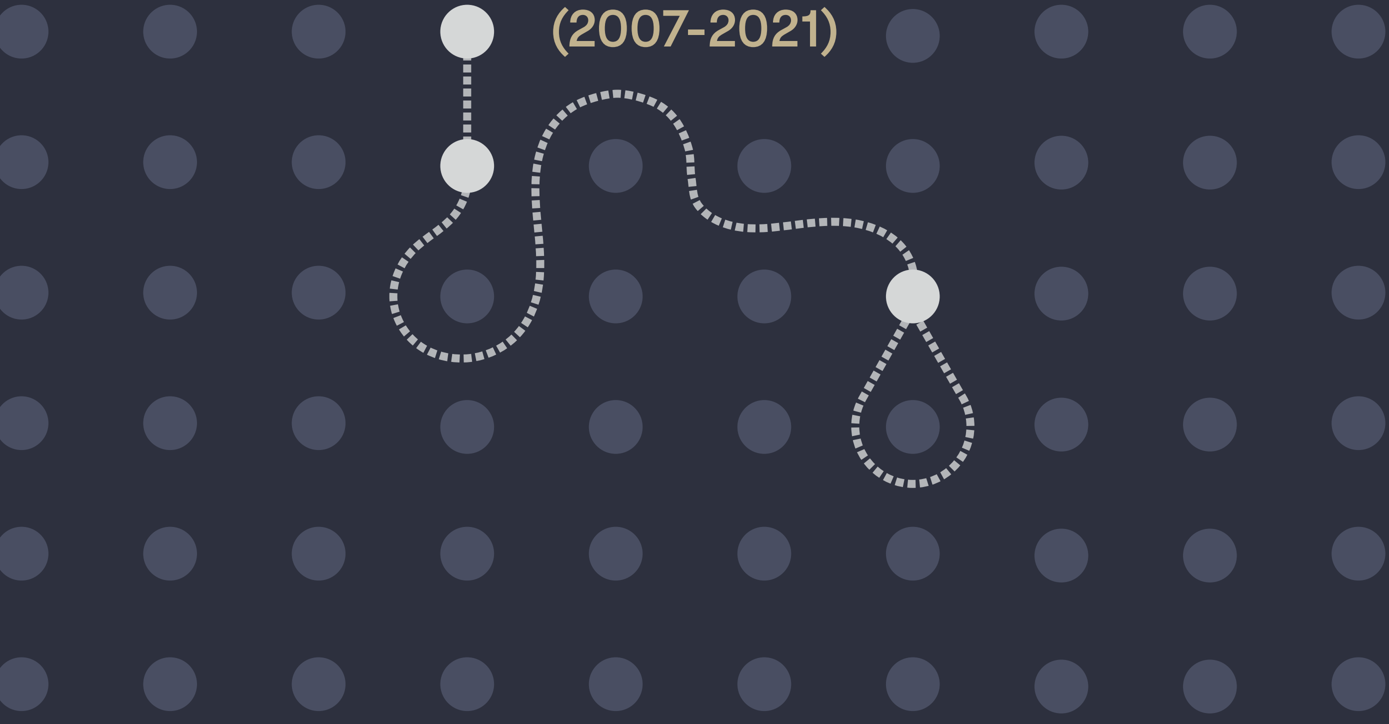
# Death Penalty and the Indian Supreme Court

(2007-2021)



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**PUBLISHED BY**
**Project 39A,**
**National Law University, Delhi**
Sector 14, Dwarka
New Delhi 110078
Published in October 2022

**ISBN**
978-93-84272-36-4

© National Law University, Delhi 2022

**DESIGN**
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**PRINTERS**
Excel Printing Universe

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# I. Introduction

A sentence of death is an exceptional punishment. As per Section 354(3) of the Code of Criminal Procedure, 1973 [hereinafter CrPC] it may only be imposed when 'special' reasons exist.[1] The CrPC also requires confirmation of a death sentence by the High Court by way of a mandatory reference, in recognition of its severity and irrevocability.[2] In line with this legislative policy, while upholding the constitutionality of the death penalty for murder, a 4:1 majority in ***Bachan Singh v. State of Punjab*** [hereinafter ***Bachan Singh***] held that the death sentence can be imposed only in the 'rarest of rare' cases where individualised reasons, pertaining to both the offence as well as the offender, exist. It further observed that any errors made by lower courts in imposing a sentence of death would be liable to be corrected by superior courts.[3]

In sum, the majority in ***Bachan Singh*** identified two factors as contributing to the fairness of the procedure through which capital punishment is administered in India: ***first***, the individualisation of punishment through a 'principled' exercise of sentencing discretion by judges, guided by legislative policy and judicial precedents; and ***second***, the availability of appellate review of trial court-imposed death sentences by superior courts as an effective safeguard against the arbitrary imposition of the death penalty.

This report collates and analyses all Supreme Court judgments, delivered during the 15-year period between 2007 and 2021, involving one or more prisoners under a sentence of death. It studies the application of the ***Bachan Singh*** framework by the Supreme Court and enquires as to whether the aforementioned bases on which ***Bachan Singh*** upheld the fairness of the capital sentencing procedure under the CrPC have proven to be (un)workable in practice.

The reasons for choosing the Supreme Court as the focus of this report are two-fold. ***First***, the Supreme Court is a court of record and its judgments are recognised as legal precedents, laying down the law to be applied by courts below. This is especially so in the context of capital sentencing, given that ***Bachan Singh*** upheld the exercise of judicial discretion in capital cases on the basis that the same would be guided by "well-recognised principles" gleaned from judicial decisions.[4] This report considers whether the Supreme Court's capital sentencing jurisprudence is a source of adequate guidance for trial courts and High Courts in their exercise of sentencing discretion in capital cases.

***Second***, the eventual reversal by appellate courts of the vast majority of trial court-imposed death sentences — over 95% of trial court-imposed death sentences are ultimately overturned by appellate courts[5] — makes the Supreme Court, the last judicial forum before which a death sentence can be appealed, a relevant site of inquiry. While the law allows only a discretionary appeal before the Supreme Court under Article 136,[6] recent case law has made the same nearly mandatory in all capital cases, meaning that a Special Leave Petition [hereinafter SLP] filed against a High Court confirmation must be admitted by the Supreme Court.[7] In capital cases, a limited oral hearing must also be compulsorily allowed in review petitions filed against the Supreme Court's confirmation of death sentences in appeal.[8] Consequently, appellate proceedings at the Supreme Court have become as much of an integral part of the process through which the capital punishment is administered in India, as the statutorily mandated pre-sentencing hearing by trial courts[9] and confirmation hearing by High Courts.[10]

This report is envisaged as an intellectual successor to the important work undertaken by Amnesty International and PUCL (Tamil Nadu and Puducherry) in their doctrinal study of death penalty cases decided by the Supreme Court between 1950 and 2006, titled 'Lethal Lottery: The Death Penalty in India'. 'Lethal Lottery' highlighted the ***ad hoc*** and judge-centric nature of reasoning in capital cases at the Supreme Court, and emphasised the resultant inequality of outcomes.

This report focuses on the arbitrariness of approaches to sentencing, and not the arbitrariness of outcomes while studying the same site as Lethal Lottery. It seeks to expose the deficient and incoherent nature of the framework that allows for such inconsistent jurisprudence in capital cases. No two offenders or crimes are the same. The recognition of fairness in sentencing as an individualisation of punishment, makes 'equality of outcomes' a limited and inadequate critical framework to adopt.[11] This report, therefore, conceptualises 'arbitrariness' in sentencing as the inconsistency of processes, rather than an inconsistency of outcomes in seemingly similar cases.

The diversity of approaches that characterise the Supreme Court's capital sentencing jurisprudence, specifically the stark differences in commutation and confirmation judgments, demonstrate the deficient nature of the capital sentencing framework that is purportedly at work, guiding judges in the identification of 'rarest of rare' cases. The report does not seek to suggest that these confirmations should actually have been commutations, i.e., that there should have been an equality of outcomes in 'similar' cases; the argument instead is that there is no equality of inputs and processes. As a result, the outcomes in all death sentence cases are unequal and erroneous; not in comparison to each other but because they emerge from inconsistent interpretation and application of sentencing principles, made possible by the inadequacy of the normative framework currently guiding capital sentencing in Indian courts.[12]

**Chapter I** of the report outlines the scope and methodology of this study. Thereafter, the report considers the nature of sentencing reasoning in capital cases. **Chapter II**, highlights the diverse and inconsistent approaches to sentencing reasoning adopted in different judgments. The chapter is further broken down into smaller sections, dealing with the

various aspects of the sentencing framework laid down in ***Bachan Singh***, namely: a consideration of aggravating and mitigating circumstances which are related to both offender and the offence; a consideration of offenders' probability of reform; and finally, a consideration of whether the alternative of life imprisonment is unquestionably foreclosed in individual cases. **Chapter III** looks at other issues that have emerged in capital sentencing case law. First, it considers the treatment of the quality of evidence on which the convict's conviction is based, as a sentencing factor. Second, it considers how the Supreme Court has dealt with procedural defects present in the manner in which courts below have conducted the sentencing exercise. **Chapter IV** thereafter, focuses on the Supreme Court's exercise of its review jurisdiction in capital cases, which exposes the arbitrariness inherent in capital sentencing decisions.

The remaining part of the report surveys procedural and substantive legal developments that took place during the 15-year period of this study, and discusses their implications. **Chapter VI** therefore considers the recognition of life imprisonment without the possibility of remission as an alternative to the death sentence; the developments in the Supreme Court's post-mercy jurisprudence; the clarification of the law on the execution of death warrants; and finally, the rejection of a constitutional challenge to the death penalty for the offence of kidnapping for ransom.



## ENDNOTES

**1** The Code of Criminal Procedure 1973, s 354(3).

**2** The Code of Criminal Procedure 1973, s 366.

**3** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [166].

**4** Ibid [165].

**5** Death Penalty India Report (2016) found that 4.9% of the 1486 prisoners sentenced to death by trial courts between 2000 and 2015 remained on death row at the end of the appeals process. See National Law University, Delhi, Death Penalty India Report (NLU Delhi Press 2016).

**6** The Constitution of India, art 134(1) (Except in cases where the High Court imposes a death sentence after reversing an acquittal by the trial court).

**7** Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India [(2014) 9 SCC 737] [57] held that under Article 136, appeals in capital cases are always admitted as a matter of practice. In Babasaheb Maruti Kamble v. State of Maharashtra [Review Petition (Crl) No. 588 of 2015], it was held that even if an SLP against a High Court confirmation of conviction and death sentence is dismissed, the same must be done via a reasoned order at least on the question of sentence. Finally, in Shatrughan Chauhan and Anr. v. Union of India [(2014) 3 SCC 1] [211, 224] it was held that *inter alia* the *in limine* dismissal of the petitioner's SLP against the High Court's confirmation had not been considered by the President when rejecting the mercy petition, and the said circumstance would justify commutation of death sentence.

**8** Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India [(2014) 9 SCC 737].

**9** The Code of Criminal Procedure 1973, s 235(2).

**10** The Code of Criminal Procedure 1973, s 366.

**11** National Law University, Delhi, Death Penalty Sentencing in Trial Courts (NLU Delhi Press 2020) [hereinafter Trial Court I Report], 46-48.

**12** Ibid (Explaining the limitations of an "equality of outcomes" approach, the Trial Court I Report observes: "If all punishments were perfectly individualised for all offenders, then no offender would be punished unequally. Equality does not mean sameness; the term more commonly refers to the consistent application of a comprehensible principle, or a mix of principles, to different cases. Therefore, the focus on equality in sentencing should be more on inputs and processes rather than on outcomes...Within the current sentencing framework in death penalty cases, this would mean equality in terms of compliance with all steps of the sentencing framework developed in Bachan Singh. Further, within each step, there has to be equality in the extent of such compliance, to ensure that it matches the standards envisaged in Bachan Singh.")

# II. Scope and Methodology

All judgments delivered by the Supreme Court between 2007 and 2021 involving a sentence of death were collected from three sources. The ***first*** source was the Supreme Court Cases Repository maintained by Project 39A, a database of death penalty cases decided by the Supreme Court since the constitution bench decision in ***Bachan Singh*** in 1980. ***Second***, the list of judgments that were tagged as death sentence matters on the Supreme Court website were sourced through web-scraping, with the assistance of ProVakil. ***Third***, to ensure comprehensiveness of the data-set, a further search on Manupatra, SCC Online, and Indian Kanoon using relevant keywords ('death penalty', 'death sentence', 'sentenced to death', 'capital punishment') was undertaken. The free text search option on the Supreme Court website was also used to find cases in which the said keywords appeared, to confirm that no available judgments had been excluded from the data-set.

Finally, the 203 judgments so collected were qualitatively studied. Information from these judgments, identified as relevant, was extracted onto a template created on an Excel Sheet. The data extracted was thereafter, quantitatively analysed using the software Tableau.

**Figure 1 is a table of the 203 judgments that form part of the data-set. These 203 judgments have been divided into two categories. *First*, challenges to death sentences that were judicially imposed. *Second*, challenges to death sentences on grounds of supervening circumstances at the post-mercy stage, consequent to the rejection of a mercy petition by the Executive.**

**Figure I: Total Dataset**

| Categories of cases | Case Type | No. of Judgments | No. of Prisoners* |
|---|---|---|---|
| Death sentence challenges | Criminal Appeal | 147 | 209 |
| | Review Petition | 37 | 40 |
| | Curative Petition | 5 | 6 |
| | **Total** | **189** | **211** |
| Post-Mercy Challenges | Post-Mercy Challenge | 13 | 28 |
| | **Total** | **203** | **225** |

*The number of prisoners does not tally with the number of judgments, as a single judgment can pertain to more than one death row prisoner in cases involving multiple accused.

# III. Nature of Sentencing Reasoning in Capital Cases

The 1973 amendment to Section 354(3) of the CrPC made life imprisonment the default punishment and death penalty the exception, requiring judges to provide 'special reasons' justifying the imposition of the death sentence.

***Bachan Singh***, while upholding the constitutionality of the death penalty for murder, interpreted 'special reasons' to mean "exceptional reasons, based on exceptionally grave circumstances relating to both the crime and the criminal".[1] It departed from the holding in ***Jagmohan Singh v. State of Punjab***[2] that judges should ***principally*** be concerned with the crime when choosing between life imprisonment and the death penalty. ***Bachan Singh*** justified this deviation on account of the introduction of a mandatory pre-sentencing hearing under Section 235(2) of the CrPC. It was observed that a pre-sentencing hearing would require consideration of material, not strictly connected to the crime, but still relevant to the question of sentence.[3]

Notably, this requirement of considering non-crime related circumstances is not readily deducible from the text of Section 235(2).[4] ***Bachan Singh***, however, emphatically read this requirement into Sections 235(2) and 354(3) of the CrPC, so that the sentence ultimately imposed is appropriately ***individualised*** to the circumstances of the offence as well as the offender.[5] ***Bachan Singh*** also held that the death penalty is an ***exceptional*** punishment, to be imposed only in the 'rarest of rare' cases, where the offender's culpability assumes proportions of extreme depravity, and the alternative of life imprisonment is unquestionably

foreclosed.[6] In service of these broad principles, the court called for mitigating and aggravating circumstances, relating to both offence and offender, to be given relative weight in light of the facts and circumstances of each individual case.[7] Furthermore, it clarified that mitigating circumstances should be given liberal and expansive interpretation.[8]

This chapter, concerned with the 189 judgments that involved a challenge to a death sentence before the Supreme Court, looks at the nature of sentencing reasoning adopted by various benches while considering circumstances of the crime and the offender. It seeks to demonstrate that all the steps endorsed in ***Bachan Singh***, viz. weighing of aggravating and mitigating circumstances to determine the extent of an offender's moral culpability, the consideration of the probability of reform, and the foreclosure of the alternative of life imprisonment, are not consistently pursued, with crucial differences in approach between judgments resulting in confirmation and commutation of death sentences.



## ENDNOTES

**1** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [161].

**2** The constitutionality of the death penalty, as administered under the 1955 CrPC which expressed no legislative preference between life imprisonment and death penalty, was upheld in Jagmohan Singh v State of Punjab [(1973) 1 SCC 20], by a 5-judge bench. The question of constitutionality was again reconsidered in *Bachan Singh* after the 1973 Amendment.

**3** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [163].

**4** The Code of Criminal Procedure 1973, s 235(2). The section merely requires the sentencing judge to "hear the accused on the question of sentence, and then pass sentence on him according to law."

