imprisonment and the death sentence. This framework, referred to as the 'rarest of rare' test, requires judges to carry out the task of sentencing in a comprehensive and nuanced manner.

The 'rarest of rare' test requires judges to first identify and balance aggravating and mitigating factors. Mitigating circumstances are conditions about the criminal which do not justify his/her criminal conduct, but contextualise their acts, and allow the court to determine whether the existence of these conditions warrant the death penalty or a sentence of life term. In approaching this exercise, it requires judges to give a 'liberal and expansive construction'[49] to mitigating factors (and not aggravating factors). Included in the mitigating factors is the obligation on the State to show that the accused is beyond the possibility of reformation[50]. The sentencing framework then requires judges to give the death sentence in the 'rarest of rare' cases, where the alternative option of life imprisonment is unquestionably foreclosed[51]. Therefore, it is clear that judges must firstly, identify and balance aggravating and mitigating factors, and then proceed to determine whether the alternative option is unquestionably foreclosed.

LIFE-IMPRISONMENT WIHOUT REMISSION

In *Union of India v. V Sriharan*[52] a Constitutional Bench of the Supreme Court clarified the legal position that life means rest of natural life, in the context of life imprisonment. It also affirmed the ratio of an earlier judgment in *Swamy Shraddananda v. State of Karnataka*[53], thereby allowing the carving out of a special category of sentence where the Supreme Court or the High Court can substitute the death sentence with imprisonment for life, or imprisonment in excess of 14 years, and put that category beyond the application of remission.[54] Therefore, as the law stands now, the Supreme Court has a wider range of sentencing options, should it choose to substitute the death penalty. It can, apart from choosing to impose life imprisonment simpliciter, also choose either a fixed term, say 25 or 30 years, or the entire natural life of the accused, and place that term beyond the operation of the statutory remission under Sections 432, 433 and 433A of the CrPC. This has the effect of increasing the threshold of the 'unquestionably foreclosed' dictum in *Bachan Singh*, as even the alternative of the special category of sentence carved out has to be unquestionably foreclosed before death can be imposed. This exercise, thus, involves a lot more than merely establishing that the crime is 'rare' merely by virtue of its brutality.



[49]Bachan Singh at Para 209.
[50]There is judicial disagreement as to whether this requirement is mandatory. The Centre in its Trial Court Sentencing Project has found that in not even one case where the death penalty was imposed by trial courts in Delhi, Maharashtra and Madhya Pradesh between the years 2000-2015 was this special duty cast on the State was fulfilled. In Anil @ Anthony Arikswamy Joseph v. State Of Maharashtra, (2014) 4 SCC 69, at para 33; the Supreme Court observed that while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation.
[51]Bachan Singh at Para 207.
[52](2016) 7 SCC 1
[53](2008) 13 SCC 767
[54]This does not affect the constitutional powers of the President and Governors under Articles 72 and 161 of the Constitution

There has been significant judicial confusion surrounding the rarest of rare framework, with cases ranging from a per incuriam decision[55] that left in its wake a string of death sentence confirmations[56] that looked only at the crime, to a mechanical 'balance sheet' approach which was clearly never envisaged by *Bachan Singh*. Thus, it is explicit that courts at all levels have struggled to implement any level of consistency with the 'rarest of rare' doctrine. As a result of this confusion, very serious questions have been raised about death penalty sentencing in India being a judge-centric phenomenon.

JUDGES' OPINION STUDY

In collaboration with the Centre for Criminology, University of Oxford, the University of Reading, and the Death Penalty Project, London, the Judges' Opinion Study seeks to investigate attitudes towards the death penalty and the criminal justice system through interviewing former judges of the Supreme Court of India. Sixty former Supreme Court Judges were interviewed to gain insight into judicial thought that goes into imposition of a death sentence. This study gave us a unique opportunity to gain insights into the sentencing practices and factors that influence judicial thought processes.

TRIAL COURT SENTENCING PROJECT

The need to analyse trial court judgments imposing death was felt after the Death Penalty India Report, 2016 found that about 4% of the death sentences imposed by the trial courts get confirmed at the appellate level. This finding stressed on the significance of trial courts imposing death sentences too frequently and many times, arbitrarily. Therefore, the Trial Court Sentencing Project seeks to analyse all the trial court death penalty judgments between 2000-2015 in three states of Maharashtra, Madhya Pradesh and Delhi.

Understanding 'Rarest Of Rare'

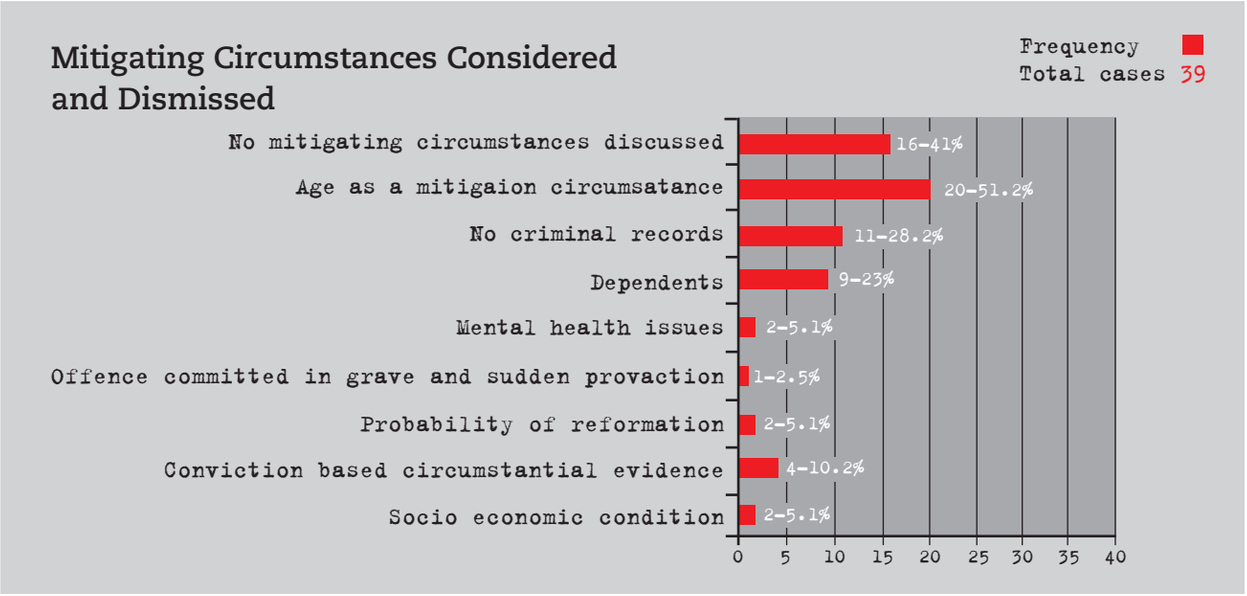
The understanding of 'rarest of rare' among former Supreme Court judges is often contrary to the original meaning assigned to it in *Bachan Singh*. The formulation as understood by the judges collapsed into certain categories of crime, or was fused with aggravating circumstances such as the brutality of the offence. For a significant number of judges, the 'rarest of the rare' doctrine is based on categories or description of offences alone and makes no mention of the judicial test requiring that the alternative of life imprisonment be 'unquestionably foreclosed'. Though the law sets out an indicative list of both aggravating and mitigating circumstances to be taken into account before determining sentence, considerable confusion persists about the weight and scope of mitigating circumstances. Opinions vary considerably on whether factors such as poverty, young age and post-conviction mental illness and jail conduct could be considered mitigating circumstances at all, despite them being judicially recognised. While some judges do not consider mitigating circumstances as relevant for the determination of sentence, some believe that some categories of offences were simply beyond mitigation. There was also disagreement about whether the burden of proof lies on the prosecution to show that the accused is beyond reformation. Some judges did not see this as a mandatory part of the *Bachan Singh* sentencing framework. They saw it as unreasonable and impossible to fulfill. The arbitrary nature of death penalty sentencing which is often attributed to the judge centric nature of it was seen as a natural outcome of the framework by the former judges.

In our study of trial court judgments across Delhi, Madhya Pradesh and Maharashtra, between 2000-2015, we found that the 'rarest of rare' test has been misunderstood to mean the rarity of the crime before the court, which is completely contradictory to what the test was meant to be. Routinely the same arguments of sympathy or arguments relating to young age, dependant family are canvassed and considered by courts. No information about the accused is available except that which is available in the case record. Most often, even the court does not ask for it. Further, in an overwhelming majority of cases, brutality trumped all other mitigating factors. Even when other mitigating factors, such as age or lack of criminal antecedents was argued, the court dismissed all of it on the basis of brutality of the crime.