**5** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [173-175].

**6** Ibid [161, 209].

**7** Ibid [161, 163].

**8** Ibid [207, 209].

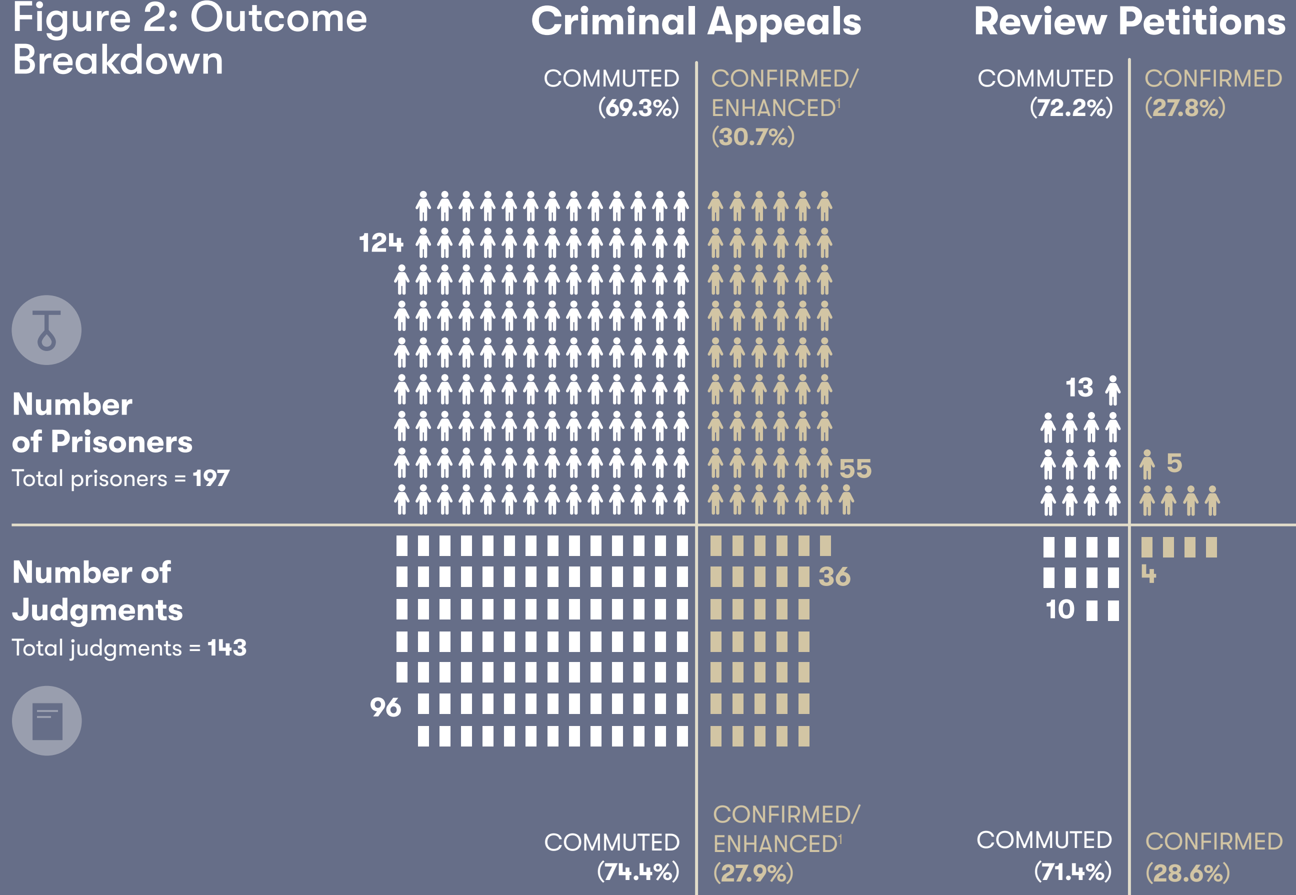
# A. The Data-Set

## Judgments Where Sentencing Reasons were Present

When analysing the manner in which sentencing was conducted in judgments rendered during the period of study, we are concerned with a subset of 143 out of 189 judgments. In these, judicial sentencing was a requirement and sentencing reasons (in some form) were present.

The said 143 judgments include 40 confirmation/enhancement judgments (36 at the stage of appeal and 4 at the stage of review) and 106 commutation judgments (96 at the stage of appeal and 10 at the stage of review). Note that there were 3 judgments ending in both confirmation and commutation of death sentences for different prisoners involved therein. Hence, 106 commutations and 40 confirmations/enhancements do not add up to a total of 146 judgments, but to a total of 143 judgments.*

### Figure 2: Outcome Breakdown




*These 3 judgments were Vikram Singh and Ors. v. State of Punjab [(2010) 3 SCC 56]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1].



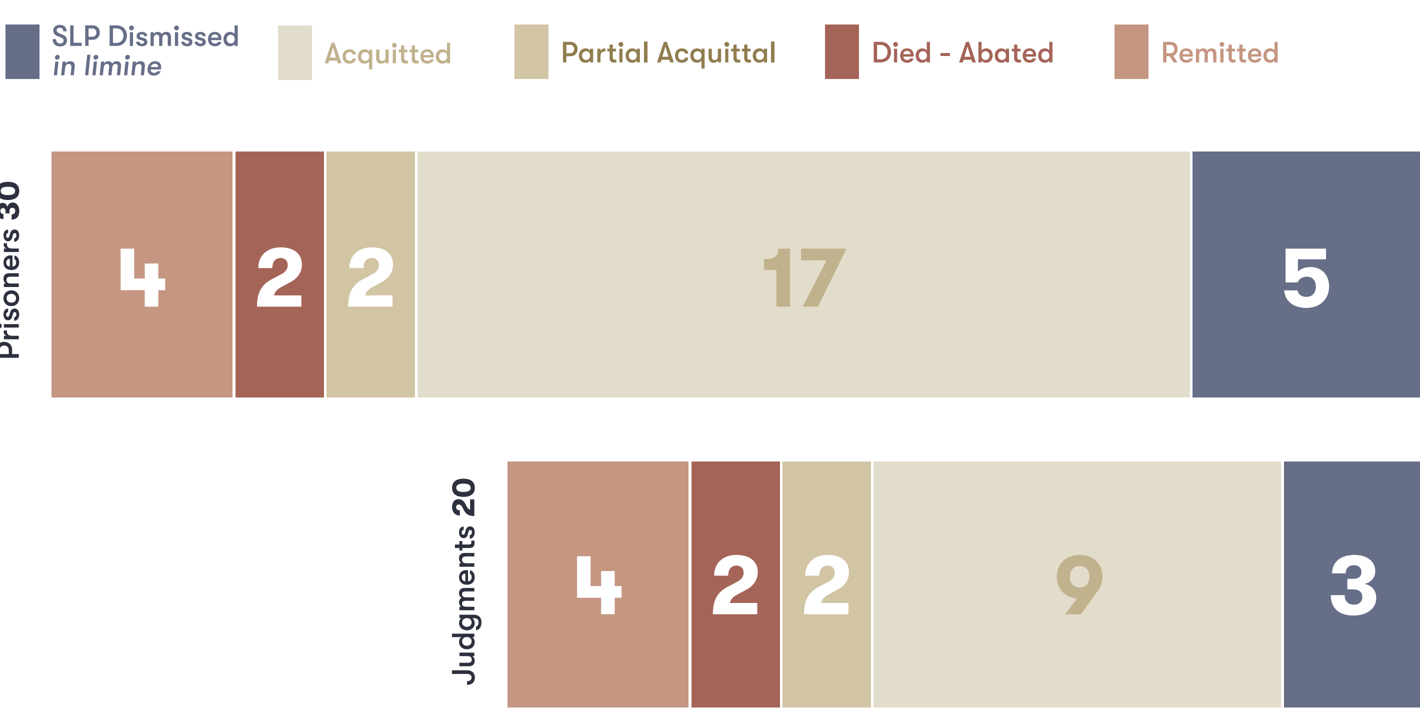
## Judgments Where Sentencing was not a Requirement and/or Sentencing Reasons were not Present

In 48 out of 189 judgments* (20 criminal appeals, 23 review petitions, 5 curative petitions), judicial sentencing was not required or a sentencing exercise was not conducted.

### A. Criminal Appeals

### Figure 3: Outcome Breakdown

There were 20 criminal appeals where death row prisoners were acquitted of all charges[2] or acquitted only of death-eligible offences (partial acquittal);[3] where the case was remitted to the trial court or high court;[4] or the matter abated as a result of the death of the convict.[5] Sentencing was also not undertaken in 3 judgments that dismissed SLPs challenging death sentences ***in limine***, i.e., the Court refused to admit the matter and exercise its discretionary jurisdiction under Article 136 of the Constitution.[6]

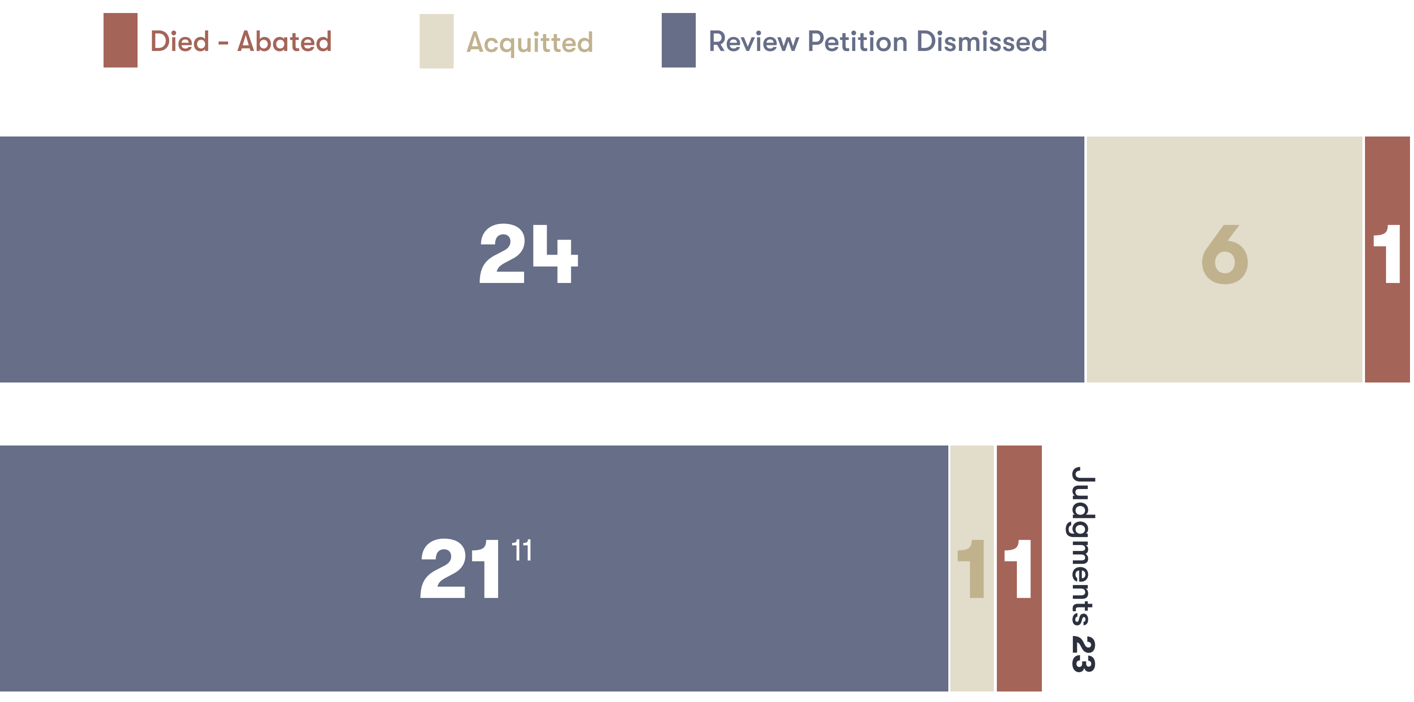



*Note that there were 2 judgments (Vyas Ram @ Vyas Kahar and Ors. v. State of Bihar [(2013) 12 SCC 349] and Basavaraj @ Basya and Ors. v. State of Karnataka [(2020) 15 SCC 310]) where there were acquittals as well as commutations. Hence, the 143 judgments where sentencing reasons were present, and the 48 judgments where sentencing was not a requirement and/or sentencing reasons were not present, do not add up to a total of 191, but to a total of 189.

## B. Review Petitions

### Figure 4: Outcome Breakdown

At the stage of review, in addition to 1 acquittal,[7] and 1 matter that abated due to the convict's death,[8] sentencing reasoning was not provided in two types of cases: ***first***, 14 judgments dismissed review petitions challenging Supreme Court judgments upholding death sentences in criminal appeal, in chambers or by circulation, i.e., without an oral hearing;[9] and ***second***, 7 judgments found that grounds for exercising the court's review jurisdiction did not exist, and consequently dismissed the review petition on that count alone, without engaging with the substantive sentencing issues raised in the judgment under review.[10]




Further, there were 5 judgments, involving 6 prisoners, which dismissed curative petitions that were filed against the dismissal of review petitions, due to the absence of any grounds for the exercise of powers under Article 137.[12]



## ENDNOTES

**1** There were 3 judgments involving 7 prisoners in which sentences of life imprisonment were enhanced to death sentences. Ram Singh v. Sonia & Ors. [(2007) 3 SCC 1]; Sattan @ Satyendra and Anr. v. State of Uttar Pradesh [(2009) 4 SCC 736]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667] (for 3 of the 6 prisoners involved).

**2** Musheer Khan @ Badshah Khan & Anr. v. State of Madhya Pradesh [(2010) 2 SCC 748]; Vyas Ram @ Vyas Kahar and Ors. v. State of Bihar [(2013) 12 SCC 349]; Adambhai Sulemanbhai Ajmeri and Ors. v. State of Gujarat [(2014) 7 SCC 716]; Dhal Singh Dewangan v. State of Chhattisgarh [(2016) 16 SCC 701]; Basavaraj @ Basya and Ors. v. State of Karnataka [(2020) 15 SCC 310]; Digamber Vaishnav and Anr. v. State of Chhattisgarh [(2019) 4 SCC 522]; Hari Om @ Hero v. State of Uttar Pradesh [(2021) 4 SCC 345]; Jaikam Khan v. State of Uttar Pradesh [2021 SCC OnLine SC 1256]; Asif Mamu v. State of Madhya Pradesh [(2008) 15 SCC 405].

**3** Rajesh v. State of Madhya Pradesh [(2017) 4 SCC 386]; Govindaswamy v. State of Kerala [(2016) 16 SCC 295].

**4** Ajay Pandit @ Jagdish Dayabhai Patel v. State of Maharashtra [(2012) 8 SCC 43]; Mohd. Hussain @ Julfikar Ali v. State (Government of NCT of Delhi) [(2012) 9 SCC 408]; Anokhilal v. State of Madhya Pradesh [(2019) 20 SCC 196]; Pappu @ Chandra Kumar v. State of Uttar Pradesh [2019 SCC OnLine SC 1961].

**5** Mohammad Shafiq @ Munna @ Shafi v. State of Madhya Pradesh [Special Leave to Appeal (Crl) No (s).8585-8586/2010]; Taher Mohd Dada @ Taher Merchant @ Taher Taklya v. State of Maharashtra [Criminal Appeal No. 2066 of 2017].

**6** Magan Lal v. State of Madhya Pradesh [Crl MP. No(s). 25566-25567]; Babasaheb Maruti Kamble v. State of Maharashtra [2015 SCC OnLine SC 1750]; Jitendra @ Jeetu and Ors. v. State of Madhya Pradesh [2015 SCC OnLine SC 1753].

**7** Ankush Maruti Shinde v. State of Maharashtra [(2019) 15 SCC 470].

**8** Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [Crl MP. 21289/2014 in Review Petition (Crl.) No.431/2014 in Criminal Appeal No.1409/2008].

**9** Shivu and Anr. v. R.G., High Court of Karnataka and Anr. [Review Petition (Crl) No.124 of 2007]; Mohan Anna Chavan v. State of Maharashtra [2008 SCC OnLine SC 29]; Sattan @ Satyendra and Anr. v. State of Uttar Pradesh [Review Petition (Crl) No(s). 136- 137 of 2009]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [2010 SCC OnLine SC 26]; M.A. Antony @ Antappan v. State of Kerala [2010 SCC OnLine SC 27]; Atbir v. State (Govt. of NCT Delhi) [Review Petition (Crl) No. 518 of 2010]; Vikram Singh and Ors. v. State of Punjab [2011 SCC OnLine SC 3]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [2011 SCC OnLine SC 5]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [Review Petition (Crl) No. 576 of 2011]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2012) SCC Online SC 1141]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [Review Petition (Crl) No(s). __ of 2013 @ Diary No. 26107/2012 in Criminal Appeal Nos. 46 of 2011]; Yakub Abdul Razak Memon v. State of Maharashtra [2013 SCC OnLine SC 679]; Surendra Koli v. State of Uttar Pradesh [2014 SCC OnLine SC 1714]; Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [Review Petition (Crl) No(s). 431 of 2014].

**10** Surendra Koli v. State of Uttar Pradesh [(2014) 16 SCC 718]; Sonu Sardar v. State of Chhattisgarh [Review Petition (Crl) No(s). 370-371 of 2014]; Yakub Abdul Razak Memon v. State of Maharashtra [(2015) 9 SCC 552]; Vikram Singh and Anr. v. State of Punjab [(2017) 8 SCC 518]; Mukesh v. State for NCT of Delhi and Ors. [[(2018) 8 SCC 149], Vinay Sharma and Anr. v. State of NCT of Delhi and Ors. [(2018) 8 SCC 186]; Akshay Kumar Singh v. State (NCT of Delhi) [(2020) 3 SCC 431].

**11** Of the 21 judgments, 14 were review petitions that were dismissed 'in chambers', without an oral hearing, while 7 review petitions were dismissed because no grounds for review were found.