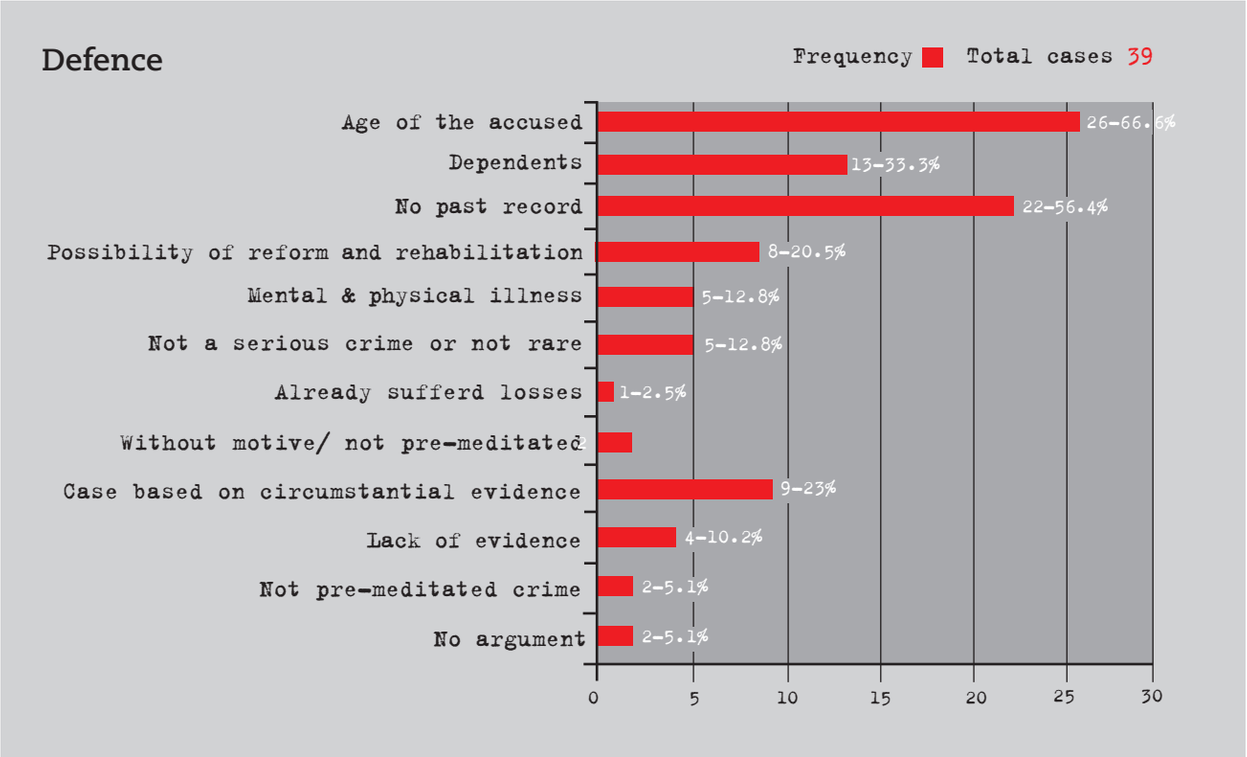
[55]Ravji @ Ram Chandra v. State of Rajasthan (1996) 2 SCC 175.
[56]Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra (2008) 15 SCC 269, Mohan Anna Chavan v. State of Maharashtra (2008) 7 SCC 561, Bantu v. The State of U.P (2008)11 SCC 113, Surja Ram v. State of Rajasthan (1996) 6 SCC 271, Dayanidhi Bisoi v. State of Orissa, (2003) 9 SCC 310, State of U.P. v. Sattan @ Satyendra and Ors (2009) 4 SCC 736, Ankush Maruti Shinde v. State of Maharashtra (2009) 6 SCC 667, Sunder Singh v. State of Uttaranchal (2010) 10 SCC 611, Ajitsingh Harnamsingh Gujral v. State of Maharashtra (2011) 14 SCC 401.

In the case of *State of Madhya Pradesh v. Jujhar Singh*[57], *the court stated that 'The circumstances in the case in hand reveal that it is case of the rarest of rare category because the 3 victims were murdered in cold blood when they were quite helpless being asleep' and imposed a death sentence solely on this count. In the case of State of Madhya Pradesh v. Jagdish@Jagga*[58] *the judge imposed death sentence saying, 'This class of crime and the behavior of the accused with the prosecutrix while committing the crime puts this crime in the rarest category. In my opinion, this case falls into the rarest category and it is appropriate that in such matters the maximum sentence of death penalty be given'.*

Of the three states studied for this project, we found that judgments in Delhi adhered the most to the framework provided in *Bachan Singh*. Despite this, however, the nature of mitigating evidence considered was extremely superficial. Factors such as age, lack of criminal antecedents and dependant family were merely mentioned and there was no reason given as to why they should lead to a reduction in sentence. For instance, in no case did we find that young age was linked to the probability of reformation. Thus, even the few judgments which adhered to the *Bachan Singh* framework, complied with it only in letter and not in spirit. The preliminary findings from Delhi are graphically represented below:



[57]Sessions Case No. 110/2011, District Indore, Madhya Pradesh
[58]Sessions Case, Rajgadh Madhya Pradesh



Procedural compliance with sentencing requirements

In the trial court sentencing project, courts pronounced the sentence on the same day in several cases and in many others, the hearing was adjourned by a single day to avoid the technicality under section 235(2) of the Criminal Procedure Code. This is despite a clear holding in *Bachan Singh* that 'the Judge should give the party or parties concerned an opportunity of producing evidence or material relating to the various factors bearing on the question of sentence'. This is also contrary to judicial precedents which state that in death sentence cases adequate time must be given to the accused to marshal their arguments as well as compose themselves after the trauma on conviction.[59]

Another sentencing aberration prevalent in all three states was lack of individualized sentencing in cases involving multiple accused. For example, in Delhi where there were 15 cases involving multiple accused only in 2 cases their individual roles in the crime were considered. Only in one-third cases (5) were their individual mitigating circumstances considered. Even in these 5 cases only cursory argument pertaining to their age and lack of criminal antecedents were made.

Procedural law in Sentencing

The issue of non-compliance with sentencing procedure was raised before the Supreme Court in the case of *Dagdu v. State of Maharashtra*[60] where the court laid down two principles regarding defects in sentencing by the trial court- Firstly, that "remand is an exception, not the rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases." Secondly, that where the court concluded that there was a defect in the sentencing process, it could remand the matter back to the trial court for a *de novo* sentencing hearing or itself cure the defect by allowing affidavits and materials to be filed on sentencing.

In *Mukesh v. Govt. NCT of Delhi* (December 16 gangrape and murder case)[61] case, the Court was called upon to adjudicate a plea that sentencing safeguards under section 235(2) were breached by the Trial Court and remained unremedied up till the Supreme Court. The sentencing was not individualised to each accused, there was no personal hearing and no genuine effort to elicit relevant mitigating circumstances was made by the Trial Court. The Supreme Court refused to remand the case to the trial

[59]Allauddin Mian v. State of Bihar (1989) 3 SCC 5; see also Rajesh Kumar v. State (NCT of Delhi) (2011) 13 SCC 706.
[60][1976] 4 S.C.C. 190
[61]Criminal Appeal No. 607-608 of 2017.

court and decided to cure the defects itself. Similarly, in *Vasanta Sampat Dupare v. State of Maharashtra*[62] the Supreme Court ruled that same day sentencing cannot vitiate sentencing trial and therefore decided to consider sentencing evidence itself. While it is indeed laudable that the Supreme Court took upon itself the burden to hear evidence on sentencing, a remedy of this nature raises doubts as the right to have the evidence re-considered in an appeal is taken away from the accused. Further, given the magnitude of the crises it makes one wonder if Supreme Court will take similar recourse in every case where the trial court doesn't comply with the norms.

Future directions in sentencing

Our preliminary findings from the study of trial court judgments, coupled with observations from the Judges' Opinion Study, reveal that sentencing in death penalty cases receives much lesser attention than it deserves. While a large part of this problem lies in the neglect of sentencing in all criminal cases, the irreversible nature of the death penalty enhances the magnitude of the issue in death cases. Right from the lowest rungs of the Indian judiciary, to its highest level at the Supreme Court, there appears to be a confusion about the meaning of the 'rarest of rare' doctrine.

The confusion around the doctrine coupled with no mitigation evidence being presented to the judges makes it very easy for the aggravating circumstances to outweigh everything else and end up in a death sentence being imposed. Therefore, the importance of presenting mitigating material in deciding on the imposition of a death sentence cannot be overstated. One mechanism that has been evolved by courts in India to determine the circumstances pertaining to the accused is to request a Probation Officer's report.[63]

The Indian sentencing system needs to take note of practises across the world which have increasingly endorsed a thorough mitigation investigation as a necessary prerequisite in death penalty sentencing. In *Williams v. Taylor*[64], the U.S. Supreme Court, while affirming an all-encompassing view of mitigation, went a step ahead and held that the trial counsel of the accused were 'ineffective' for failing to conduct a thorough investigation of the background of the accused. The Court opined regarding the bearing of such an investigation, as follows:

"They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood [...] Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration [...] Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school[...] or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way.