**12** Sunil Baban Pingale v. State of Maharashtra [Curative Petition (Crl.) No.4 of 2008]; Yakub Abdul Razak Memon v. State of Maharashtra [(2015 9 SCC 552]; Vinay Sharma and Anr. v. State of NCT of Delhi [2020 SCC Online SC 230]; Akshay Kumar Singh v. State (NCT of Delhi) [[(2020) 2 SCC 454]; Pawan Kumar Gupta v. State of NCT of Delhi [(2020) 4 SCC 54].

# B. Approaches to Mitigation

Mitigating circumstances are aspects pertaining to an offender's character, background, record, offence, or any other circumstances, which, while not constituting excuses or justifications for the crime, might serve as the basis for a lesser sentence.[1]

The ***Bachan Singh*** framework conceptualised mitigation in a broad and expansive manner. ***Bachan Singh***'s acknowledgement of "numerous ***other*** circumstances [in addition to an illustrative list of mitigating circumstances][2] justifying the passing of a lighter sentence"; its recognition of the expansive and liberal "scope and concept of mitigating circumstances";[3] and its call to exercise "caution and compassion....scrupulous care and humane concern" in capital sentencing,[4] reflect the intention to expand the scope of mitigation beyond proximal circumstances relating to the crime and the offender. Thus, not only are proximal mitigating circumstances, which are directly related to the crime to be considered (nature of the offence, motive, accused's immediate mental state during the commission of the crime etc.), but remote mitigating circumstances that diminish offenders' 'moral culpability' and/or demonstrate their capacity for reform, must also be considered. The exceptional nature of the death penalty, and the need for individualised sentencing, are other principles laid down in ***Bachan Singh***, buttressing this expansive reading of the scope of mitigation in capital sentencing.

This chapter looks at the nature of engagement with mitigating circumstances in the Supreme Court's capital sentencing case law. Specifically, it highlights the fact that several judgments have failed to recognise the importance of the expansive scope of mitigation in capital sentencing, for the purpose of individualisation of sentencing as well as the exceptionalisation of the death sentence. Commutation judgments fare more favourably than confirmation judgments in terms of the consideration of mitigating circumstances, in complete repudiation of the ***Bachan Singh*** framework, which calls for the imposition of the death sentence only in rarest of rare cases, where it can be demonstrated that there is no significant mitigation diminishing the culpability of the offender and/or pointing towards the probability of reformation. The failure to mention mitigating circumstances at all, or engage with only proximal mitigating circumstances, or engage with them summarily, is in ignorance of the normative principles that underlie the capital sentencing framework laid down in ***Bachan Singh***.

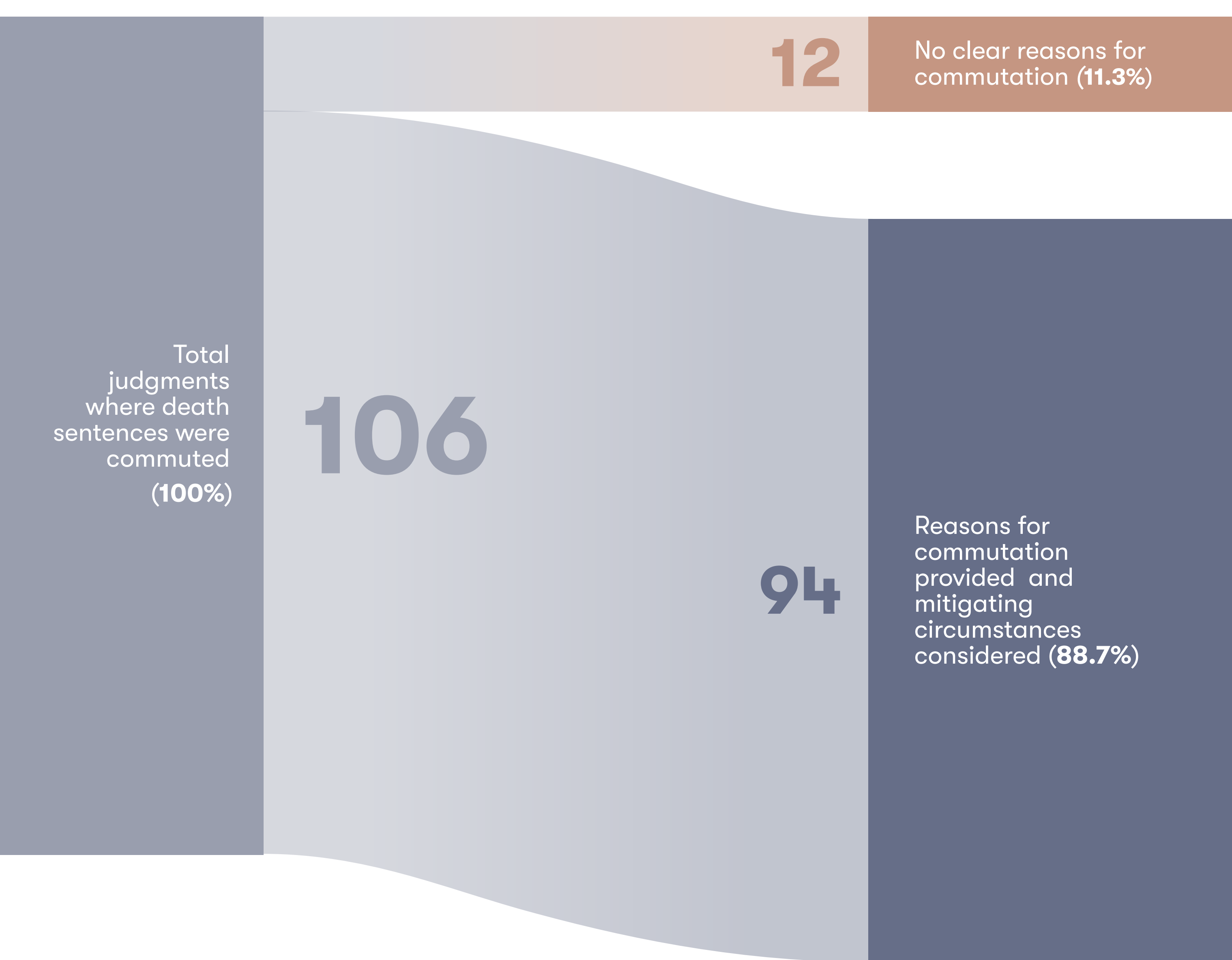
This chapter is concerned only with the 143 judgments (including 106 commutations and 40 confirmations or enhancements) where the conduct of a sentencing exercise was a requirement and sentencing reasons were available.



## Mitigation in Commutation Judgments

### Figure 5: Sentencing Reasoning in Commutation Judgments

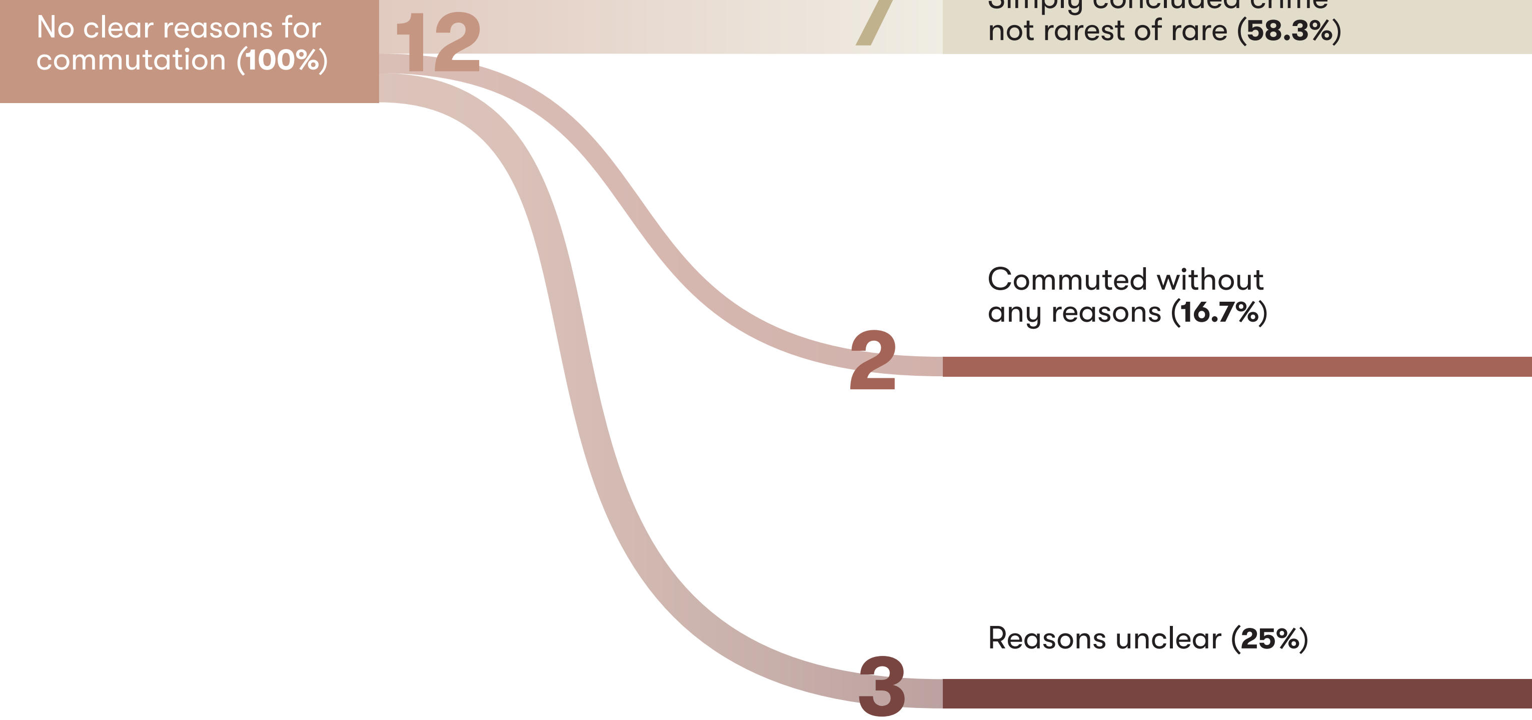
The 106 judgments ending in commutation of death sentences may be categorised into two broad groups based on their general approach to sentencing reasoning. ***First***, judgments where the reasons for commutation were not clear, and consequently, there was no real consideration of mitigating circumstances as part of sentencing reasoning. ***Second***, judgments where sentencing reasoning involved a consideration of mitigating circumstances, on the basis of which death sentences were commuted to life imprisonment.



## A. Judgments With no Clear Reasons for Commutation

### Figure 6: Nature of Sentencing Reasoning Where the Reasons for Commutation are not Provided/are Unclear

The failure to provide clear reasons for commutation, while observed in 12 out of 106 commutation judgments, raises concerns pertaining to the non-fulfillment of the Supreme Court's institutional role in capital cases.






9 commutation judgments simply concluded that the crimes in question were not 'rarest of rare'[5] or commuted the death sentence to life imprisonment without providing any reasons.[6] There also were 3 judgments that stood out sorely for their confused and unclear reasoning. The whole or major part of their sentencing reasoning read like that of a confirmation judgment, but they ultimately and inexplicably commuted death sentences to life imprisonment.[7]

For instance, in ***Anil @ Anthony Arikswamy Joseph v. State of Maharashtra***,[8] the court held that there were no mitigating circumstances, only aggravating circumstances, and society would approve of the the imposition of the death penalty in the case. Therefore, as per the law laid down in ***Gurvail Singh v. State of Punjab***,[9] the case qualified for the death penalty. The judgment thereafter recognised the need for assessing the probability of reformation based on evidence, which the defence counsel had argued was not done by courts below, but noted that in the case at hand 'special reasons' existed, indicating that it was an exceptional case, fit for the death penalty. However, it went on to commute the death sentence to life imprisonment (30 years without remission).[10] This form of vague and contradictory reasoning was also adopted in ***Alber Oraon v. State of Jharkhand***,[11] where the same sentence (30 years without remission) was imposed, employing a similar crime-similar outcome approach to the use of precedents,[12] undercutting the goal of individualised sentencing. Finally, in ***Arvind Singh v. State of Maharashtra***,[13] the court rejected the accused's young age and lack of a criminal record as relevant mitigating circumstances, but commuted the death sentence without stating reasons for the same.

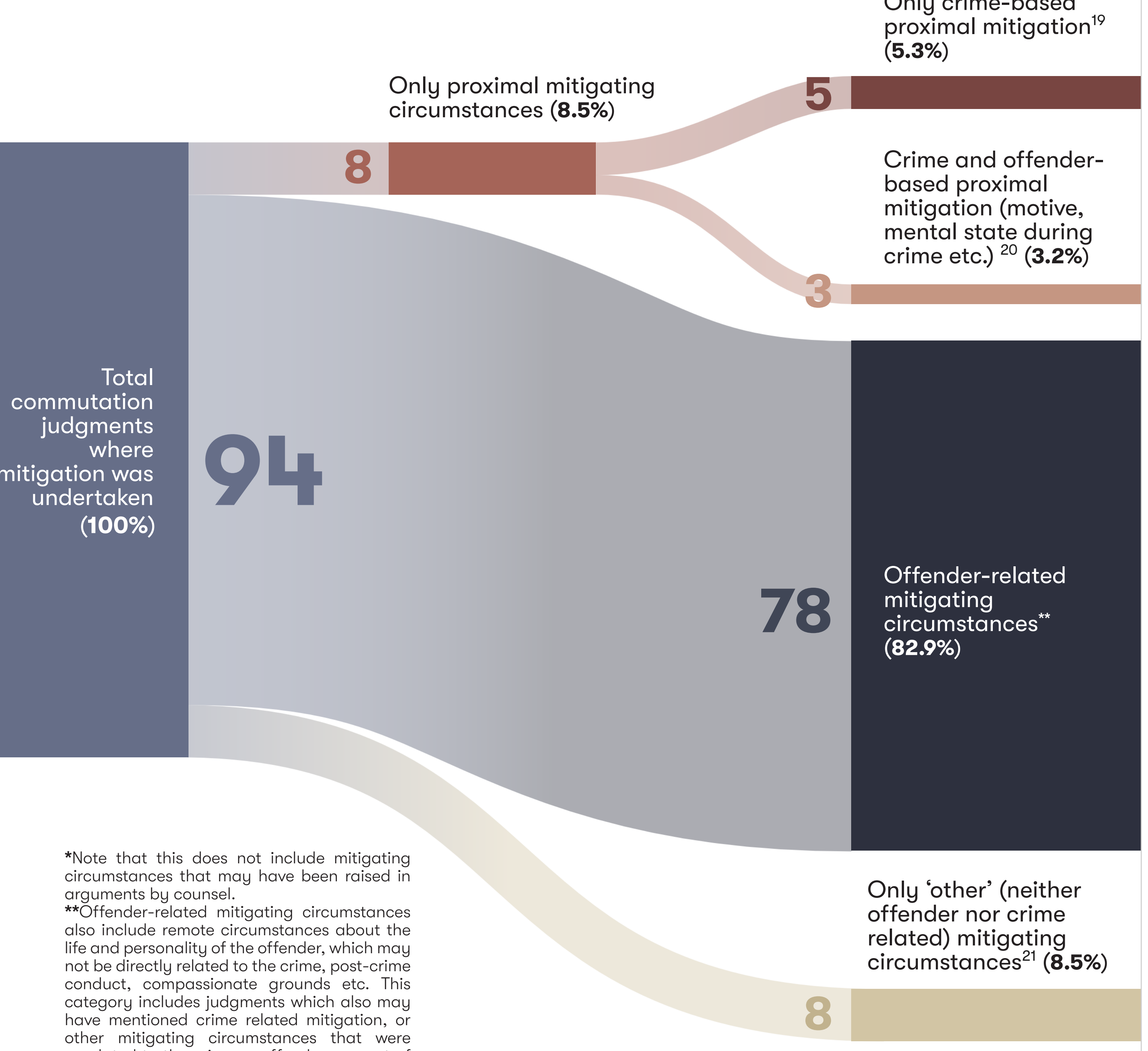
Admittedly, an elaborate sentencing exercise, involving the weighing of aggravating and mitigating circumstances, may not be necessary in judgments that result in commutation of death sentences, given that life imprisonment is the default punishment for which 'special reasons' are not required.[14] However, reasons for commutation must be forthcoming even if the sentencing court is ***prima facie*** satisfied that the crime at hand is not of such a grave nature as to be in the realm of consideration for the death sentence.

***First***, Section 345(3) of the CrPC requires provision of 'reasons' for the sentence imposed, when the offence convicted under is punishable by death, or in the alternative, life imprisonment; 'special reasons' being necessary only when the death sentence is imposed.[15] Therefore, while 'special reasons' need not be provided, 'reasons' for commutation must be clear from the judgment. ***Second***, the Supreme Court is not just a sentencing court making an independent decision on sentence,[16] but is also an appellate court which must give reasons when reversing a sentence of death that has been imposed by a trial court, and confirmed by the High Court. ***Finally***, ***Bachan Singh*** seemingly adopted a judicial self-regulation model of sentencing in the context of the death penalty, through appellate review as well as guideline judgments.[17] It treated judicial precedent, along with the legislative policy underlying Section 354(3), as the primary sources of sentencing guidance in capital sentencing.[18] Consequently, Supreme Court judgments where sentencing reasoning is incomprehensible or absent, indicate its failure to perform its institutional role in capital sentencing.