Our lawyers and judges must also recognise and give full effect to constitutional right to be represented by counsel. The sentencing process must imbibe constitutional values of due process with "real and abiding concern for the dignity of human life".[65]

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[62]Judgment dated 03.05.2017 in Review Petition (CRL.) Nos.637-638 of 2015 in Criminal Appeal Nos.2486-2487 of 2014.
[63]Birju v. State of M.P., (2014) 3 SCC 421; Anil @ Anthony Arikswamy Joseph v.
State Of Maharashtra, (2014) 4 SCC 69; Bharat Singh vs. State (NCT of Delhi) (Order dated 17.04.2014, DSR No. 1/2014].
[64]529 U.S. 362 (2000)
[65]Bachan Singh, para 207.

Mitigation in Death Penalty Cases

Mitigation is the process of gathering and presenting evidence to a court that portrays the accused as embedded in their historical, biological, psychological and social context. It is important to recognise that mitigation is not a legal excuse or justification for the crime. Instead, it serves to explain the behaviour of the client and to inspire compassion with the judge.[66] This process typically entails collecting documentary evidence and conducting interviews with key informants, including family members, partners, employers, school teachers, doctors, as well as clients themselves.

What hampers mitigation in India

While there have been significant developments in the US and other countries with regard to the value and standards of mitigation in capital cases, similar standardization of the process and presentation format of mitigating evidence has not occurred in India. In the United States, practice guidelines such as the ABA guidelines (2003) mandate the involvement of a 'mitigation specialist' in death penalty cases.[67] In India, minimum standards or steps in the process of conducting mitigation investigation have not been outlined by law. Given the complexity of mitigation investigations and the lack of understanding of how they are to be conducted, defense lawyers invariably end up presenting bare minimum mitigating evidence, available only from the case record.[68]

Despite frequent references by Courts to mitigation as being fundamental to capital cases, no standard practise has emerged regarding the duty of the defense lawyer or the Court to ensure the collection and presentation of mitigation evidence. However, courts are now recognising the importance of mitigation evidence. During the Criminal Appeal proceedings in the Delhi 2012 gang-rape case, the Supreme Court directed that defense counsel be provided two hours of face-to-face meetings with the accused for a limited period to collect mitigation information and present it in the form of affidavits.[69] The Court held that the sentencing process in the lower courts was deficient. In another case the Supreme Court allowed the petitioner to file additional evidence even at the review stage.[70]

Also, through our work so far on cases involving mitigation, we have learnt that the efforts invested in tracing a person's life history are enormous and necessarily involve investment of time and resources - two very limited elements available to any defense lawyer. A typical mitigation investigation, requires several meetings with the accused and other mitigation witnesses such as family and friends of the accused over a long period of time along with the collection of documentary evidence from different sources, engagement with experts to help analyze the information collected etc. Added to the human cost is the financial cost that is incurred during such an investigation. These factors explain the absence of a robust mitigation practice in India.

Need for a dedicated mitigation investigator

History of the Guideline 1.1: ...Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought."

[66]Representing Individuals Facing the Death Penalty: A Best Practices Manual, Death Penalty Worldwide, available at: http://www.worldcoalition.org/media/resourcecenter/EN-Death_Penalty_Manual_-_final_copy_01_16_13.pdf.
[67]ABA Guidelines (2003) : "Guideline 4.1(A)(1) The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."
[68]See section II for research findings on this.
[69]Order dated 03.02.2017, in S.L.P. . No.3119-3120 of 2014 [Mukesh and anr.v State]
[70]Order dated 31.08.2017 in R.P.(Crl.) Nos.637-638/2015 [Vasant Sampat Dupare v State of Maharashtra]

Since lawyers are already engaged in crafting arguments addressing conviction from the case records, it is very difficult to expect them to be able to comprehensively conduct mitigation investigation. A mitigation investigation seeks to uncover facts and experiences from the defendant's life - relating to their mental, psychological, social and economic conditions and taking cognizance of their history of illness, abuse, accidents, etc. It therefore becomes crucial for a mitigation investigation to be supplemented by someone other than the defense lawyer, with a skill set appropriate to collect such information and present it to the Court. Several visits and hours of conversation are often required to build confidence and trust with the accused and family members who are wary of discussing uncomfortable issues.

Time requirement in the last investigation we conducted:

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15 interviews with the client.
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18 interviews with relatives
and other.
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Process of mitigation investigation

Through our mitigation work so far, which involve working on several cases at the High Court confirmation or Supreme Court appeal stage, or even at the mercy petition preparation case, a broad outline of the steps involved in mitigation is as follows:

STAGE 1: CASE AND CLIENT EXPLORATION

The first stage is focused on becoming familiar with the existing case-related documents and exploring any available secondary sources of information about the client, including newspaper articles, research materials, stories, video content, etc. It is essential in this stage that a preliminary meeting between client, mitigation investigator and defense lawyer takes place with the aim to introduce the mitigation investigator and explain the purpose of the mitigation exercise. Having the defense lawyer present in this initial meeting helps establish the credibility of the mitigation investigator with the client. During this stage key mitigation witnesses are identified. Relevant information to be collected at this stage includes juvenile/past offence records, medical history, reports from social service interventions, etc. Following these meetings and evidence collection, a preliminary note on the potential direction of the mitigation investigation must be prepared. This note helps guide the investigation in the future.

STAGE 2: DATA COLLECTION

The second stage is focused primarily on data collection. Using a "scorched earth approach", the mitigation investigator collects all possible information that relates to the client. This may require several rounds and hours of interviews with the client and witnesses as well as following-up on new leads that emerge during these interviews. Key to this process is the documentation of all information that is received from the field and it is the responsibility of the mitigation investigator to ensure that interviews are transcribed, translated and thematically segregated in order to facilitate their analysis. By the end of this stage, the mitigation investigator must be in a position to present the findings to external experts who can undertake analysis of the data and suggest further precise probes that need to be explored.

Date	Age of Dupare	Theme	Sub category	Narrative	Location	Source of information
1968	7			Family shifts to Kothuma		
		School		He has studied till class 7th. He was not interested in his studies and left them.	Kothuma	Ganga-13/6/17
		Behaviour		There was Shankary temple there and a tree near it. Vasanta used to live there.[What did he do there?]Nothing. He used to act like crazy and hide there from our father	Kothuma	Ganga- 31/5/17
		Relationships	relationship with father	[Was he afraid of your father?]He used to commit crimes/mischief and he was afraid that his father would beat him. So he would hide there (at the Shankar temple).	Kothuma	Ganga- 31/5/17
		Mental health	Treatment at home	[When asked about his childhood] My mother-in-law used to tell me everything, in his madness he would break shops and stalls and they would tie him up		Pushpa-31/5/17
1980	12		Treatment	When Dupare is 12 he is taken to a doctor . *(We are not sure as to the exact cause for this visit)*	Saurer Khapa	Ganga- 31/5/17
1971-72	10-12		Theft	He started stealing when he was 10-12. That time he used to steal pen, pencil and learnt how to steal chivda. Then, there are certain people who come who make gurol, he went and stole something from there too. My father got very angry on that day and beat him a lot. He tied his legs and hung him upside down and shouted at him that we have so much to eat at home and that we have a lot of money too.			
1973-1975	12-15	Behaviour		All he did was break people's locks and (laughs) burst things with air in them, something that he used to do since he was 12 or 15.		Ganga- 31/5/17
	12-13	Relationships	Relationship with father/ Physical abuse	whenever he used to do his petty crimes of theft etc. my own father used to take him and put him in jail since his childhood. Since he was 12 or 13 years old. He used to do that so that he improves. So whenever he used to get out of the house, he used to draw a painting and whenever he did this, he used to land himself in trouble.	Kothuma	Ganga - 31/5/17
	10+	Behaviour	abnormal behaviour	[Why was he taken to the baba?] He used to act in an insane way that is why. For eg: This is coconut oil, normal people put it on their hair but he would throw the oil on the wall or he would destroy something. And at times it was without reasons. Otherwise, he would act very normal, cook food, he used to even plead the hair of his brother's wife (sahini). At times he used to have insanity episodes at other times he was normal.		Ganga- 31/5/17
				If anyone used to tell my mother about any Baba, she used to take him there. Once there was someone (in Nandal(saumukhi village) in whose body the soul of Niranjan Devi had come, so we had taken him there too. That time he was 13-14 years old. I do not remember much. But yes, my mother did try taking him to all Gods. Once there was Tajoala Devi in someone's body but now science has advanced so much that nowadays nobody believes in all this. People of those times used to believe in all this, so my mother used to take him. The soul of the Devi used		

Screenshot of excel sheet list of dates arranging information chronologically and thematically.

STAGE 3: PREPARATION AND PRESENTATION OF MITIGATING EVIDENCE:

The final stage of an investigation involves the preparation of substantive mitigation submissions as well as identifying and preparing mitigation witnesses who can be called to testify in court. These submissions should include affidavits from doctors, psychiatrists/ psychologists, social workers or mitigation witnesses (such as family or friends of the accused) who can help enhance the credibility of the submissions.