# B. Judgments Where Sentencing Reasons were Provided for Commutation

## Figure 7: Mitigating Circumstances* Taken Into Account to Commute

In 94 (88.7%) of all 106 commutation judgments, sentencing reasons were provided. These judgments considered mitigating circumstances and commuted death sentences while relying on them. Broadly, three types of mitigating circumstances were considered in sentencing reasoning in these commutation judgments.




*Note that this does not include mitigating circumstances that may have been raised in arguments by counsel.
**Offender-related mitigating circumstances also include remote circumstances about the life and personality of the offender, which may not be directly related to the crime, post-crime conduct, compassionate grounds etc. This category includes judgments which also may have mentioned crime related mitigation, or other mitigating circumstances that were unrelated to the crime or offender, as part of the sentencing calculus.



In commutations where sentencing reasons were forthcoming and mitigation was undertaken, most judgments (82.9%) did at least mention one remote offender-related mitigating circumstance, including equity factors and compassionate grounds, as part of the sentencing reasoning. However, the nature of engagement with such offender-related sentencing factors varied from case to case; while some merely mentioned them, as though going through some sort of checklist, a few others linked them to diminished culpability or capacity for reformation.

8 judgments however, limited mitigation to proximal circumstances (directly connected to the crime), of which 5 focused only on crime-based proximal mitigating circumstances. The latter approach may not necessarily be seen as a deviation from the expansive construction given to mitigating circumstances in ***Bachan Singh***, on account of the statutory recognition of life imprisonment as the default punishment and the death sentence as the exception.

In another 8 commutation judgments, other mitigating circumstances, such as quality of evidence, manner of commission of crime not being on record, acquittal of co-accused etc., were treated as mitigating circumstances and the sole ground for commutation.

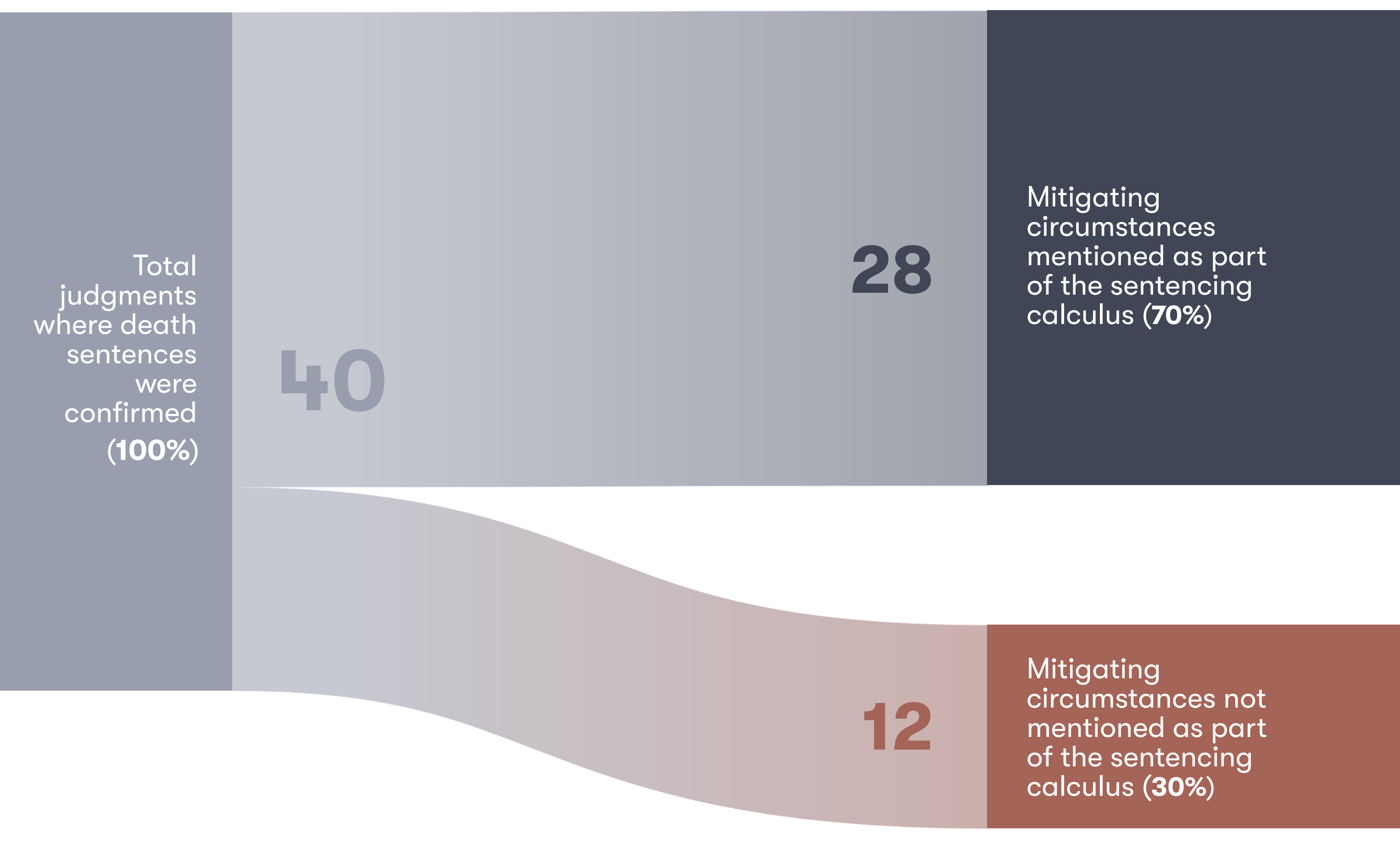
The data suggests that the Supreme Court has, as intended by ***Bachan Singh***, understood the scope of mitigation to be broad and expansive in its commutation judgments. However, note that even if a judgment simply noted that the offender had become a victim of his own past, without explaining why and how this was relevant to the choice of sentence, it has been included in the category labelled 'Offender-related mitigating circumstances'[22]. Thus, the fact that over 80% of commutation judgments have been included in this category should not be interpreted to mean that the quality of sentencing reasoning was satisfactory in all of them. The idea is to simply show that a wide-range of offender-related mitigating circumstances has at least been deemed relevant in commutation judgments.

Section D provides a more in depth look at the actual treatment of individual mitigating circumstances and demonstrates that the level of engagement with offender-related remote mitigating circumstances may not always be satisfactory, given the Supreme Court's general failure to provide individualised reasons specific to a particular offender, or adopt a clear and consistent normative grounding for the consideration of various offender-related sentencing factors.

## Mitigation in Confirmations

### Figure 8: Consideration of Mitigating Circumstances in Confirmation Judgments

In contrast to commutations, the approach to mitigation in the 40 confirmation/ enhancement judgments presents a bleak picture.



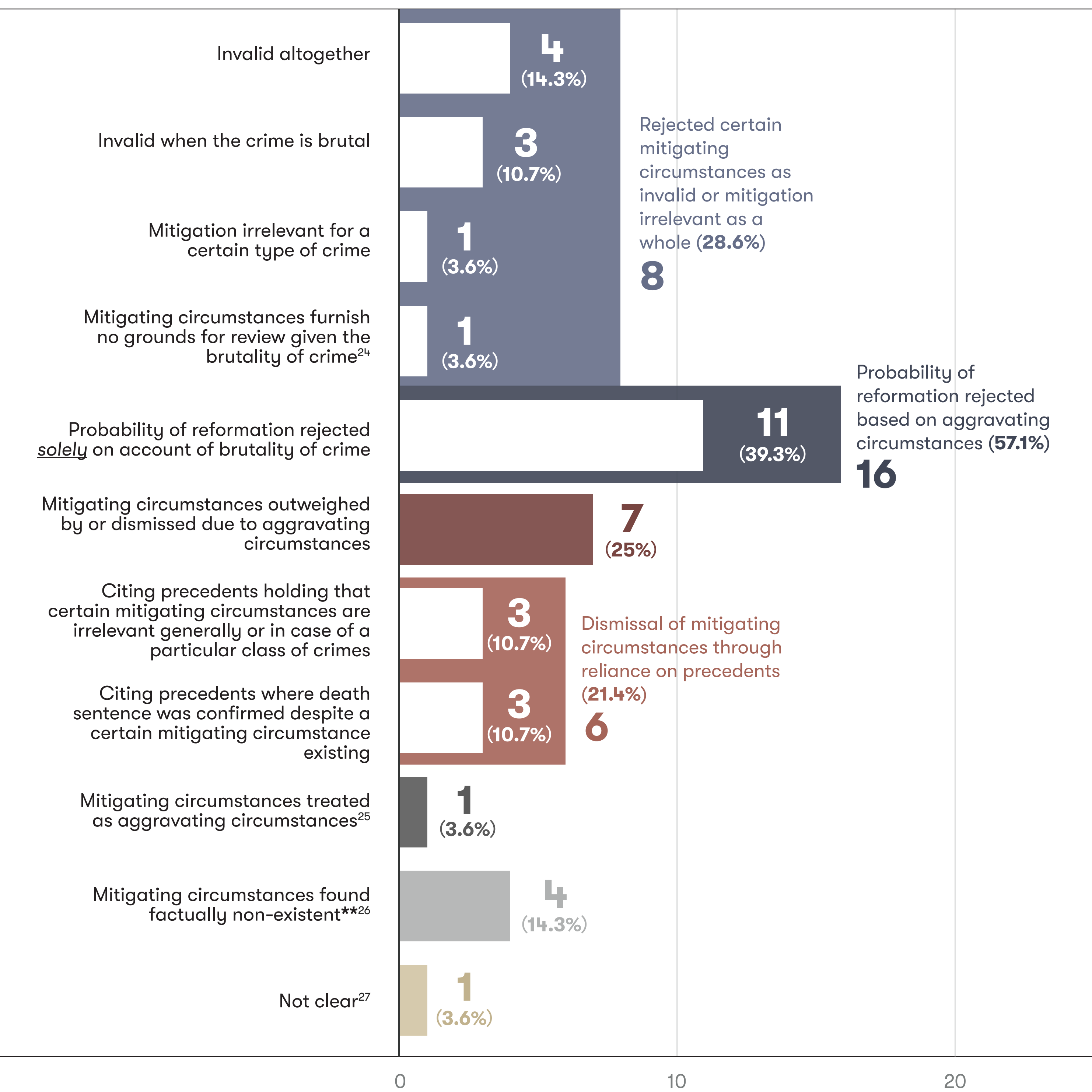

12 judgments (30%) of all 40 confirmations did not consider mitigating circumstances at all.[23] This is despite it being incumbent on a court to consider mitigating circumstances, not just relating to the crime but also the offender, before confirming a death sentence, given that the death penalty is an exceptional punishment for which 'special reasons' must exist. Further, only when the characteristics of the offender are considered alongside crime-based circumstances, can the court effectively individualise the sentence. The failure to mention any mitigating circumstances as part of the sentencing calculus, let alone assign weights to them, along with reasons, demonstrates the failure to comply with the least disputed aspect of ***Bachan Singh***, i.e, the conduct of mitigation.



### Figure 9: Treatment of Mitigating Circumstances in Confirmations*

In the 28 (70%) confirmation/enhancement judgments, where mitigating circumstances were considered as part of sentencing reasoning, they were treated improperly.

Total [All confirmation judgments where mitigating circumstances were mentioned] = **28**




*Since the same judgment could have adopted multiple approaches to the consideration of mitigating circumstances, these categories are not all mutually exclusive.

**This category includes cases where some mitigating circumstances may have been principally accepted as mitigating but were found to be inapplicable to the case based on the factual matrix.

Even when mitigating circumstances (specifically those relating to the offender) were mentioned as part of the sentencing calculus, they were either rejected as being invalid or irrelevant altogether and/or rejected as being irrelevant in case of particularly brutal or heinous crimes.

For instance, young age, conviction based on circumstantial evidence, existence of dependents, and compassionate grounds such as pregnancy, were principally rejected as mitigating circumstances,[28] without judgments providing any reasons for such a normative position. Given that these circumstances have been considered as mitigating in a host of other judgments, including ***Bachan Singh***, which considered extreme youth to be of compelling importance,[29] the rejection of certain sentencing factors as irrelevant altogether, shows how malleable the sentencing framework laid down in ***Bachan Singh*** is; allowing judges to simply discard sentencing factors as irrelevant, when they subjectively opine that the death sentence should be confirmed in a given case. Another version of such outcome-driven reasoning was found in judgments where mitigating circumstances were rejected as irrelevant simply because the crime was deemed to be brutal.[30] This is not just contrary to the very concept of mitigation, but also suggests that the requirement of considering mitigating circumstances can effectively be rendered superfluous if judges are keen to impose the death sentence. Thus, the fact that the 'rarest of rare' doctrine is a hollow framework that judges can subjectively fill with content,[31] is borne out by the Supreme Court's case law, which shows that the ***Bachan Singh*** framework does not constrain judges from pursuing crime-centric reasoning, while ignoring offender-related mitigating factors in individual cases.

Consequently, in 1 confirmation judgment,[32] while the offenders' lack of criminal antecedents was principally understood to be a mitigating circumstance, it was held that for the nature of the crime involved, ordinarily there can be no mitigation at all. Not only does this pay lip service to the need for considering mitigating circumstances, it effectively makes the death penalty mandatory for similar offences, contradictory to ***Bachan Singh***'s observations against the standardisation of rarest of rare cases, which need to be identified through the exercise of judicial discretion. This would involve consideration of both mitigating and aggravating circumstances, and the assignment of weights to them, with reasons.

In 7 (25%) confirmation judgments where mitigating circumstances were mentioned as part of the sentencing calculus, offender-related mitigating circumstances were dismissed or outweighed on account of aggravating circumstances.[33] In almost all of these,[34] the aggravating circumstances were restricted to crime-related factors. Such outweighing or balancing out of mitigating circumstances was done without enquiring into whether the offenders' circumstances, when weighed holistically with the crime-related aggravating circumstances, diminished their moral culpability. These cases, again, seem to have been decided simply on account of the 'crime' being perceived as too grave or serious.

The same approach was taken when offenders' capacity for reformation was raised as a mitigating circumstance, with 11 judgments (39.3%) using crime-based aggravating circumstances alone, as evidence of the improbability of reformation;[35] a conceptually fraught approach since the assessment of reformation is a forward-looking enterprise, necessarily involving the consideration of offender-related circumstances, a fact acknowledged by other judgments rendered during the study period.[36] Given the overwhelming number of Supreme Court confirmation judgments using the gravity of the crime to reject offenders' probability of reformation, it is not surprising therefore that the same faulty approach is also prevalent amongst trial courts.[37]



Another erroneous approach to mitigation, also observed in trial courts, was the use of precedents to confirm death sentences, in contravention of the principle of individualisation.[38] So-called similar cases were cited in certain judgments to dismiss individual mitigating circumstances. In the first category of such judgments,[39] precedents that themselves deviated from ***Bachan Singh***, in their treatment of mitigating circumstances, were cited to dismiss the relevance of certain mitigating circumstances generally or for a certain class of crimes. For instance, 2 judgments[40] rejected the young age of the offenders as a mitigating circumstances, relying on the judgment in ***Mofil Khan and Anr. v. State of Jharkhand***.[41] This represents the subversion of the principle of individualised sentencing in its starkest form, given that in the latter case, age may actually have been irrelevant, as the accused were middle-aged, a factual circumstance absent in the judgments that relied on it.[42] In ***Mukesh v State of NCT, Delhi***, Justice Banumathi relied on ***Purushottam Dashrath Borate and Anr. v. State of Maharashtra***,[43] to hold that the age of the accused or family background of the accused or lack of criminal antecedents cannot be mitigating circumstances when the crime is heinous and calculated.

Another category of judgments dismissed mitigating circumstances by citing precedents confirming death sentences despite a certain mitigating circumstance existing.[44] For instance, the judgment in ***Sunder Singh v. State of Uttaranchal***, rejected 6 years of time spent on death row as mitigating, given that another judgment confirmed the death sentence in similar circumstances, despite the convict therein having been in prison for 10 years.[45] Note however, that 6 years of incarceration has also been considered mitigating by the Supreme Court.[46]

Figures 8 and 9 represent the various distortions of the scope and concept of mitigation as observed in the Supreme Court's confirmation judgments. They provide clear indication of the prevalence of crime-centric reasoning in confirmation judgments, contrary to ***Bachan Singh***'s emphasis on the need to consider circumstances of both the crime and the offender, as well as its expansive understanding of mitigation in the context of the death penalty. This approach of focusing primarily on the crime has been specifically disavowed in other judgments of the Supreme Court.[47] However, crime-centric reasoning of this nature continues to be employed in confirmation judgments. The trickle-down effect of this on trial courts is therefore, not surprising.[48]

# ENDNOTES

**1** Russell Stetler, 'The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing' (2007-2008) 11 *University of Pennsylvania Journal of Law & Social Change* 237, 238-245.

**2** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [206] ("Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances: (1) That the offence was committed under the influence of extreme mental or emotional disturbance. (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death. (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above. (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence. (6) That the accused acted under the duress or domination of another person. (7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.")