While these three stages may appear to be clearly divided, given the complicated nature of a mitigation investigation, there is invariably an overlap between them. Data collection is virtually a never-ending process and mitigation investigators must always be prepared to unearth new information regardless of which stage the investigation may be in.

Challenges faced so far in conducting mitigation investigations

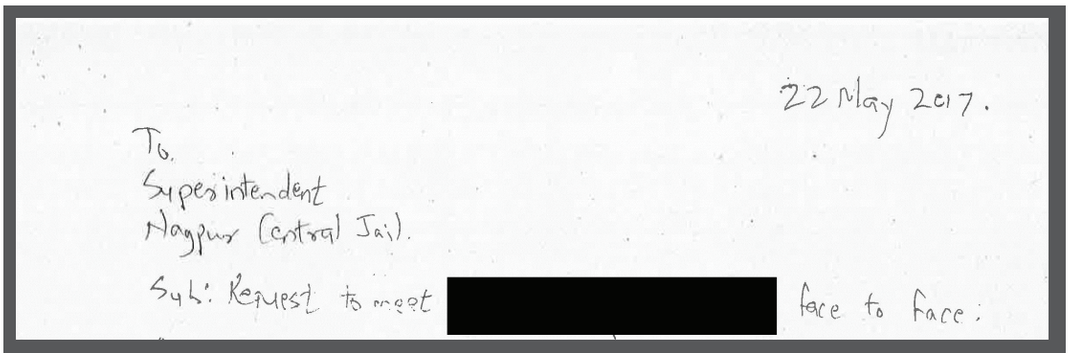
LACK OF ACCESS TO PRISONERS FOR NON-LAWYERS

A significant challenge that hinders effective mitigation investigations in India is the lack of access a mitigation investigator might have with the accused and their family. Since the process explores deeply personal and traumatic information of a person's life, meeting the accused consistently and freely becomes vital. The absence of recognition of a mitigation investigator in Prison Manuals and legislations inhibits superintendents from allowing access.

where other meetings are taking place, the client and investigator are separated by a glass or wire mesh and must communicate via a telephone in the presence of jail officials who are eager to monitor the conversation. This makes clients even more wary of speaking freely and discussing intimate details of their lives. Applications seeking 'face to face' meetings with clients have not been successful.

One of the ways in which an attempt has been made to address this is by maintaining regular contact with accused represented via letters. Numerous clients from different jails in the country have written in response to mitigation investigators and several others have expressed greater trust in the defense team due to such communication. The lack of confidentiality in client and attorney communication has, however, been a major hurdle in clients writing to the Centre's mitigation team. Prisoners often shy away from talking and restrict their communication to only surface level information to avoid conflict with prison authorities. Also, communication through letters has limited use as as expecting clients with little or no education to write letters is a challenge. The defense team also aims to constantly communicate with family members of the accused. Investigators often encounter hostile families who do not wish to discuss or involve themselves with the case. In these situations it becomes extremely difficult, both practically and ethically, to build trust and create a space for the family members to co-operate with the mitigation investigators.

The fear of repercussion from jail officials forces them to only speak positively of their incarceration and sometimes provide false information to their own

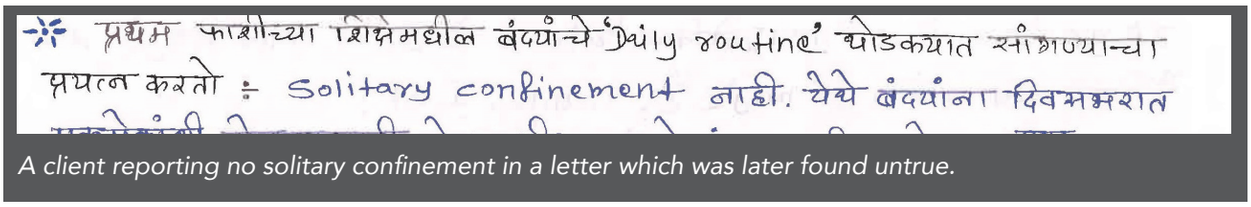

22 May 2017.

To,
Superintendent
Nagpur (Central Jail).

Sub: Request to meet [redacted] face to face.

Subject of handwritten application seeking face to face meeting.

In our experience, even where mitigation investigators have managed to meet their clients, the conditions of access are detrimental to the entire process. In most jails, access is granted in a *mulakaat* room, defense team. A similar hindrance to speaking freely is faced when clients communicate with their defense team via letters or telephone calls.



A client reporting no solitary confinement in a letter which was later found untrue.

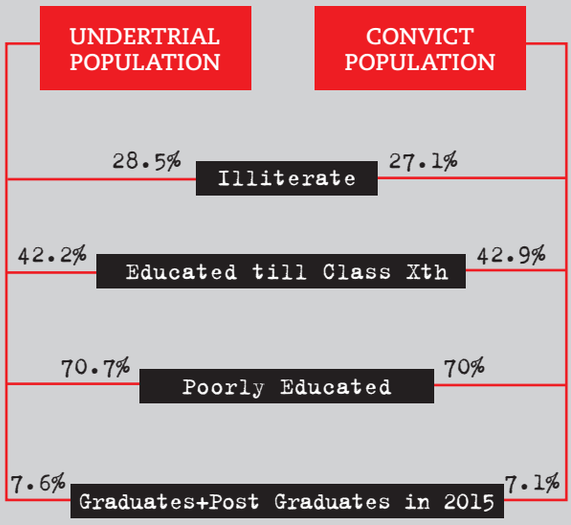
Lack of access to prisoners for mental health professionals

Prisons usually have a consulting or full time psychiatrist or psychologist apart from the Chief Medical Officer ('CMO') who seeks to ensure the mental well being of the prisoners. However, attention to the mental health conditions of death row prisoners is often deficient, and the prison authorities often refuse to allow for any medical or mental health related tests by hospitals or independent mental health professionals. Further, the medical/mental health records of the prisoners are often not provided by the prison to the defense counsel, and a court order is demanded for the same. The Centre is currently litigating against such limited access to mental health records in the Bombay High Court.

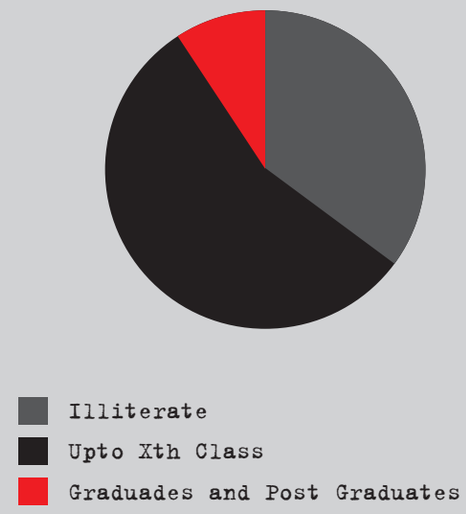
Due to the lack of access to mental health records, and to independent mental health professionals, often relevant conditions are ignored by the prison authorities and consequently the defense lawyers.

Lack of data outlining life history

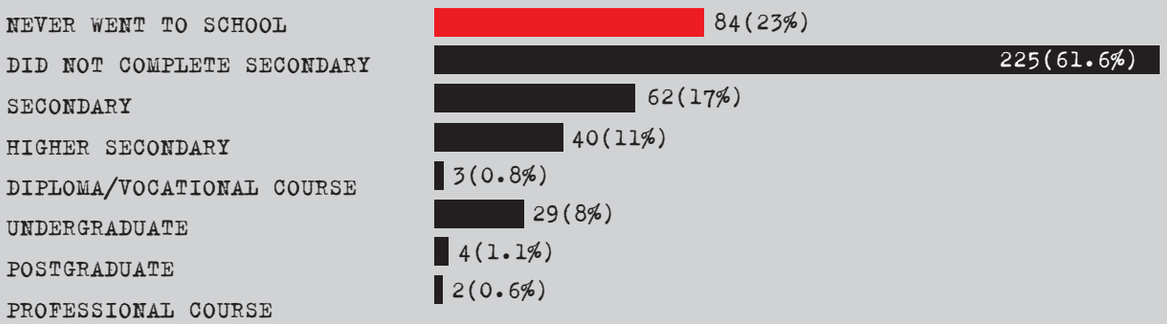
All our clients come from socio-economically backward circumstances.



(NCRB Prison Statistics 2015)



Educational Profile of Prisoners on Death Row
(Source: DP India Report, 2016)



Frequently we face the situation where they have no documents, especially from their childhood. They have either no or very little education and hence no school records are available. They rarely accessed physiological and mental health facilities and even if they did, they have no records. This makes it necessary to depend on oral evidence. Collecting this evidence poses a huge challenge especially for older clients whose childhood information becomes impossible to get.

Ethical issues with mitigation investigation

Given the extremely invasive nature of mitigation investigations and the attempt to unearth information that many people do not wish to speak about, mitigation investigators constantly grapple with ethical dilemmas. Primary among these, and intrinsic to the very purpose of mitigation, is asking clients and their families to recount their troubled pasts and speak about traumas that they wish to forget. There is the larger ethical concern of retraumatizing the families who, due to the nature of the crimes, are already the focus of a lot of societal attention and pressure. Unable to provide any sustained psychological help to them, mitigation investigators must traverse these conversations with extreme sensitivity and compassion.