**3** Ibid [209].

**4** Ibid.

**5** Haresh Mohandas Rajput v. State of Maharashtra [(2011) 12 SCC 56]; Neel Kumar @ Anil Kumar v. State of Haryana [(2012) 5 SCC 766]; Sandeep v. State of U.P. [(2012) 6 SCC 107]; Dnyaneshwar Haibhau Kulal v. State of Maharashtra [(2012) 13 SCC 441]; Madhu @ Madhuranatha and Anr v. State of Karnataka [(2014) 12 SCC 419]; Rajkumar v. State of Madhya Pradesh [(2014) 5 SCC 353]; Tattu Lodhi v. State of Madhya Pradesh [(2016) 9 SCC 675].

**6** Arjun Laxman Jogadlya v. State of Maharashtra [Criminal Appeal No. 656 of 2007]; Selvam v. State Thr. Insp. of Police [(2014) 12 SCC 274].

**7** Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69]; Arvind Singh v. State of Maharashtra [2020 SCC OnLine SC 400]; Alber Oraon v. State of Jharkhand [(2014) 12 SCC 306].

**8** Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69].

**9** This three-part test was laid down in Gurvail Singh v State of Punjab [(2013) 2 SCC 713], whereunder the death penalty may be imposed when 1) there are no mitigating circumstances (criminal test); 2) only aggravating circumstances exist (crime test); and 3) the society approves of the death penalty in the given case (the 'rarest of rare' or R-R test). Given that the three-step test was satisfied as per the judgment in this case, it is unclear as to why the death sentence was commuted.

**10** The judgment summarily referred to the defence counsel's arguments that the probability of reformation was not considered by courts below, and the child victim had himself gone with the accused, but did not clearly affirm these as mitigating circumstances in the case at hand.

**11** Alber Oraon v. State of Jharkhand [(2014) 12 SCC 306].

**12** Trial Court I Report, 48.

**13** Arvind Singh v. State of Maharashtra [2020 SCC OnLine SC 400].

**14** Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498] [133] (Here, a 2-judge bench observed that "[a] sentencing hearing, comparative review of cases and similarly aggravating and mitigating circumstances analysis can only be given a go by if the sentencing court opts for a life imprisonment").

**15** The Code of Criminal Procedure 1973, s 345(3) ("When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence").

**16** Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1] [5] (In a case of death sentence, the Supreme Court will "come to [its] own conclusions on all issues of facts and law, unbound by the findings of the trial court and the High Court.")

**17** Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* 130-133 (2016). See also Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1] [51].

**18** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [165].

**19** Ujjagar Singh v. State of Punjab [(2007) 13 SCC 90] (Commuted on account of the accused's acquittal for the additional charge of rape); Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421] (Commuted based on diminished role/degree of participation); Ghulam Mohi Ud Din Wani v. State of Jammu and Kashmir [Criminal Appeal No(s). 1275-1276 of 2014) (Commuted based on diminished role/degree of participation); Md. Jamiluddin Nasir and Aftab Ansari v. State of West Bengal [(2014) 7 SCC 443] (Commuted as the crime was not as brutal as other terror cases where the death sentence has been confirmed); Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596] (Commuted due to a lack of intention to kill the rape victim).

**20** Kulwinder Singh v. State of Punjab [(2007) 10 SCC 455]; Vikram Singh and Ors. v. State of Punjab [(2010) 3 SCC 56]; Absar Alam @ Afsar Alam v. State of Bihar [(2012) 2 SCC 728].

**21** Uttam Chakraborty and Anr. v. State of Assam [(2010) 14 SCC 518] (Commuted on the basis that the sole eyewitness was a child); Tersem Singh v. State of Punjab [Criminal Appeal No(s). 42-43 of 2007] (Commuted as conviction was based on circumstantial evidence alone); Mohd Bin Beerankutti v. State of Karnataka [(2014) 14 SCC 493] (Commuted as the manner of commission was not on record and conviction was based on circumstantial evidence alone); Sanaullah Khan v. State of Bihar [(2013) 3 SCC 52] (Commuted as the manner of commission was not on record); Ram Deo Prasad v. State of Bihar [(2013) 7 SCC 725] (Commuted on account of poor quality of evidence); Basavaraj @ Basya and Ors. v. State of Karnataka [(2020) 15 SCC 310] (Commuted as the other three co-accused were acquitted); Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388] (Commuted on account of poor quality of evidence); Ravishankar @ Baba Vishwakarma v. State of Madhya Pradesh [(2019) 9 SCC 689] (Commuted on account of residual doubt).

**22** Dileep Bankar v. State of Madhya Pradesh [(2021) 1 SCC 718].

**23** Shivu & Anr v. R.G. High Court of Karnataka and Anr. [(2007) 4 SCC 713]; Mohan Anna Chavan v. State of Maharashtra [(2008) 7 SCC 561]; Bantu v. State of Uttar Pradesh [(2008) 11 SCC 113]; M.A. Antony @ Antappan v. State of Kerala, [(2009) 6 SCC 220]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667]; Vikram Singh and Ors. v. State of Punjab [(2010) 3 SCC 56]; C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567]; Surendra Koli v. State of Uttar Pradesh [AIR 2011 SC 970]; Mohd. Arif @ Ashfaq v. State of NCT of Delhi [(2011) 13 SCC 621]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2012) 4 SCC 37]; Sunder @ Sundararajan v. State by Inspector of Police [(2013) 3 SCC 215]; Khushwinder Singh v. State of Punjab [(2019) 4 SCC 415].

**24** Saleem and Anr. v. State of Uttar Pradesh [Review Petition (Crl) No(s). 632-633 of 2015].

**25** Manoharan v. State [(2020) 5 SCC 782] (Young age was treated as an aggravating circumstance, as incarceration would pose a continuous burden on the State).

**26** Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Jagdish v. State of Madhya Pradesh [(2009) 9 SCC 495]; Ajay Kumar Pal v. State of Jharkhand [(2010) 12 SCC 118]; Deepak Rai v. State of Bihar [(2013) 10 SCC 421].

**27** State of U.P. v. Sattan @ Satyendra and Ors.[(2009) 4 SCC 736].

**28** Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [(2008) 15 SCC 269] (circumstantial evidence); Manoharan v. State [(2020) 5 SCC 782] (existence of dependents); Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632] (pregnancy and other such compassionate grounds); Deepak Rai v. State of Bihar [(2013) 10 SCC 421] (young age).

**29** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [207].

**30** Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Manoharan v. State [(2020) 5 SCC 782].

**31** This was also a finding of previous research undertaken on judicial attitudes to capital sentencing, based on interviews with 60 former Supreme Court judges. See Centre on the Death Penalty, National Law University Delhi, Matters of Judgment 58-61 (NLU Delhi Press 2017) [hereinafter Matters of Judgment].

**32** Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1] [885-886] ("We accept the contention of learned senior counsel and treat the lack of prior criminal record as a mitigating factor; other ascertained mitigating circumstances are not at the higher pedestal to bargain for reduction of sentence....Under the established jurisprudence, these two factors- a commanding position and a crime of 'utmost gravity' ordinarily merit the extreme penalty even accounting for the guilty plea and mitigating factors. This is the special reason, which warrants death penalty to the accused.")

**33** Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; Sonu Sardar v. State of Chhattisgarh [AIR 2012 SC 1480]; Deepak Rai v. State of Bihar [(2013) 10 SCC 421]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1].

**34** Except B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124], where the presence of criminal antecedents was also considered.

**35** Ram Singh v. Sonia & Ors. [(2007) 3 SCC 1]; Prajeet Kumar Singh v. State of Bihar [(2008) 4 SCC 434]; Md. Mannan v. State of Bihar [(2011) 5 SCC 317]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2011) 7 SCC 125]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [(2011) 14 SCC 401]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Ishwari Lal Yadav and Ors. v. State of Chhattisgarh [(2019) 10 SCC 423]; Sonu Sardar v. State of Chhattisgarh [AIR 2012 SC 1480]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631].

36 Swapan Kumar Jha @ Sapan Kumar v. State of Jharkhand [(2019) 13 SCC 579] [19] ("[i]t is a dangerous presumption that a perpetrator of such an act is incapable of reform and rehabilitation just by virtue of having committed the crime, and indeed flies in the face of the concept of reform to begin with."); Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460] [47] ("the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated."); Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69] [33] ("the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. Facts, which the Courts, deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials."); Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136] [8] ("To satisfy that the sentencing aim of reformation is unachievable...the Court will have to highlight clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the Court focuses on the circumstances relating to the criminal, along with other circumstances").

37 Trial Court I Report, 72-73.

38 Ibid, 40-43.

39 Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Mukesh and Anr. v. State for NCT of Delhi [(2017) 6 SCC 1].

40 Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632].

41 [(2015) 1 SCC 67].

42 Ibid, 40-43.

43 [(2015) 6 SCC 652].

44 Sunder Singh v. State of Uttaranchal, [(2010) 10 SCC 611]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Manoharan v. State [(2019) 7 SCC 716].

45 Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1].

46 Ramesh v. State of Rajasthan [(2011) 3 SCC 685].

47 Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498] [62-63, 71]; Sangeet v State of Haryana (2013) 2 SCC 452 [34-49]; Shankar Kisanrao Khade v State of Maharashtra (2013) 5 SCC 546 [123-124] (separate opinion of Lokur J.).

48 See Trial Court I Report.



# C. Consideration of Crime-Related Circumstances

In ***Machhi Singh v. State of Punjab***,[1] a 3-judge bench of the Supreme Court departed from the decision of the 4-judge majority in ***Bachan Singh***. Instead of consideration of mitigating and aggravating circumstances, pertaining to both the crime and the offender, as intended by ***Bachan Singh***, ***Machhi Singh*** reoriented emphasis on crime-based considerations.

***First***, ***Machhi Singh***'s reformulation of the ***Bachan Singh*** framework left little room for the consideration of unique circumstances of individual offenders at the stage of sentencing. It laid down five predetermined categories of 'rarest of rare' cases and in doing so, seemed to offer a checklist of cases where the death sentence would be the most appropriate punishment. These five categories, namely, where manner of commission is extremely brutal, where the motive reveals extreme depravity and meanness, where the crime is anti-social or socially abhorrent, where the crime is enormous in proportion, and where the victim is innocent and helpless or is a beloved public figure,[2] are predominantly crime-based, and contradict ***Bachan Singh***'s holding that both crime and offender related circumstances must be considered in every case when making the choice between life imprisonment and death penalty. The 'standardisation' or categorisation of cases as 'rarest of rare' was also rejected in ***Bachan Singh***, not only because an exhaustive enumeration would not be feasible but also because the assessment of moral culpability based on rigid rules and standards would undermine the goal of individualised sentencing.[3]

***Second, Macchi Singh*** introduced 'collective conscience' of society or public opinion as a relevant consideration in capital sentencing.[4] It defined 'rarest of rare' cases as those where "collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."[5] Contrary to ***Machhi Singh***'s framing of collective conscience as being independent of judges' individual beliefs, ***Bachan Singh*** had warned that "perception of "community" standards or ethics may vary from Judge to Judge" and that "there is every danger...they might write their own peculiar view or personal predilection into the law".[6]

This section analyses the impact that ***Macchi Singh***'s crime-focused sentencing framework has had on the Supreme Court's capital sentencing jurisprudence.

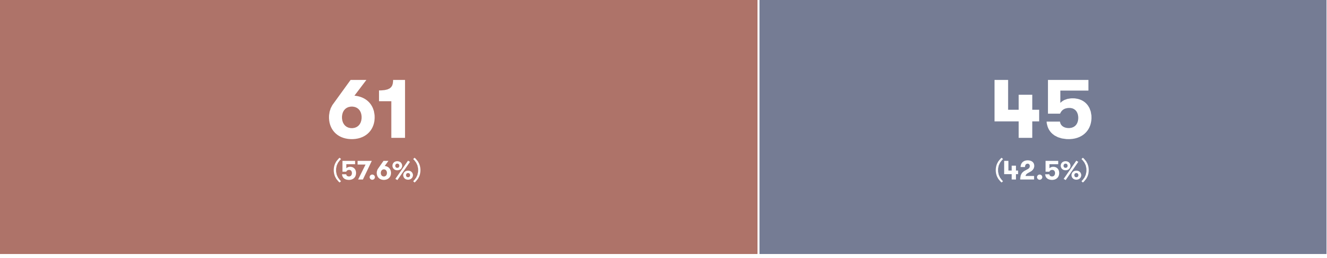
## Reliance on *Machhi Singh*

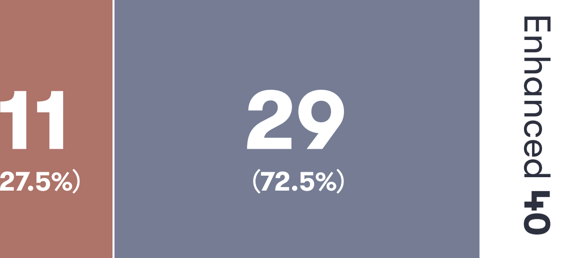
Despite *Machhi Singh*'s many deviations from *Bachan Singh*, it has come to be considered in the Supreme Court's capital sentencing jurisprudence, as one of the most important decisions laying down guidelines to be followed in capital cases. Judgments that have attempted an enumeration of guidelines seem to have combined both *Macchi Singh* and *Bachan Singh* frameworks, without regard for the differences between the two.[7] Even *Gurvail Singh v. State of Punjab*, a judgment that set out to lay down a framework that would ameliorate the crime-centric reasoning in capital cases, adopted 'collective conscience' as a relevant indicator.[8]

The Supreme Court's failure to reckon with the doctrinal inconsistencies created by *Macchi Singh* has impacted the manner in which capital cases are decided, with more than half of all sentencing judgments (74 of 143) having cited *Macchi Singh* - confirmation judgments citing it more frequently than commutation judgments.

### Figure 10: Was *Macchi Singh* cited by the Court?

Total [All judgments] = **143**






## Reliance on *Machhi Singh*'s Crime Categories

While *Macchi Singh* was cited in 42.5% of all commutation judgments and 72.5% of all confirmation judgments, its five categories were specifically relied on in 9 judgments involving 12 prisoners. These judgments unambiguously placed reliance on *Machhi Singh*'s categorisation of 'rarest of rare' cases in their sentencing reasoning. There were several others where *Macchi Singh* categories were invoked but the language of those decisions was not sufficiently clear for us to draw conclusions as to the nature of reliance.

8 of the 9 judgments where the *Machhi Singh* categories were relied on, confirmed the death sentences of the prisoners involved[9] and 1 judgment enhanced two sentences of life imprisonment to death sentences.[10] These judgments, heavily influenced by *Machhi Singh*, did not follow *Bachan Singh* faithfully, given their inordinate focus on crime-based circumstances.

In 2008, a 3-judge bench explicitly addressed *Machhi Singh*'s departure from *Bachan Singh*; its five categories effectively having translated a 'relative category' of 'rarest of rare' cases into an absolute category of cases where the death penalty would be the only appropriate punishment, consequently, expanding the scope of the death penalty. This acknowledgement of *Machhi Singh* as a deviation from *Bachan Singh* was again repeated in *Haru Ghosh v. State of West Bengal*,[12] *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*[13] and *Sangeet and Anr. v. State of Haryana*[14]. Further, in *Ramnaresh and Ors. v. State of Chhattisgarh*,[15] the bench warned against treating the *Machhi Singh* categories as determinative, reiterating the need to "examine all or majority of the relevant considerations to spell comprehensively the special reasons". However, most judgments continue to cite both *Machhi Singh* and *Bachan Singh* as the two most important judicial precedents laying down guidelines for capital sentencing, without acknowledging the doctrinal rifts between them.