Onus of costs

While the Supreme Court in the December 16 gang rape case outlined the responsibility of defense lawyers to collect mitigating circumstances on behalf of the accused, an effective mitigation investigation requires multiple visits and interviews to the accused and the family of the accused, and the same requires resources which most persons serving death sentence cannot avail. Often, the case requires the intervention of a mental health professional and obtaining the services of a qualified mental health professional and getting access to the prisoner imposes an additional cost on the accused. While the Delhi High Court in *Bharat Singh* had imposed the duty on the Court instead, of collecting and presenting mitigating material through a probation officer appointed by the Court, the way forward needs to include the development of a model where access to mitigation investigation can be provided to the accused irrespective of their socio-economic disadvantages.
The Centre has tried to overcome its limitation with conducting prison visits to collect mitigating material, by integrating constant communication with prisoners, and engaging in conversations related or unrelated to their case, including general news and topics of interest.

Outcomes so far: The effect of a thorough mitigation process

In *Mr. John Doe's*[71] case, the prisoner was represented by state appointed legal aid lawyers across the appellate process until he was represented before his Review Petition in the Supreme Court by lawyers from the Centre on the Death Penalty. A perusal of the judgements of the Trial Court and the Supreme Court shows the lack of appreciation of mitigating circumstances in favour of the accused. The curious history of the case involved Mr. Doe being represented by the same legal aid appointed Trial Court lawyer after the matter was remanded by the Bombay High Court due to absence of the counsel during cross-examination stage. In the second run of the trial, the counsel absented himself during the sentencing stage and no mitigating evidence was presented before the court.

"37. As to Point No. 6: Understanding was given to accused that he has right to make submissions on the point of sentence. Opportunity was also afforded to accused to make submissions on the point of sentence. However, he has not made any submission on the point of sentence. Therefore, he was directed to think out and then make submission pointing out circumstances which are prevailing in his family, details about his family members, source of livelihood for his family etc. after some time. Even thereafter though accused was asked to make submission on the point of sentence he has not submitted anything.
38. Shri R.H. Virsen advocate for the accused is not turned up though called repeatedly. Heard A.P.P. Miss

Trial court judgment noting the absence of the lawyer.

However, neither the High Court nor the Supreme Court remanded the matter for a full appreciation of mitigating circumstances. The Supreme Court, on the point of such deficiency at the sentencing stage, opted instead to allow submission of mitigating evidence at the review stage. However, it refused to

[71]Name changed. Person represented in Review Petition proceedings and after dismissal of Review Petition by the Supreme Court by the Centre on the Death Penalty, NLU Delhi.

entertain the ground of a mental health condition as relevant mitigating circumstance, owing to the lack of evidence, and refused requests for psychiatric tests and even refused to allow access to medical records of Mr. Doe.

After the dismissal of the Review Petition, during the preparation of the mercy petition of Mr. Doe, the mitigation investigators of the Centre, conducted several interviews with Mr. Doe, his sister, his other extended family, his friends, wife and children to develop a full life chronology of Mr. Doe. It was found that Mr. Doe had a very traumatic childhood as he was physically abused by parents and teachers. He was always found to be strange and had to drop out of school in class 6. He was taken to various faith healers, ashrams and babas where he was possibly sexually abused. He saw visions and heard sounds which others did not.

The investigators also conducted several psychometric tests to develop a profile of cognitive function and intellectual ability and possibility of psychosis. After the material was reviewed by three psychiatrists, they reported the possibility of severe mental health conditions inhibiting the culpability of Mr. Doe in the commission of the crime.

All this information was obtained in 2017. By this time, many relatives of Mr. Doe whom he was close to, especially his mother and uncle, had passed away. The information gathered would have been relevant for the trial court to consider before sentencing Mr. Doe to death.

CLINICAL IMPLICATIONS –
There is reasonable evidence to suspect:
1.Intellectual Disability (Mental Retardation)
2.Chronic organic brain pathology like Temporal Lobe Epilepsy

Psychiatrist's report finding possibility of temporal lobe epilepsy, intellectual disability and organic brain damage.

Drawing by Mr. Doe showing the vision of a snake he used to see since childhood.

One of the foundational principles of criminal jurisprudence rests on the assumption of rationality of every person, their ability to weigh the pros and cons of their actions and their capacity to understand the consequences of those actions. As a result, mental health of the accused is a significant factor that influences outcomes at various key stages of a trial. Medical and behavioural sciences such as psychiatry, psychology, and neurology have, therefore, come to occupy an important role in the administration of criminal justice worldwide. However, the development of jurisprudence has been narrow in its understanding of mental health. The emphasis on 'insanity' and the traditionally restricted understanding of mental illness as schizophrenia or psychosis disregard and discount the complexity of mental health and its importance in moulding an individual's outlook and response to life, the range of formally recognised and debilitating mental illnesses, such as depression, bipolar disorder, post-traumatic stress disorder, and intellectual and cognitive disability.

The juridical relevance of mental health in criminal trials, can be traced back to the seminal works of William Blackstone[72], Edward Coke[73], Matthew Hale[74] and William Hawkins[75] who extensively discuss the effect of the accused's "insanity", "madness", "lunacy" and "idiocy" on a trial and its outcome. The first three terms refer to mental illness, while the fourth category refers to intellectual disability (also commonly known as "mental retardation"). In *Commentaries on the Laws of England*, Blackstone writes that "idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities". He further states that mental incapacity precludes a defendant from being tried, sentenced and executed.[76]

In our criminal justice system, mental health of the accused is relevant at four stages: i. competence to stand trial, ii. defence of insanity, iii. during sentencing, and iv. before the execution of the death sentence. It is important to note that to raise mental health considerations, familiarity with the components of mental illness, various kinds of mental illness as well as intellectual disability allows a thorough defence to be raised. However, mental health concerns need to be considered at all stages of appeal and at the mercy and post-mercy stages also.

Competence to Stand Trial

Sections 328 and 329 of the CrPC lay down the procedure for postponing an inquiry or a trial, respectively, in cases where a Magistrate or a Court of Sessions has reason to believe that the accused is of unsound mind. The assumption in these sections is that to ensure a fair trial, the accused must have the capacity to instruct their counsel and make out a defence.

Strict compliance with section 329 is required and the trial has to be mandatorily postponed if the accused is found unfit to stand trial.[77] Even the

[72]Blackstone, William, Commentaries on the Laws of England, Vol. IV, (1765-1769).
[73]Coke, Edward, Institutes of the Laws of England, Vol. III, (1680).
[74]Hale, Mathew, The History of the Pleas of the Crown, Vol.I, (1800).
[75]Hawkins, William, A Treaties of the Pleas of the Crown, (1716).
[76]Blackstone, William, Commentaries on the Laws of England, Vol. IV, , Chapter 2, (1765-1769).
[77]Dimple @ Dimpu @ Gurucharan v State of Punjab, 2008 SCC Online P&H 1530, paras.15.

absence of an inquiry under section 328 or section 329 when such a plea is taken by the accused or her counsel vitiates the trial.[78] If the accused is of unsound mind, the trial may be suspended until the accused is once again found to be of sound mind and fit to stand trial. Under section 331, a trial may resume once it is found that the accused has "ceased to be of unsound mind."

In death penalty cases, these provisions extend to confirmation proceedings before the High Court. The Supreme Court has held that in confirmation hearings the High Court has to decide on facts as well as law. Thus, if no defence is made out due to absence of instructions from the accused to the counsel resulting from unsoundness of mind, the High Court ought to postpone the hearings since not doing so would be a miscarriage of justice.[79]

However, neither has "unsoundness of mind" been defined nor have courts formulated a standard regarding the determination of "unsoundness of mind" for competence evaluations. In the absence of any such standard, it is important for lawyers to meet the accused and ensure a thorough mental health evaluation, including evaluation of intellectual disability, of the accused is done.

Unsoundness of mind at the time of the offence

The defence of unsoundness of mind under section 84 of the IPC negates the culpability of the accused. This is a derivation of the M'Naghten rule, and a successful insanity defence requires the accused to prove that (a) at the time of commission of the offence, they were (b) by reason of unsoundness of mind (c) unable to know the nature of the act or (d) unable to know its wrongfulness, or that it was contrary to law.

The burden shifts onto the accused to prove unsoundness of mind at the time of commission of the offence.[80] However, the standard of proof is the lower standard of preponderance of probabilities, rather than that of beyond reasonable doubt. The court has also held that though it is upon the accused to raise the insanity defence, prejudice is caused to the accused if previous history of mental illness is revealed but not brought before the court.[81]

Legal Insanity versus Medical Insanity

Legal insanity is referred to as 'unsoundness of mind' in the IPC, however an operational definition of the same is lacking. The term insanity is now considered obsolete in the medical community with its use being increasingly confined to the legal context.