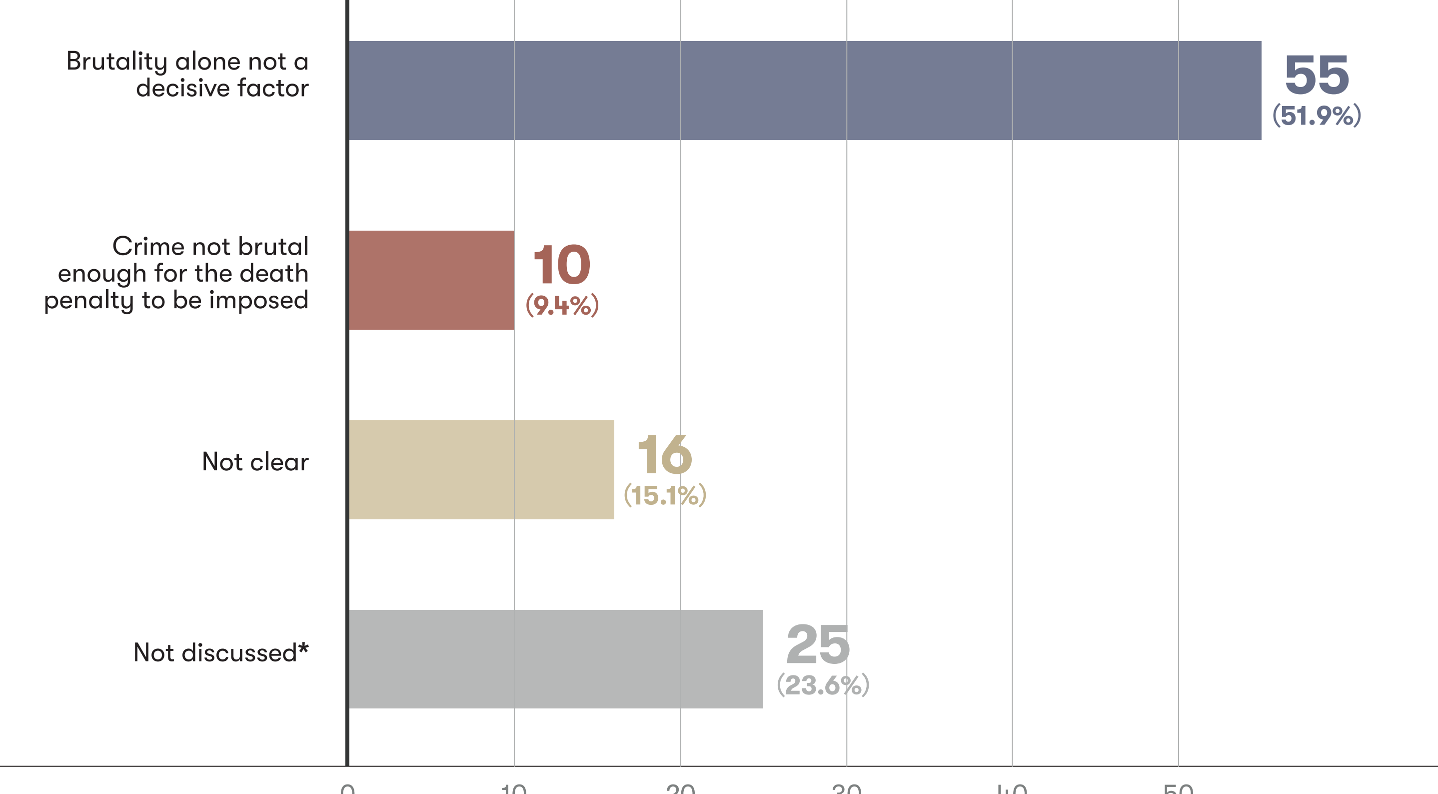
# Invocation of Brutality of Crime

***Bachan Singh***'s explicit deviation from ***Jagmohan***'s 'principally crime' approach highlights the importance of offender-related circumstances in capital sentencing. However, the frequent emphasis on the 'brutality' of the crime (an umbrella term for crime related circumstances such as nature of offence, its manner of commission, the motive for the crime, the number and personality of the victim(s), offender's degree of participation etc.) has overshadowed the relevance of other remote but relevant offender-related circumstances in capital sentencing.

# A. Commutations

## Figure 11: Use of 'Brutality' in Commutations

About half of the 106 commutation judgments, implicitly or explicitly held that the brutality of the crime cannot be the sole or determinative criterion in the determination of whether a case is 'rarest of rare'.




*In these judgments, crime-based aggravation or the normative relevance of brutality of crime, were not discussed in any real sense.



However, the 10 commutation judgments that found that the crime in question was not brutal or grave enough for the death penalty to be imposed, raise an important issue.[16] These judgments appeared to suggest that principally, there could be crimes involving extreme brutality, which then would be determinative as to whether it was 'rarest of rare', leaving room for doctrinal confusion as to the importance of offender-related circumstances in such cases, and the weight to be attached to them. This takes a limited view of culpability determination in capital cases, by suggesting that when the crime itself is brutal, culpability is extreme, irrespective of other offender-related circumstances.

To avoid such doctrinal confusion, it is important for judgments to provide clarity on the steps involved in reaching a decision on sentence, even if they end up commuting death sentences. In the category of cases where the crime is held as not brutal enough for the death penalty, it would be important to clarify that the commutation is due to the crime ***prima facie*** attracting the default punishment of life imprisonment; and that even if the crime had been graver, brutality alone would not be dispositive, given the requirement of considering offender-related circumstances, and the whether the alternative of life is unquestionably foreclosed.

However, the lack of doctrinal clarity on this point is quite common, with 16 commutation judgments being unclear as to the relevance of the brutality of the crime,[17] and its interaction with other offender-related circumstances in the determination of culpability. For instance, many of these judgments cited ***Haresh Mohandas Rajput***'s formulation of 'rarest of rare'. There, it was held that a case is 'rarest of rare' if the offender is incapable of reformation and is a menace to society.[18] At the same time it was observed that "in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner....[and] affects the entire moral fiber of the society, e.g. crime committed for power or political ambition or indulge in organized criminal activities, death sentence should be awarded."[19] The judgment did not clarify if the two requirements (crime being committed in an extremely brutal manner and the offender being a menace to society) ought to be independently satisfied or if the latter was dispositive of the former, i.e., the brutality of the crime could itself be an indication of the accused being a menace to society, making the circumstances of the crime determinative in capital sentencing. This confusion stems from an observation in ***Bachan Singh*** itself, that the "extremely cruel or beastly manner of commission of murder is itself a demonstrated index of the depraved character of the perpetrator".[20]

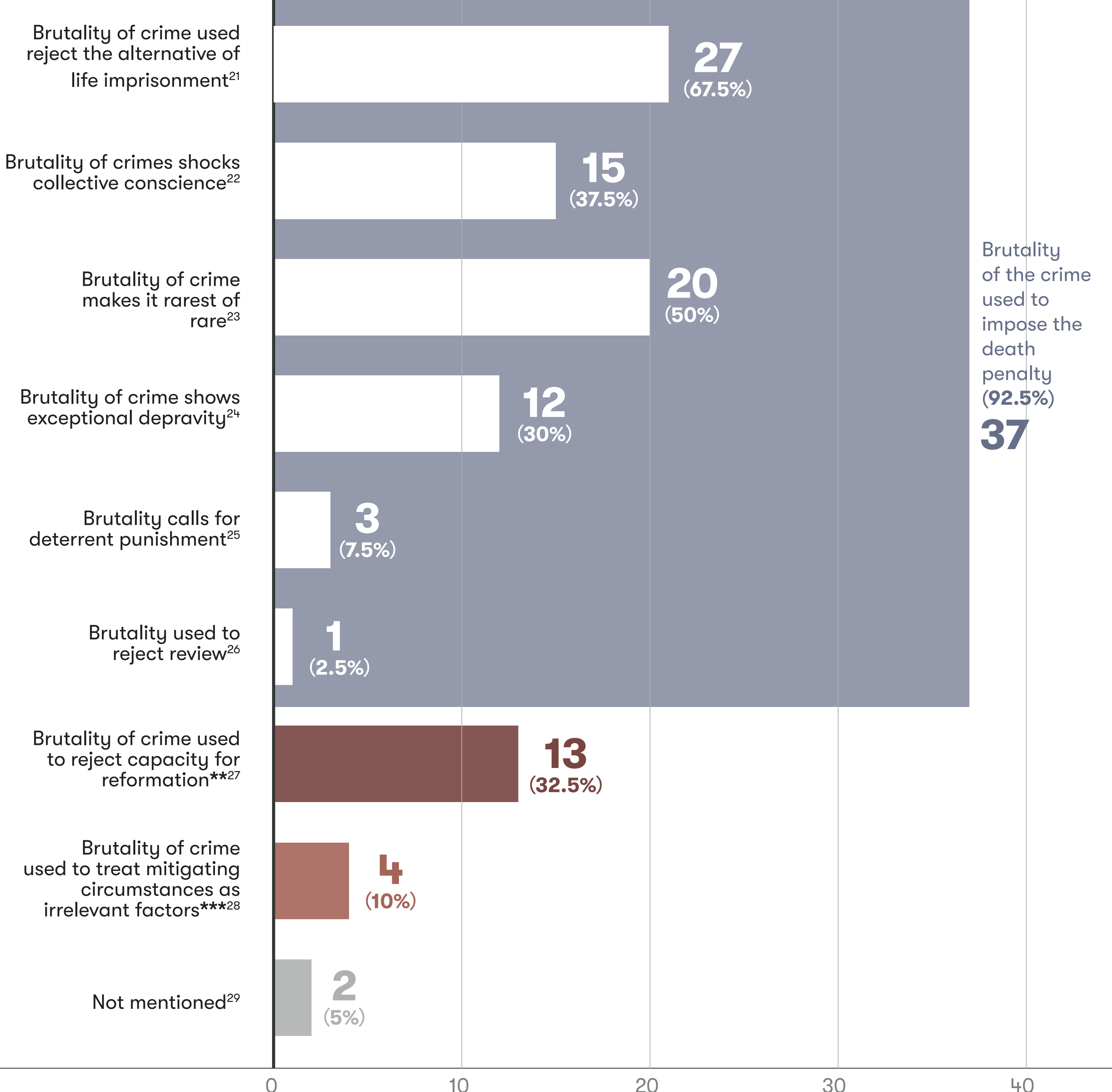
This form of doctrinal confusion renders the Supreme Court's case law an inadequate and incoherent source of guidance for courts below.

## B. Confirmations

### Figure 12: Use of 'Brutality' in Confirmations*

While brutality was often not discussed or was treated as relevant but not decisive in commutation judgments, the opposite was true of confirmation decisions. Brutality of the crime was frequently treated as the primary and overriding consideration in confirmation decisions.

Total [All confirmation judgments] = **40**




*Since the same judgment could have used the brutality of crime in multiple ways, these categories are not all mutually exclusive.
**In these judgments, reformation was either automatically deemed improbable or any probability thereof was 'outweighed' by crime-based aggravating circumstances. Note that in 6 of these confirmation judgments (15%), the probability of reformation was the sole offender-related circumstance mentioned as part of the sentencing calculus, only to be summarily rejected on account of crime-based aggravation.
***In these judgments, the mitigating effect of certain offender-related sentencing factors was principally rejected in case of crimes deemed to be particularly brutal.



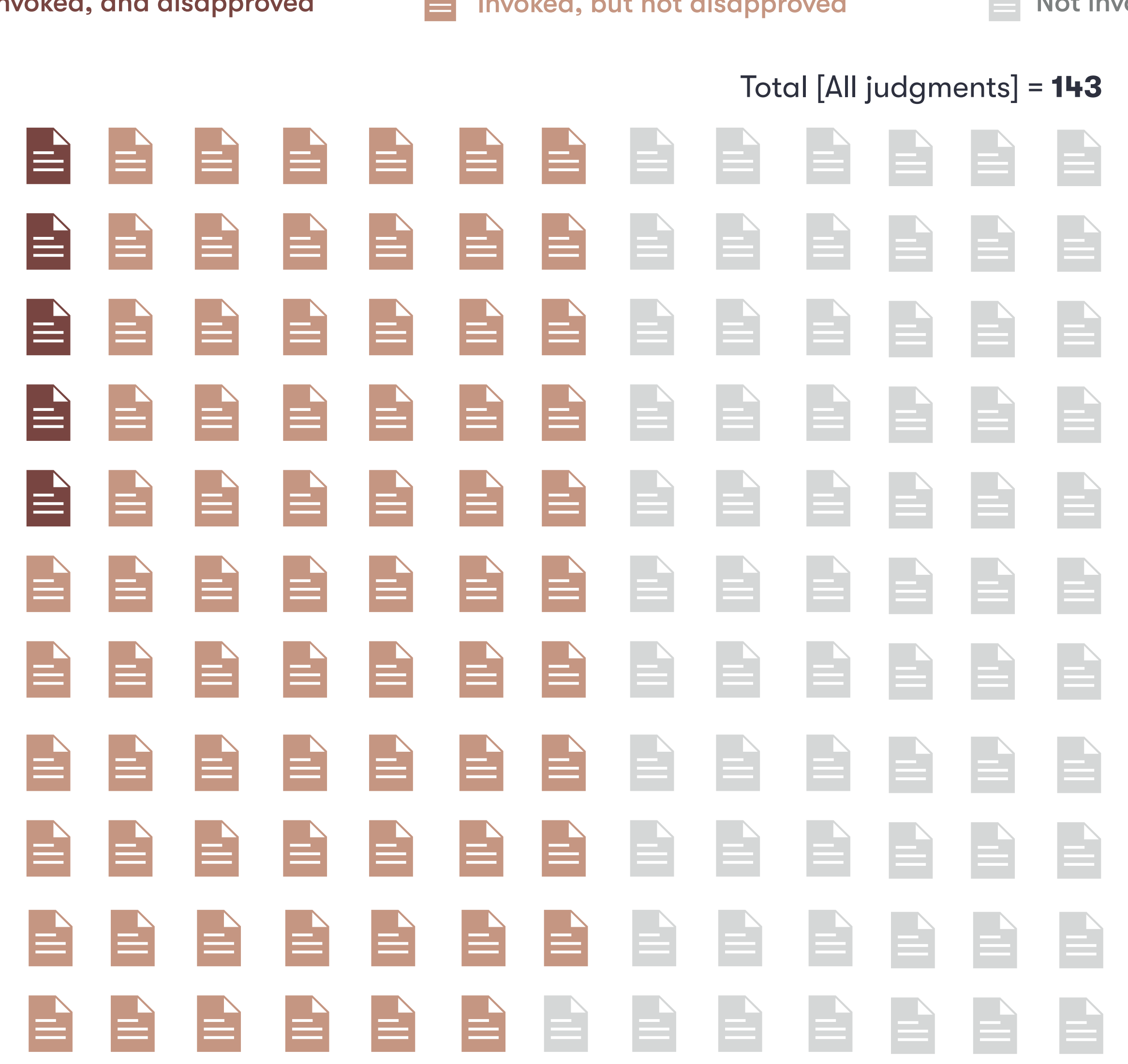
Brutality was not only considered determinative on the issue of whether a given case was 'rarest of rare' in a large number of judgments, but was also treated as a reason for rejecting or dismissing the 'probability of reformation' and the 'alternative of life imprisonment'. While it is natural for the brutality of crime to figure more dominantly in confirmation decisions, the issue lies with the way in which its normative relevance is understood. The inordinate focus on the brutality of the crime leaves little room for the independent consideration of offender-related circumstances in sentencing reasoning. Even when offender-related mitigating circumstances are mentioned as part of the sentencing calculus, diminished importance is attached to such sentencing factors, relative to the brutality of the crime.[30] The ***Bachan Singh***'s framework's emphasis on individualisation of sentences requires that crimes not be judged as heinous or brutal in isolation, but in the wider psycho-social context of the offender.

Thus, the rejection of the probability of reformation (32.5%) and the alternative of life imprisonment (35%) with reference to brutality of the crime, are significant doctrinal deviations from ***Bachan Singh***. This approach makes the ***Bachan Singh*** framework's requirement of assessing the probability of reformation, based on evidence, altogether superfluous. It also makes the brutality of the crime determinative as to the choice between life imprisonment and death penalty, going against ***Bachan Singh***'s direction to ***first***, construe mitigation expansively, and ***second***, consider both offence and offender-related circumstances.

## Use of Collective Conscience

Since *Macchi Singh*'s categorisation of crimes as 'rarest of rare', based on whether the collective conscience of society is sufficiently shocked by them, society-centric penological goals have been frequently invoked in the Supreme Court's capital sentencing jurisprudence.

### Figure 13: Were Society-Centric Penological Goals Invoked?



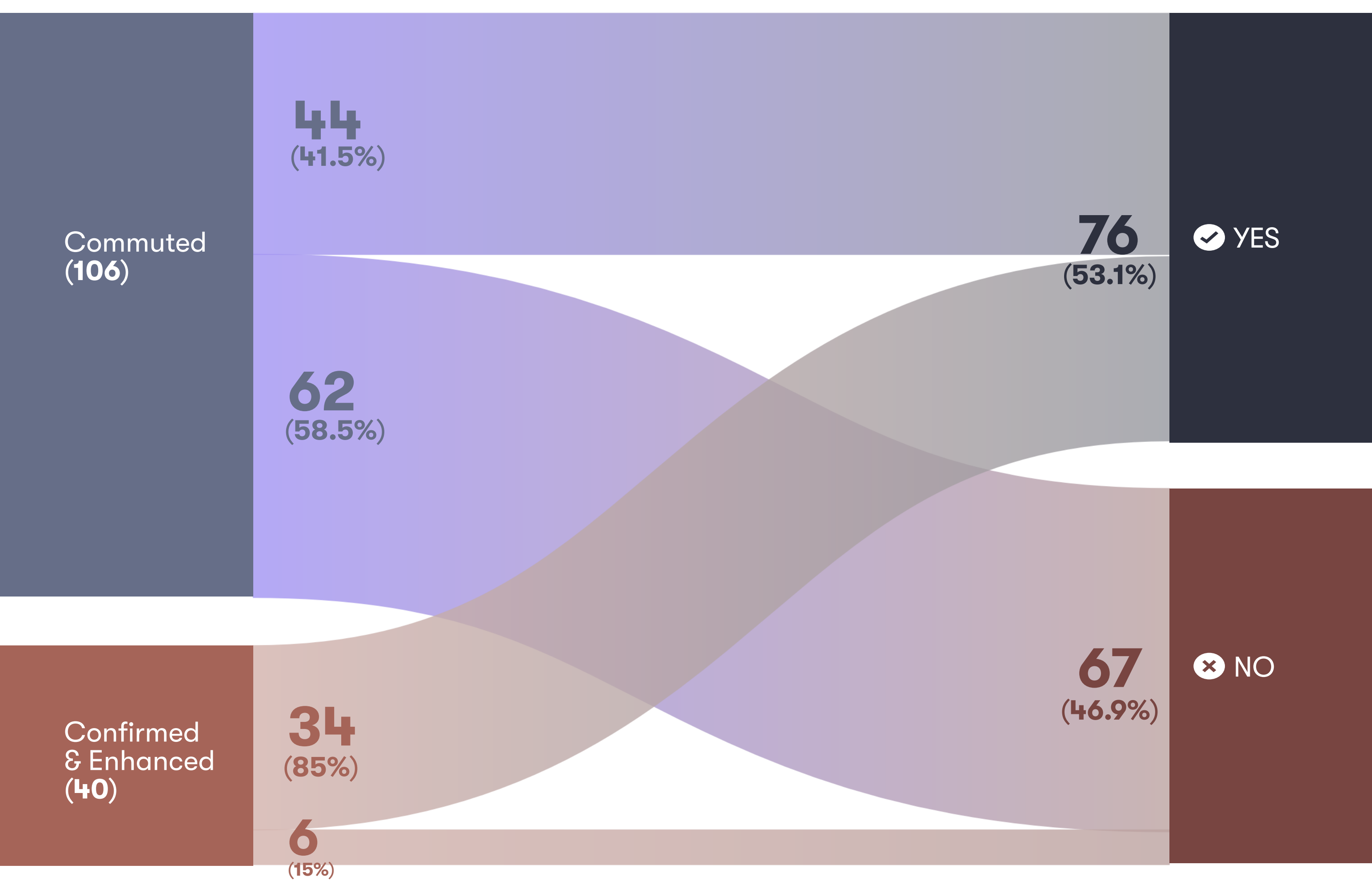

Society-centric penological goals were invoked in 76 (53.1%) of all 143 sentencing judgments. Of these, only 5 (7.04%) commutation judgments disapproved of the invocation of the society-centric goals as a signpost guiding sentencing discretion in capital cases.[31] 1 of these judgments also did not unequivocally do so, as the two separate opinions written by the two judges on the bench differed, with one seemingly endorsing their use and the other rejecting the same.[32] In all other judgments, society-centric penological goals were either independently invoked in sentencing reasoning or invoked in precedents cited by the court or both.

The frequent use of ambiguous society-centric goals in both commutation and confirmation decisions, more commonly in the latter (in 85% of confirmations as opposed to 41.5% of commutations), has made capital sentencing less principled and more intuitive and therefore, arbitrary. The impossibility of ascertaining what society considers deserved punishment, or the harm caused to society as a result of the offence, or the reduction of public confidence in the administration of justice if the death sentence is not imposed, ought to raise concerns about such indeterminate and nebulous considerations guiding the choice between life imprisonment and death penalty. Despite their ambiguity, society-centric goals have become a mainstay of death penalty sentencing at the Supreme Court.

Their use has resulted in sentencing reasoning taking a retributive or vengeful turn.[33] The focus on societal reactions to the 'crime' has encouraged the sidelining of offender-related circumstances in the determination of offenders' moral culpability, departing from the need to appropriately individualise sentences, and consequently reducing the overall fairness of the process through which death sentences are imposed.

### Figure 14: Was Collective Conscience or Associated Words Mentioned?

Total [All judgments] = **143**



## ENDNOTES

**1** Machhi Singh v State of Punjab [(1983) 3 SCC 470].

**2** Ibid [33-37].

**3** The court observed that any attempt at standardisation would lead to the "sacrifice [of] justice at the altar of blind uniformity". Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [170-177. 192-195].

**4** See Trial Court I Report, 53-54.

**5** Machhi Singh v State of Punjab [(1983) 3 SCC 470] [32].

**6** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [175].

**7** Haresh Mohandas Rajput v. State of Maharashtra [(2011) 12 SCC 56]; Ramnaresh and Ors. v. State of Chhattisgarh [(2012) 4 SCC 257].

**8** Gurvail Singh v. State of Punjab [(2013) 2 SCC 713] (In this case, Justice Radhakrishnan lay down a new framework, which would make the imposition of a death sentence appropriate only when 1) there are no mitigating circumstances (criminal test); 2) only aggravating circumstances exist (crime test); and 3) the society approves of the death penalty in the given case (the 'rarest of rare' or R-R test). The last step of this three-part test invoked public opinion, without clarifying the nature of departure from *Machhi Singh*, such that the crime-centric nature of sentencing reasoning encouraged therein could be avoided.)

**9** Prajeet Kumar Singh v. State of Bihar [(2008) 4 SCC 434]; Jagdish v State of Madhya Pradesh [(2009) 9 SCC 495]; Mohd. Arif @ Ashfaq v. State of NCT [(2011) 13 SCC 621]; Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Manoharan v. State [(2019) 7 SCC 716]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1].

**10** Ram Singh v. Sonia & Ors. [(2007) 3 SCC 1].

**11** Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka [(2008) 13 SCC 767] [40-43].

**12** Haru Ghosh v. State of West Bengal [(2009) 15 SCC 551] [28].

**13** Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498] [129].

**14** Sangeet and Anr. v. State of Haryana [(2013) 2 SCC 452] [49-51].

**15** Ramnaresh and Ors. v. State of Chhattisgarh [(2012) 4 SCC 257] [61].

**16** Kulwinder Singh v. State of Punjab [(2007) 10 SCC 455]; Des Raj v. State of Punjab [(2007) 12 SCC 494]; Ujjagar Singh v. State of Punjab (2007) 13 SCC 90]; Vikram Singh and Ors. v. State of Punjab [(2010) 3 SCC 56]; Maheboobkhan Azamkhan Pathan v. State of Maharashtra [(2013) 14 SCC 214]; Mohd Bin Beerankutti v. State of Karnataka [(2014) 14 SCC 493]; Dharam Deo Yadav v. State of Uttar Pradesh [(2014) 5 SCC 509]; Md. Jamiluddin Nasir and Aftab Ansari v. State of West Bengal [(2014) 7 SCC 443]; Ghulam Mohi Ud Din Wani v. State of Jammu and Kashmir [Criminal Appeal No(s). 1275-1276 of 2014]; Yogendra @ Jogendra Singh v. State of Madhya Pradesh [(2019) 9 SCC 243].

**17** Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka [(2008) 13 SCC 767]; Sheo Shankar Singh v. State of Jharkhand [(2011) 3 SCC 654]; Haresh Mohandas Rajput v. State of Maharashtra [(2011) 12 SCC 56]; Neel Kumar @ Anil Kumar v. State of Haryana [(2012) 5 SCC 766]; Sandeep v. State of U.P. [(2012) 6 SCC 107]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Madhu @ Madhuranatha and Anr v. State of Karnataka [(2014) 12 SCC 419]; Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69]; Rajkumar v. State of Madhya Pradesh [(2014) 5 SCC 353]; Tattu Lodhi v. State of Madhya Pradesh [(2016) 9 SCC 675]; Arvind Singh v. State of Maharashtra [2020 SCC OnLine SC 400]; C. Muniappan and Ors. v. State of Tamil Nadu [(2016) 12 SCC 325]; Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596]; Ashok Debbarma @ Achak Debbarma v. State of Tripura [(2014) 4 SCC 747]; Alber Oraon v. State of Jharkhand [(2014) 12 SCC 306].

**18** Haresh Mohandas Rajput v. State of Maharashtra [(2011) 12 SCC 56] [20].

**19** Ibid.

**20** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [201].

**21** Ram Singh v. Sonia & Ors. [(2007) 3 SCC 1]; Prajeet Kumar Singh v. State of Bihar [(2008) 4 SCC 434]; Mohan Anna Chavan v. State of Maharashtra [(2008) 7 SCC 561]; Bantu v. State of Uttar Pradesh [(2008) 11 SCC 113]; Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [(2008) 15 SCC 269]; State of U.P. v. Sattan @ Satyendra and Ors. [(2009) 4 SCC 736]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667]; Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567]; Surendra Koli v. State of Uttar Pradesh [(2011) 4 SCC 80]; Md. Mannan v. State of Bihar [(2011) 5 SCC 317]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2011) 7 SCC 125]; Mohd. Arif @ Ashfaq v. State of NCT of Delhi [(2011) 13 SCC 621]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [(2011) 14 SCC 401]; Sonu Sardar v. State of Chhattisgarh [(2012) 4 SCC 97]; Sunder @ Sundararajan v. State by Inspector of Police [(2013) 3 SCC 215]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Mofil Khan and Anr. v. State of Jharkhand; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Khushwinder Singh v. State of Punjab [(2019) 4 SCC 415]; Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124].

**22** Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667]; Vikram Singh and Ors. v. State of Punjab [(2010) 3 SCC 56]; Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567]; Md. Mannan v. State of Bihar [(2011) 5 SCC 317]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2011) 7 SCC 125]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [(2011) 14 SCC 401]; Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Khushwinder Singh v. State of Punjab [(2019) 4 SCC 415]; [AIR 2019 SC 2639]; Manoharan v. State [(2020) 5 SCC 782].

**23** Mohan Anna Chavan v. State of Maharashtra [(2008) 7 SCC 561]; Bantu v. State of Uttar Pradesh [(2008) 11 SCC 113]; Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [(2008) 15 SCC 269]; State of U.P. v. Sattan @ Satyendra and Ors. [(2009) 4 SCC 736]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667]; Ajay Kumar Pal v. State of Jharkhand [(2010) 12 SCC 118]; Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; Sunder Singh v. State of Uttaranchal [(2010) 10 SCC 611]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2011) 3 SCC 85]; Surendra Koli v. State of Uttar Pradesh [(2011) 4 SCC 80]; Md. Mannan v. State of Bihar [(2011) 5 SCC 317]; Mohd. Arif @ Ashfaq v. State of NCT of Delhi [(2011) 13 SCC 621]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [(2011) 14 SCC 401]; Sonu Sardar v. State of Chhattisgarh [(2012) 4 SCC 97]; Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; Manoharan v. State [(2019) 7 SCC 716]; Manoharan v. State [(2020) 5 SCC 782]; Jagdish v. State of Madhya Pradesh [(2009) 9 SCC 495].

**24** C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567]; Sunder Singh v. State of Uttaranchal [(2010) 10 SCC 611]; Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1]; Sunder @ Sundararajan v. State by Inspector of Police [(2013) 3 SCC 215]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2012) 4 SCC 37]; Ravi v. State of Maharashtra [(2019) 9 SCC 622].

**25** Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Manoharan v. State [(2019) 7 SCC 716]; Vikram Singh and Ors. v. State of Punjab [(2010) 3 SCC 56].

**26** Saleem and Anr. v. State of Uttar Pradesh [Review Petition (Crl.) No(s). 632-633 of 2015].

**27** Ram Singh v. Sonia & Ors. [(2007) 3 SCC 1]; Prajeet Kumar Singh v. State of Bihar [(2008) 4 SCC 434]; Md. Mannan v. State of Bihar [(2011) 5 SCC 317]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2011) 7 SCC 125]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [(2011) 14 SCC 401]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Ishwari Lal Yadav and Ors. v. State of Chhattisgarh [(2019) 10 SCC 423]; Sonu Sardar v. State of Chhattisgarh [AIR 2012 SC 1480]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; Manoharan v. State [(2019) 7 SCC 716].

**28** Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Manoharan v. State [(2020) 5 SCC 782]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1].

**29** Shivu & Anr. v. R.G. High Court of Karnataka and Anr. [(2007) 4 SCC 713]; M.A. Antony @ Antappan v. State of Kerala [(2009) 6 SCC 220]. (In *Shivu*, there were no reasons provided for the sentence imposed, and the only discussion in the sentencing portion of the judgment was on penological goals. In *MA Antony*, there was no discussion on sentence altogether. The appeal was dismissed after the court had dealt with arguments on conviction.)

**30** Note that the conclusion that the focus on brutality is to the detriment of any real consideration of mitigating circumstances is part of the findings of

previous research undertaken on judicial attitudes towards capital sentencing, based on interviews with 60 former Supreme Court judges. See Matters of Judgment, 68 ("For 21 judges, the nature of the crime, or the manner of its commission, were not just aggravating factors, but bordered on being determinative of the question whether the accused deserved to be sentenced to death. Additionally, for an almost equal number, the brutality of the crime weighed very heavily in the balancing between aggravating and mitigating factors.")

**31** Chhannu Lal Verma v. State of Chhattisgarh [(2019) 12 SCC 438] [25]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800] [27]; Manoj Suryavanshi v. State of Chhattisgarh [(2020) 4 SCC 451] [32]; Mohinder Singh v. State of Punjab [(2013) 3 SCC 294] [37.4]; Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498] [80-89] (Note that in addition to these, Sangeet and Anr. v. State of Haryana [(2013) 2 SCC 452] seems to suggest that there has to be consideration of additional material for the court to conclude that collective conscience of society has been shocked).

**32** Mohinder Singh v. State of Punjab [(2013) 3 SCC 294] (Justice Sathasivam's opinion accepted their use, while Justice Kalifulla rejected their use in capital sentencing).

**33** Trial Court I Report, 53-54; Anup Surendranath, Neetika Vishwanath & Preeti Pratishruti Dash, 'Penological Justifications as Sentencing Factors in Death Penalty Sentencing' 2020 6(2) *Journal of National Law University Delhi* 107, 114-115.

# D. Consideration of Offender-Related Circumstances

Mitigating circumstances can be of various types.[1] ***First***, those that reduce offenders' blameworthiness by indicating that they are not fully culpable, such as crimes committed in an inebriated state; or under duress or mental stress; or due to lack of maturity. ***Second***, circumstances that indicate that the offender is capable of being reformed and rehabilitated, such as young age, promising conduct in prison etc. The ***third*** kind are circumstances that courts ought to take into account so as to ensure equal impact of punishments,[2] including handicaps that make the impact of a given punishment unduly harsh or onerous for particular offenders, thereby increasing the relative severity of punishment. Such circumstances may be that of old age, poor health, mental and physical disabilities etc.[3] This section considers offender-related sentencing factors that fall within these broad categories.

This section aims to demonstrate the Supreme Court's limited engagement with offender related sentencing factors, especially mitigating circumstances, and its lack of understanding as to their impact on or relevance to the determination of moral culpability and capacity for reform. The superficial and acontextual manner in which these offender-related circumstances are considered, as though they form part of a checklist, without any deeper engagement with the implications of these factors, undermines the goal of individualisation of punishment.

# Age

***Bachan Singh*** recognised both young age and old age to be relevant mitigating circumstances. In fact, it specifically observed that young age or more specifically, extreme youth, was of compelling importance.[4] Young age is generally considered a mitigating circumstance on account of its correlation with a lack of relevant cognitive and emotional experiences, reducing young persons' abilities to reconcile conflicting moral standards, and fully understand the consequences of their behaviour.[5] Young age has also been linked to the probability of reformation.

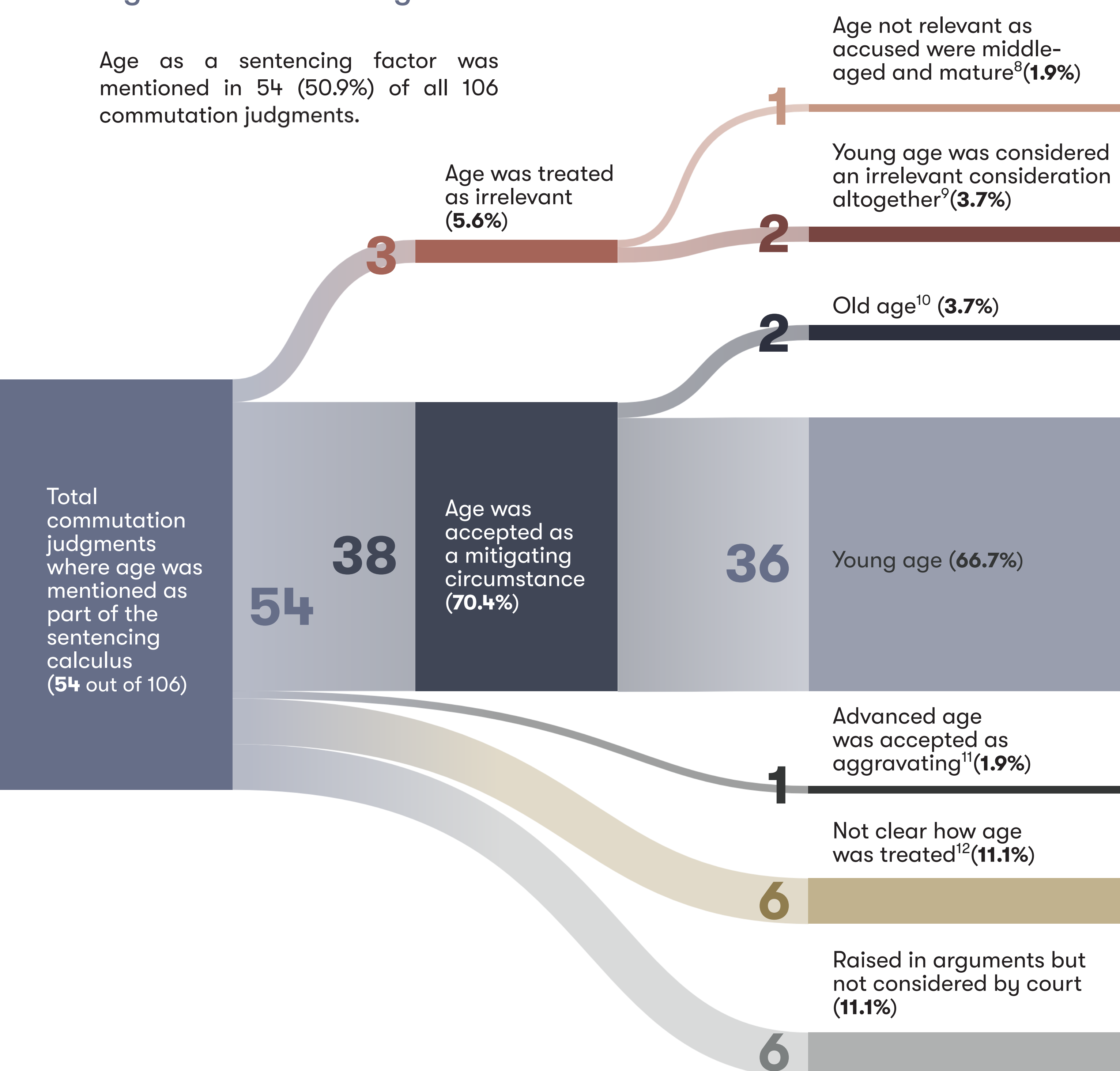
Old age on the other hand, is a factor relevant to assessing the equality of impact in punishment, as it may exacerbate the severity of the punishment,[6] making it disproportionate; or may also be an indication of reduced capacity to undergo moral reflection inherent in a proportionality rationale for punishment.[7]

However, determining whether the age of an offender is a mitigating circumstance in a given case or not, requires a sentencing court to provide individualised reasons, justifying age-based mitigation or rejection thereof in the specific context of a specific offender. However, this form of individualised sentencing reasoning is not seen in either commutations or confirmations at the Supreme Court.