Medical insanity refers to the presence of varying degrees of mental disorders (disturbances in thought, behavior and mood) such as those classified by the International Classification of Diseases (ICD-10) and the Diagnostic and Statistical Manual of Mental Disorders (DSM-V)

Legal insanity does not refer to any prescribed diagnostic criteria but refers to the 'mental state' of the person at the time of commission of the offense. While the field of medicine describes the patient's mental status on a continuum that ranges from extreme illness to health, the law views the same through a categorical lens which either terms the person as criminally responsible or not.

It remains unclear, whether the law incorporates intellectual disability within its understanding of unsoundness of mind or legal insanity.

[78]Kuldeep Singh v State of Haryana, CRA No. D-540-DB of 2005, Decided on 14 Sep, 2012.
[79]Vivian Rodrick v State of West Bengal (1969) 3 SCC 176
[80]Dahyabhai Chhaganbhai Thakker v State of Gujarat, 1964 SCR (7) 361, para 7; Surendra Mishra v State of Jharkhand, (2011) 11 SCC 495, para 13.
[81]Bapu@ Gajraj Singh v State of Rajasthan (2007) 8 SCC 66, para.8.

Unsoundness of mind refers to 'legal insanity' rather than 'mental insanity', or the prevailing medical consensus on mental disorder or mental illness. It is intrinsically linked with *mens rea*. As a result, the section is concerned only with those accused who meet the criteria of unsoundness at the time of commission of the offence, and not all persons with physical or mental infirmities.[82]

However, the court's narrow understanding of what constitutes "at the time of commission of offence" has often resulted in the defendant discharging an evidentiary burden which is much higher than the preponderance of probabilities. Further, the inherent nature of mental illness, is such that it defies predictability making it nearly impossible to identify a determinate moment at which the accused became of unsound mind.

The Royal Commission on Capital Punishment (1949-53) in England criticized the M'Naghten rule. It recommended provisions for diminished responsibility, where the mental makeup of the accused did not fall within the category of legal insanity, but where the accused had a severe mental illness.[83] Subsequently, the Homicide Act, 1957 was enacted which provides that in cases of murder where the accused persons have an "abnormality of mind" caused by "arrested development" or "disease or injury", they should be subjected to a diminished standard of criminal responsibility. Although several jurisdictions have adopted the diminished responsibility standard, it has not yet found a place in Indian adjudication or legislation.

Both section 329, CrPC and 84, IPC rely on an understanding of capacity as the ability of the accused to, *inter alia*, decode their circumstances and environment, be cognizant of and happenings around them and provide relevant responses. This understanding of capacity itself raises complex questions of functionality, the ability of the accused to perceive and navigate the world, to understand and respond adequately to the complicated situations in a trial or formulate appropriate reactions to a situation. It, therefore, requires the lawyer and judge to go beyond merely external and behavioural manifestations of mental illnesses, most commonly observable during severe episodes of psychosis and schizophrenia. They must ensure a thorough mental health evaluation and not a superficial evaluation of orientation to time and date (which is common). It requires investigation into the mental health of the accused not just at the time of the incident or at the time immediately after and before the incident but also a history of past mental illness, which might have resurfaced at the time of the incident due to certain triggers.

Mental health considerations during sentencing

Mental health at the time of commission of the offence has often been considered as a mitigating factor to commute the death sentence of the accused. Even in cases where evidence falls short of the criteria for 'legal insanity', it may be used for commuting the death sentence of the accused.[84]

Mental health is understood as the individual's ability to realize one's potential, to cope with daily life stressors, to work productively and be able to actively contribute to society. It is harder to define mental health than physical health, because diagnosis depends on the individual's subjective perception of thier experience rather than objective means of assessment.
The concepts of mental health and mental illness are interlinked, however, over the years there has been significant progress in the behavioral sciences such that it is possible to distinguish between the two.

[82]Mariappan v State of Tamil Nadu (2013) 12 SCC 270; State of Rajasthan v Shera Ram alias Vishnu Dutta, (2012) 1 SCC 602.
[83]The Report of the British Royal Commission on Capital Punishment by Command of Her Majesty, September, 1953. (H. M.'s Stationery Office, Comd. Number 8932.)
[84]Gopalan Nair v State of Kerala, (1973) 1 SCC 469, para 3; Francis alias Ponnan v State of Kerala, (1975) 3 SCC 825, para 11.

According to *Bacchan Singh*, the mental and emotional state of the accused while committing the offence is of relevance as a mitigating factor. It is not necessary that the poor emotional and mental state of the accused should amount to a mental illness.[85] In a case where the accused harboured a belief that he was being poisoned, the death sentence was commuted on the ground that the act was committed in the frenzy of extreme emotional and mental disturbance.[86]

In various cases while commuting death sentence, the Supreme Court has not relied on mental health literature and instead employed its own standards of what constitutes factors that may have affected the mental health status of the accused. These factors include the tumultuousness of the relationship of the accused with deceased family members[87], 'mental imbalance' as a result of violent incidents that may have impacted the accused before the act[88] and pressures such as extreme financial hardship which may have lead to 'insane behavior'[89].

Understanding mental health vis-à-vis sentencing

Indian jurisprudence on mental health and criminal law commonly refer to caricatures of psychotic disorders or severe mental illnesses such as schizophrenia. Common mental illnesses such as major depressive disorder, dysthymia (a persistent depressive disorder), and generalized anxiety disorder, are largely ignored or dismissed within current jurisprudence. These illnesses affect a person's functioning, severely distort their perception of themselves and their surroundings, and can be extremely debilitating and cause severe suffering. These illnesses tend to worsen under the stress of restrictive environments such as the prison setting.

Courts have also rarely looked into the intellectual functioning and cognitive development of the prisoner. Intellectual disability (commonly known as mental retardation) can significantly detriment an individual's ability to navigate the complexities of life. A nuanced understanding of intellectual disability and cognitive impairment becomes especially important during the sentencing exercise undertaken by courts in death penalty cases. Mitigating circumstances, which look at various aspects of the life of the accused, in essence, contextualize a person. An individual's diminished ability to navigate life with sufficient insight into their actions and the consequences becomes an important factor to be presented and considered by courts.

It is imperative to consider clinical perspectives on mental illness and intellectual disability. However, it is also important to note that, mental health goes beyond these formalized categories and should not be reduced as such. Mental health comprises elements belonging to the psychological, social and emotional realms of a person's life. It is shaped continuously by our daily experiences, and in turn drives our responses to those experiences. Poverty, inability to access support systems such as family and friends, neglect in school, social isolation, unavailability of nutritious food and proper health services, and physical and sexual abuse are stressors that affect a healthy organic, psychological and emotional development of an individual. The mental health of an individual is, therefore, acutely interlinked with the social context of a person, and it is the lawyer's duty to adduce evidence on these factors which are essential in capturing the lived experience of the prisoner during the sentencing stage.

Assessing mental health

Not all mental health concerns of the accused, including mental illness and intellectual disability, are immediately observable to an untrained eye. The lawyer will often not be able recognize the presence of intellectual disability or mental illness, unless the symptoms are overt. Even if some symptoms are recognizable, there is a potential danger of misunderstanding the nature and severity of the mental health concerns of the prisoner. Assessment of the mental health of the accused, therefore, requires intervention of mental health professionals such as psychiatrists and clinical psychologists to truly understand mental health concerns affecting a prisoner.

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[85]Ibid para 206-207.
[86]Balraj v State of UP, (1994) 4 SCC 29.
[87]Vashram Narshibhai Rajpara v State of Gujarat, (2002) 9 SCC 168; Ashok Laxman Sohoni and Anr v State of Maharashtra, (1977) 2 SCC 103.
[88]Nemu Ram Bora v The State of Assam and Nagaland, (1975) 1 SCC 318; Srirangan v State of Tamil Nadu, (1978) 1 SCC 17.
[89]Janki Dass v State (Delhi Administration), 1994 Supp (3) SCC 143.

Understanding the mental health of the accused requires an investigation into developmental history, potentially traumatic events and stressors that they may have been exposed to, and past history of mental illness that may have been diagnosed or gone undetected.

It is essential to undertake an evaluation of the current state of the mental health of the accused, including mental illness and intellectual disability. This is especially important because it allows an assessment of the potential adverse mental health consequences of incarceration and of living under the death sentence. Indeed, the large number of suicides by prisoners[90] warrants an investigation into the mental health of the accused. In addition to a detailed clinical interview with the prisoner, mental health professionals may administer specialised psychometric tests designed to evaluate the mental health status of the prisoner. These tools can range from screeners for mental illness,[91] tests for intellectual disability,[92] screeners for potentially traumatic events experienced by the accused,[93] and tests for the current cognitive abilities of the prisoner.[94]

A thorough and holistic interview is time consuming and requires long periods of interaction between the accused and the mental health professionals. In addition to interviewing the prisoner, interviews with family members are also important to substantiate the context and plug gaps in the information provided by the accused. It is therefore, essential as a lawyer for the accused, to enlist the assistance of mental health professionals during the sentencing stage to ensure a robust and holistic mental health evaluation of the prisoner.

Gathering evidence on mental health

In our experience, an impediment to providing evidence on mental health is the inability of accused to access mental health professionals as part of their defence team. Prisons, typically, limit the interaction between the accused and the counsel to a 15-20 minute interview between the lawyer and the accused. Nobody else from the defence team has an opportunity to meet the accused. This limits the amount of information based on which a proper evaluation can be done by the mental health professional on the team.

We have however, been able to overcome this barrier to a large extent by continuous collaborative efforts between the lawyers and the mental health professionals (a psychologist and a psychiatrist) on the team. In one of cases in the Supreme Court, in which we are presenting evidence on mental health, we act as the go-between the psychologist and the accused. Our meetings with the accused are focused on areas that the mental health professionals have asked us to explore. We also conducted extensive interviews, over many meetings, with the family members of the accused who acted as key informants and gave us information regarding the life of the accused. While this is secondary information for a mental health assessment, we have compensated for the lack of interaction between the accused and the mental health professionals by collating comprehensive information covering the past and current life and mental health of the accused.

There is thus an urgent need to push for allowing the accused to have access to mental health professionals as a key component of the defence team. A considerable amount of important and relevant information can be provided by the accused when interacting directly with the mental health professional, as opposed to conveying the information through secondary means.

The Supreme Court may have recognized the importance of mental health considerations at the sentencing stage, but procedures for a robust evaluation of these aspects remain lacking.

Mental health considerations at the stage of execution

This is usually the final stage after all legal and administrative remedies have been exhausted. In cases at this stage, the President has exercised

[90]According to the latest official estimates, approximately 67% of all unnatural deaths of prisoners across prisons in India were suicides, Prison Statistics Report, 2015, National Crime Report Bureau, p.113.
[91]DSM 5 Self- Rated Level 1 Cross-Cutting Symptom Measure-Adult.
[92]Wechsher Adult Intelligence Scale – IV.
[93]Life Event Checklist for DSM-5.
[94]Mini-Mental Status Examination

constitutional powers under Article 72 of the Constitution to reject the mercy petition of the accused. This stage is different from others as here the court inquires into the impact of the sentence itself on the mental health of the prisoner.

The purpose is to examine whether the death sentence in its continuing application has adversely affected the mental health of the accused, and whether implementing the sentence on a person with poor mental health would be contrary to the right to life under Article 21. The court's perspective when answering both these questions is not formulated in terms of capacity of the accused but is grounded in the fundamental right of the accused to life and dignity.

In answering the question on the continuing application of the death sentence, the Supreme Court has consistently commuted death sentences relying on the reason that inordinate delay in deciding mercy petitions coupled with the uncertainty of death causes a dehumanising effect and violates the right to life of the accused.[95]

The recognition of the court of the dehumanising effect of delay is an indicator of the court's understanding of mental health and raises, once again, the need for a psychological evaluation of the prisoner. While evidence of this can be produced before the court in post-mercy writs, it also indicates the need to make the issue of dehumanisation of the prisoner and their mental health state while formulating the mercy petition. This is also an opportunity for the accused to raise grounds of mental health considerations and produce evidence of the mental health of the accused which might not have been brought to the notice of the courts during the judicial process. Considering the proximity of execution, access to a mental health professional to thoroughly conduct a mental health evaluation and investigate the life of the accused for potential issues of mental illness and intellectual disability becomes necessary.

As to the implementation and execution of the death sentence, the Supreme Court has held that insanity/ mental illness/schizophrenia is a relevant supervening factor, and the execution of prisoners suffering from insanity/mental illness/schizophrenia is a violation of their right to life and dignity.[96] Holding mental illness to be a relevant consideration, the court has extended the resultant protection of Article 21 to all death row prisoners, including those charged with terror offences.[97] In reaching its conclusion regarding prohibition of execution of prisoners with mental illness, the court has stressed on the inherent dignity of each prisoner and avoided formulating a legal threshold, which might not be in keeping with the realities of mental illness which a prisoner might have.

To ensure that persons with mental illness are not executed, *Shatrughan Chauhan* formulated guidelines for regular mental health evaluations of death row prisoners.[98] However, these are yet to find their way into practice. Prison manuals do not require regular evaluation, instead require the superintendent of the prison to postpone an execution in cases where the prisoner has a mental illness. This relies on the ability of the superintendent to detect mental illness in the prisoner. However, mental illness, intellectual disability and severe mental health concerns are not easily observable to an untrained eye. Therefore, relying only on the superintendent's understanding of mental health concerns creates the possibility of execution of a person with severe mental health concerns. Further, even if a prison appointed mental health expert conducts an investigation, it is important for them to inquire into the full range of mental health concerns, outlined above. Limiting the evaluation to schizophrenia or only behaviorally observable does disservice to *Shatrughan Chauhan's* mandate that persons with mental illness cannot be executed.

The Supreme Court has been inconsistent in its stand on the role that mental health should play precluding a prisoner from execution. In the case of *Amrit Bhushan Gupta v. Union of India*[99] was a three

[95]Ediga Anamma vs. State of A.P., (1974) 4 SCC 443, para 15; T.V. Vatheeswaran v State of Tamil Nadu, (1983) 2 SCC 68, para 12; Madhu Mehta v Union of India, (1989) 4 SCC 62, para 3.
[96]Ibid paras 86-87.
[97]Navneet Kaur v State of NCT of Delhi and Anr, (2014) 7 SCC 264.
[98]Shatrughan Chauhan and Ors v Union of India, paras 241.9-241.10. [92](1977) 1 SCC 180.
[99](1977) 1 SCC 180.

judge bench which held that despite two psychiatrists finding that the prisoner was suffering from chronic schizophrenia and severe depression, it would not be a ground to stay or commute the death sentence due to absence of any such law in India. In this case, the prisoner had not preferred an appeal against his conviction or sentence and his relatives had instead filed petitions under Article 226 of the Constitution before the Delhi High Court and filed mercy petitions before the President on several occasions. The stay of execution was vacated and the prisoner was executed in January 1977 in Tihar Jail.

At each of the aforementioned stages, the issue is to be looked at from different perspectives. The failure to raise considerations of mental health at one stage does not preclude its relevance at other stages. For instance, though the accused may be found unfit to stand trial, it is entirely possible they will be adjudged fit at the time the offence was committed. It is also important to bear in mind that claims relating to mental health have different evidentiary thresholds at each stage. The threshold required for a successful insanity defence is not necessarily the same as required during sentencing. Nonetheless these conceptions have often been misemployed owing to the lack of a clear understanding and consensus within the legal community.

It was this gap in the law that urged the Centre to undertake the Mental Health Research Project to assess the mental health of prisoners currently under the sentence of death in India.

The Mental Health Research Project

Taking off from the jurisprudence developed in *Shatrughan Chouhan*, where the court held that prisoners with mental illness cannot be sentenced to death, and motivated by the position that mental health should be understood holistically, the Mental Health Research Project set out to investigate three key categories of mental health among the death row population in India. The project's three aims are to investigate into the presence of mental illness, if any, among the death row population in the country, to inquire into the presence of intellectual disability, if any, among prisoners sentenced to death and to unearth the relationship between the mental health of prisoners and the lived experience of being under the sentence of death.

We have interviewed 83 prisoners who were, at the time of fieldwork, under the sentence of death in Chhattisgarh (8), Kerala (17), Madhya Pradesh (30) and Karnataka (28). We conducted face to face interviews with the prisoners as well as their families.

Semi structured interviews were conducted with the families with the aim of gathering information on the life of the prisoner before and after arrest and their developmental history. These interviews helped us gain an insight into the life of the prisoner, the environment in which they grew up and which shaped their values. The stress caused by the death sentence is a continuous one which is marked by extreme social stigma and a feeling of perpetual loss. In this way, the disintegration of the family of the prisoner often becomes the collateral damage of the death sentence. Interviews with each family lasted around 3-4 hours.

Interviews with prisoners were a combination of semi-structured interviews and psychometric tests. The purpose of the semi-structured interviews was to understand the lived experiences of the prisoners while in prison and on death row and to also get their perspectives on their lives before and after arrest. The reason it is important to get the prisoner's perspective is because it is an insight into how their lives have impacted their mental health, and their ability to navigate the world they are from and to which they are now confined to. The semi-structured interviews also helped us understand the psychological and emotional impact that the death sentence has had on the prisoners. We employed psychometric tests with the specific purpose of investigating into any mental illness that may be present currently as well as the current cognitive and intellectual disability in the prisoner. The tests we have used for our project are (a) DSM -5 Self- Rated Level 1 Cross-Cutting Symptom Measure-Adult as a screener for mental illness, (b) WHO - ASSIST V3.0 to inquire into substance use and dependence, (c) Mini-Mental State Examination to measure cognitive functioning of the prisoner, (d) Life Events Checklist to screen for potentially traumatic

events that a prisoner may have been exposed to, and (e) Wechsler Adult Intelligence Scale- 4th Edition to investigate the presence of intellectual disability.

Interviews with the prisoners were conducted over two sessions, with each session lasting approximately 3-4 hours per prisoner. Interviews with the families and the prisoners were conducted by teams comprising lawyers/law students and mental health professionals/students.

One of the tentative findings of the project is that an overwhelming majority of the prisoners screened positive for at least one symptom indicative of poor mental health condition of the prisoner at the time of the interview. Our tests and interviews have revealed a population marked by adverse mental health, attempts to suicide and mental illness. The presence of mental illnesses such as major depression disorder, persistent depressive disorder and generalised anxiety disorder in this population is more than double the general population average. Rates of attempt to suicide are also high among this population.[100] However, in most of the cases, lawyers have not raised these mental health considerations and consequently judges have not paid any consideration to the mental health of the prisoner.

The project has also shed light on the debilitating effects of mental disorders that are often sidelined in the jurisprudence on mental health and criminal law. For instance, in the case of a prisoner who fits the diagnostic criteria for dysthymia, the rejection of his mercy petition had a profoundly negative impact on his mental health. Dysthymia is a mental illness that is marked by chronic depression (i.e. over a prolonged period of time). Symptoms of dysthymia include significant disruptions in sleep and appetite, low energy and self-esteem, and a pervasive feeling of hopelessness. The prisoner we interviewed had attempted suicide once before in the past and in the wake of the rejection of his mercy petition, his thoughts of suicide had resurfaced. He cites the hopelessness of his situation and his inability to see a future for himself as the main reasons for his considering suicide. Poor prison conditions, lack of support system, inability to sleep, and constant rumination about his death sentence brought into stark focus by the rejection of his mercy petition all had a compounding effect on his mental illness. Despite not fitting the commonly used template of a psychotic disorder, this prisoner's mood disorder and its debilitating effects ought to be considered at every stage of the trial. However, over the course of his appeals the issue was never raised before the court.

The project is a move towards spreading awareness among the legal community, especially lawyers and judges, about the complexities of mental health, mental illness and intellectual disability – areas that lawyers must explore in mounting mental health arguments at any given stage in the trial, including the sentencing phase, the appellate stages, at the time of submitting the mercy petition as well as in post-mercy writs.

[100]These findings are tentative and in no way can be considered final.

GLOSSARY

Mental Illness

The *Mental Healthcare Act, 2017* defines mental Illness as "a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by sub normality of intelligence.

Intellectual Disability

The Rights of Persons with Disabilities Act, 2016, defines intellectual disability as a condition characterized by significant limitation both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior which covers a range of everyday, social and practical skills, including: (a) specific learning disabilities (b) autism spectrum disorder.

> Intellectual Disability = Intellectual Functioning + Adaptive Behaviour

Intellectual Functioning

Intellectual functioning refers to cognitive processes such as learning, reasoning, problem solving and is measured by an Intellectual Quotient (IQ) test.[1] An IQ score is best understood as an estimation of the intellectual functioning of the individual represented as a range, rather than a discrete category. A bright-line standard used to quantify deficits in intellectual functioning is inaccurate since it reduces the condition of intellectual disability to an IQ score of below 70.

Adaptive Behavior

Adaptive behavior refers to the ability to learn basic life skills and adjust behavior according to changing life circumstances (ability to navigate through one's environment by choosing the appropriate responses/skills to maximize success and minimize conflict). The assessment of adaptive behavior takes into account three broad skill areas namely conceptual, social, and practical skills spanning across two time frames: adaptive functioning within the developmental period (before age 18) and during adulthood (above 18 years of age).[2]

> Indian law makes a distinction between mental illness and intellectual disability, while the WHO considers mental illness and intellectual disability under the umbrella term of mental disorder.

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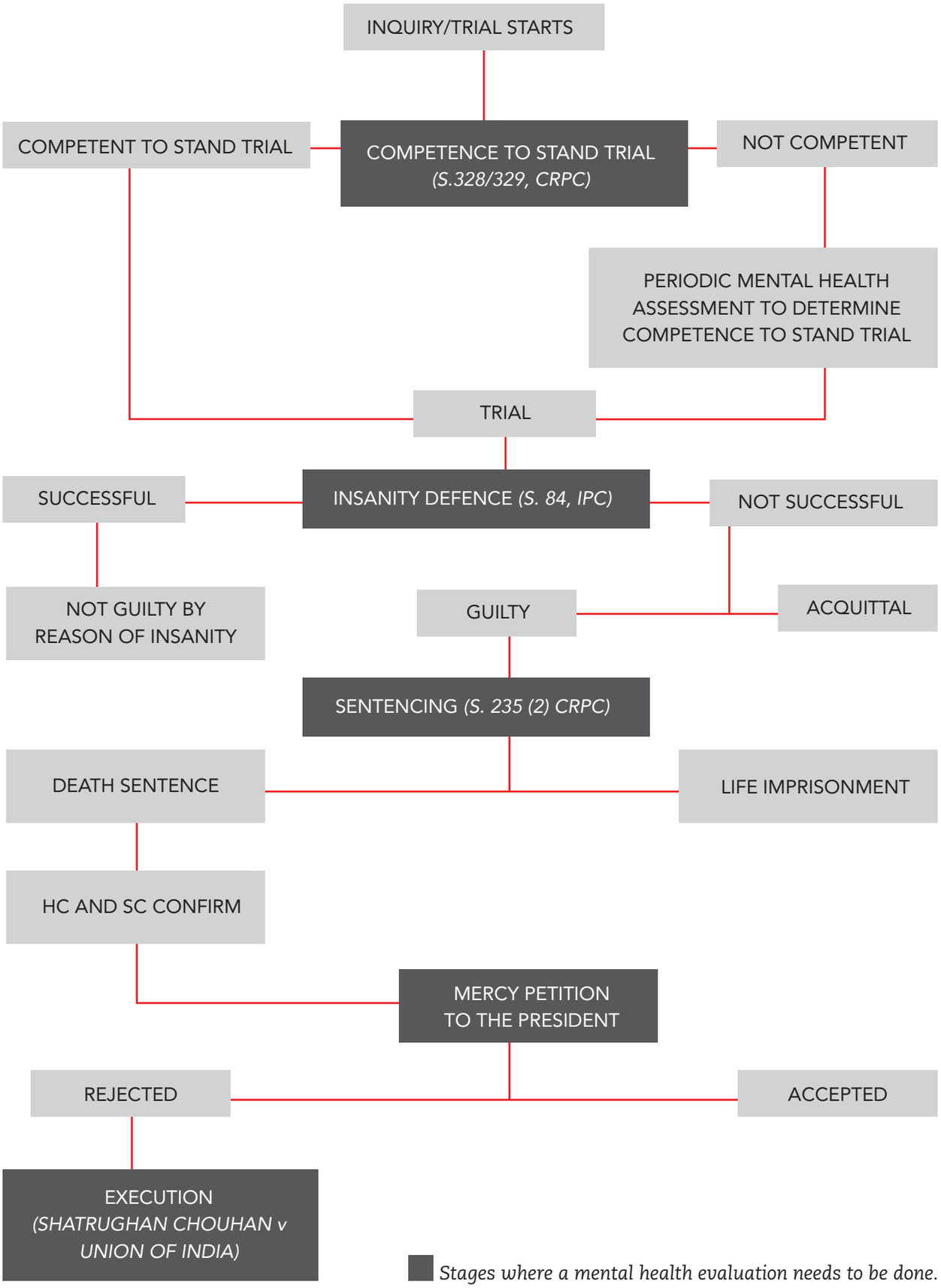
[1]Tasse, J.M. (2015). The Death Penalty and Intellectual Disability. Washington D.C. American Association on Intellectual and Developmental Disabilities

[2]American Association on Intellectual and Developmental Disabilities. (2017). [data last retrieved on 10/10/2017 from http://aaidd.org/intellectual-disability/definition#.Wdw_RWiCzIU]

FLOW CHART OF THE PROCESS



Stages where a mental health evaluation needs to be done.

LAWYERS' CONSULTATION
NATIONAL LAW UNIVERSITY, DELHI
CENTRE ON THE DEATH PENALTY

PROGRAM SCHEDULE

18TH NOVEMBER 2017
"CASUARINA", INDIA HABITAT CENTRE, NEW DELHI

TIME	SESSION	SPEAKER(S)
10:00 am - 10.30 am - Tea		
10:30 am - 11:15 am	Introduction	Dr. Anup Surendranath, Centre on the Death Penalty, NLU-D
11:15 am - 12:00 am	Procedural and evidentiary issues in criminal litigation	Yash S Vijay, Shreya Rastogi
12:00 pm - 12:15 pm - Tea		
12:15 am - 1:00 am	Sentencing in Death Penalty Cases	Neetika Vishwanath, Rahul Raman, Preeti Pratishruti Dash
1:00 pm - 2:00 pm - Lunch		
2:00 pm - 2:45 pm	Mitigation Investigation	Rahil Chatterjee, Shweta Wankhede
2:45 pm to 3:30 pm	Mental Health in Criminal Trial	Maitreyi Misra, Angela Joseph, Peter John
High Tea		

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