## A. Commutations

### Figure 15: How was Age Treated in Commutations?



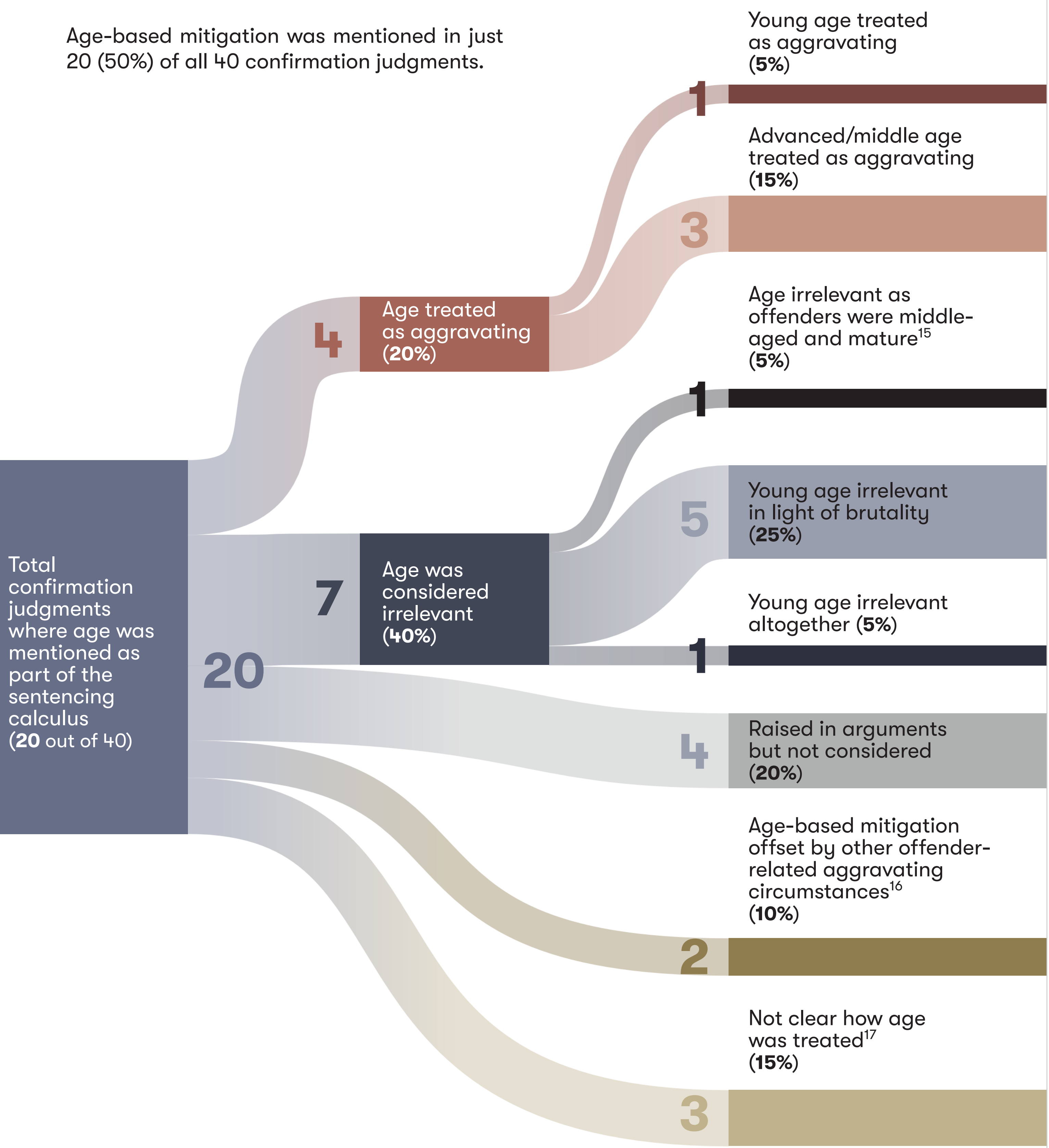

A variety of approaches, with regard to the treatment of age, was observed. The majority of judgments accepted age-based mitigation, but 2 commutation judgments also deemed the same to be an irrelevant consideration.[13]

What stood out however, was the absence of individualised reasoning in these judgments, explaining why age was mitigating in the case of given offenders. While a link was often made between young age and reformation,[14] the same was seldom done with respect to diminished moral culpability for the crime itself.

## B. Confirmations

### Figure 16: How was Age Treated in Confirmations?

Age-based mitigation was mentioned in just 20 (50%) of all 40 confirmation judgments.




Within the 20 judgments, 4 (20%) did not consider age-based mitigation arguments raised by the defence. Some judgments found age-based mitigation to be irrelevant, with 5 (25%) finding the same irrelevant in light of the brutality of the crime,[18] and 1 finding age an irrelevant consideration altogether.[19] This demonstrates a circular logic, as none of the judgments explained why young age did not diminish offenders' moral culpability for the crime committed, thereby reducing the so-called 'heinousness' or 'brutality' of crime.

Furthermore, in 3 judgments, advanced age (31, 43, and 47 years) was treated as an aggravating circumstance.[20] All 3 were child rape and murder cases, and in one of them, advanced age (31 years) was treated as an aggravating circumstance when compared to the age of victim.[21] While young age is generally accepted as a mitigating circumstance for impeding decision-making abilities, the corollary, i.e., middle-age implying full decision-making capacity and thus heightened moral culpability, is not necessarily true. These are individualised assessments that need to be made for each offender but are rarely undertaken.

In 1 confirmation judgment, young age was treated as an aggravating circumstance, with the observation that "young age poses a continuous burden on the State and presents a longer risk to society, hence warranting more serious intervention by Courts".[22] This completely misconstrues the concept of mitigation, and goes against established precedent recognising age-based mitigation as furthering the penological goals of proportionality and reformation within the ***Bachan Singh*** framework of individualised sentencing.

# Socio-Economic Background

In ***Mulla & Anr v. State of Uttar Pradesh***,[23] the Supreme Court held that 'economic depravity' may lead a person to crime, and thus socio-economic factors could amount to mitigating circumstances. It linked crimes committed due to socio-economic backwardness to the probability of reformation, presumably based on the understanding that persons who are driven to crime due to poverty rather than innate criminality shall be amenable to being reformed and rehabilitated. Further, childhood deprivation may also correlate with the development of inadequate moral safeguards, and can in some cases lead to diminished moral culpability.[24] Notably, in ***Sunil Damodar Gaikwad v. State of Maharashtra***,[25] "undeserved adversities of childhood' were considered to be mitigating, but without the said normative basis being identified.

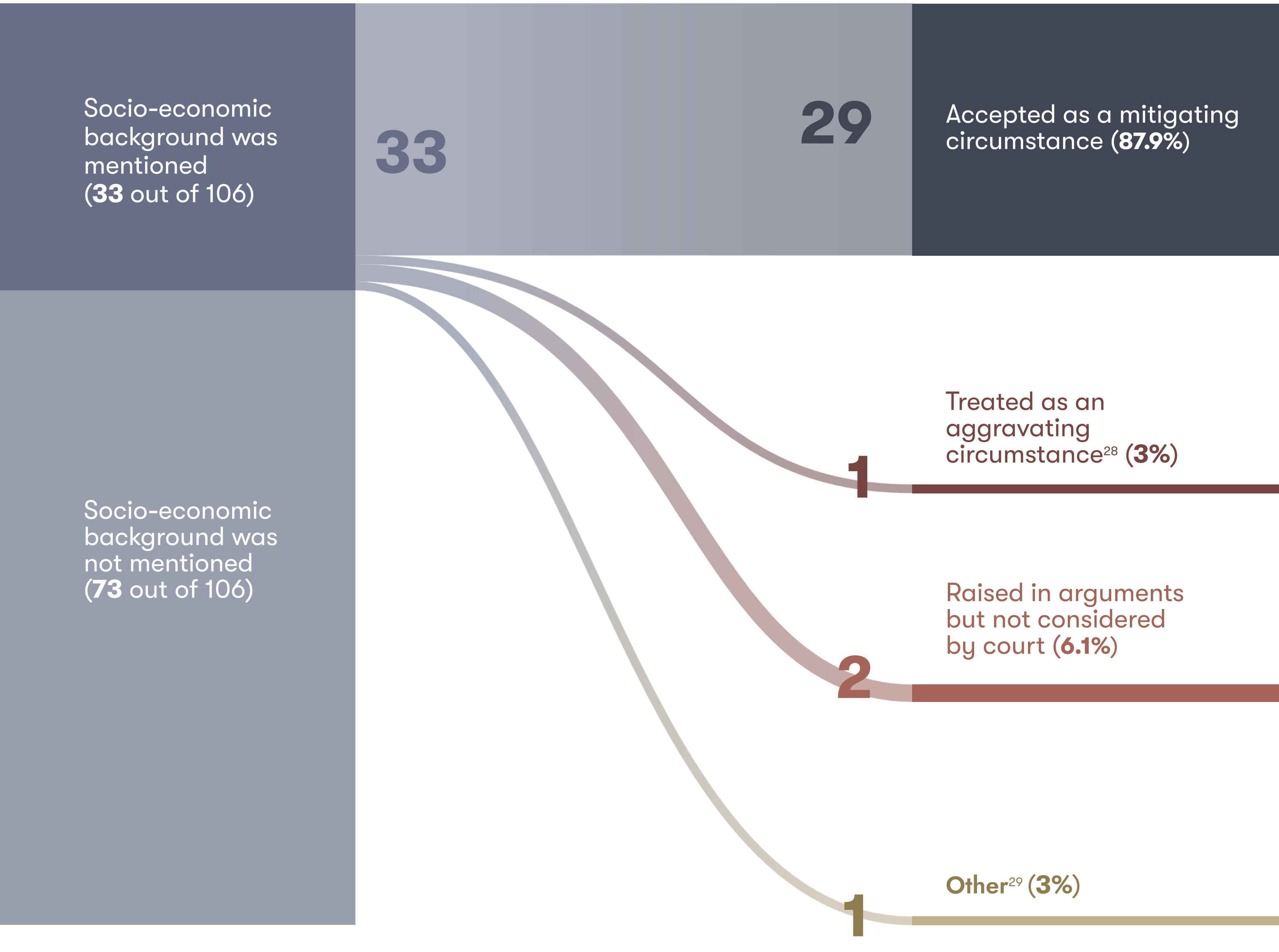
Given the relevance of offenders' socio-economic background, and the fact that more than 70% of individuals sentenced to death in India belong to marginalised communities,[26] it is concerning that the same was mentioned as a sentencing factor in only 30.1% (43) of all 143 judgments where a sentencing exercise was undertaken.



## A. Commutations

### Figure 17: Treatment of Socio-Economic Background in Commutations

Socio-economic background was mentioned in 33 (31.1%) of 106 commutation judgments, with a vast majority of them (87.9%) treating the same as a mitigating circumstance.[27]



### Figure 18: Reasons for Treating Socio-Economic Background as Mitigating in Commutations*

Socio-economic background was most commonly treated as a mitigating factor when the crime was committed due to poverty or want of money, i.e., when it provided motive for the crime or contributed to the disturbed mental state in which the crime was committed,[32] but was also often linked to the probability of reformation.[33] Further, 3 judgments recognised poverty as creating barriers to access to justice, and linked the same to poor quality of legal representation, which was then treated as a mitigating circumstance.[34]

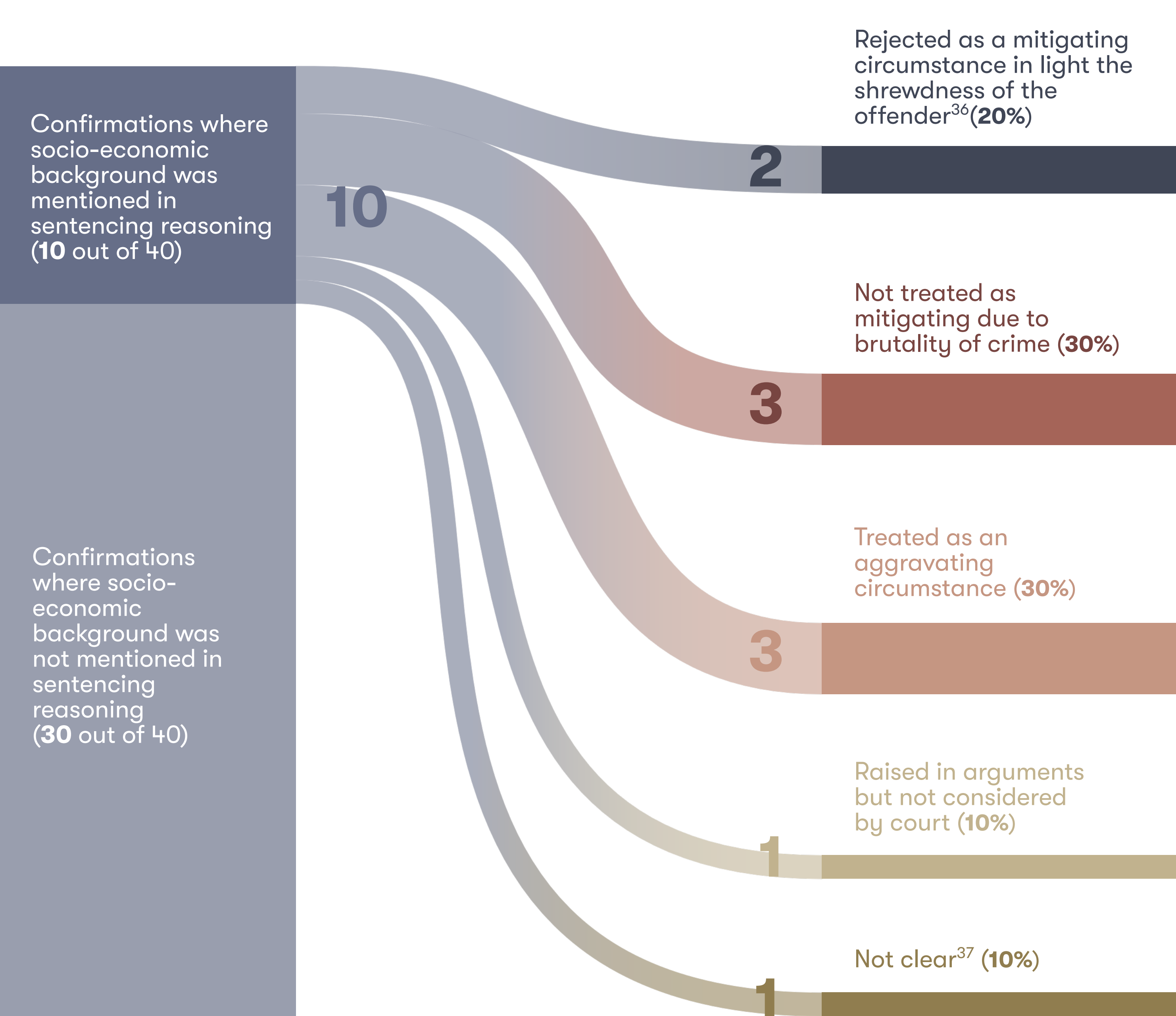
*As the same judgement could have adopted multiple reasons for treating socio-economic background as a mitigating circumstance, these categories are not all mutually exclusive



## B. Confirmations

### Figure 19: Treatment of Socio-Economic Background in Confirmations

Socio-economic background was discussed in far fewer confirmations, i.e., 10 out of 40 (25%) confirmation judgments, and was outweighed by or rejected based on crime-based aggravating factors in 3 of the judgments in which they were mentioned.[35]




It must be noted that in 3 confirmation judgments, offenders' relatively advanced socio-economic background and absence of illiteracy or backwardness,[38] were treated as an aggravating circumstance, with no justification as to why the absence of disadvantage qualified as an aggravating circumstance, and heightened the culpability for a given offence. This justification ought to have been forthcoming given *Bachan Singh*'s direction to expansively construe mitigating circumstances, while omitting the same instruction for aggravating circumstances.

# Criminal Antecedents

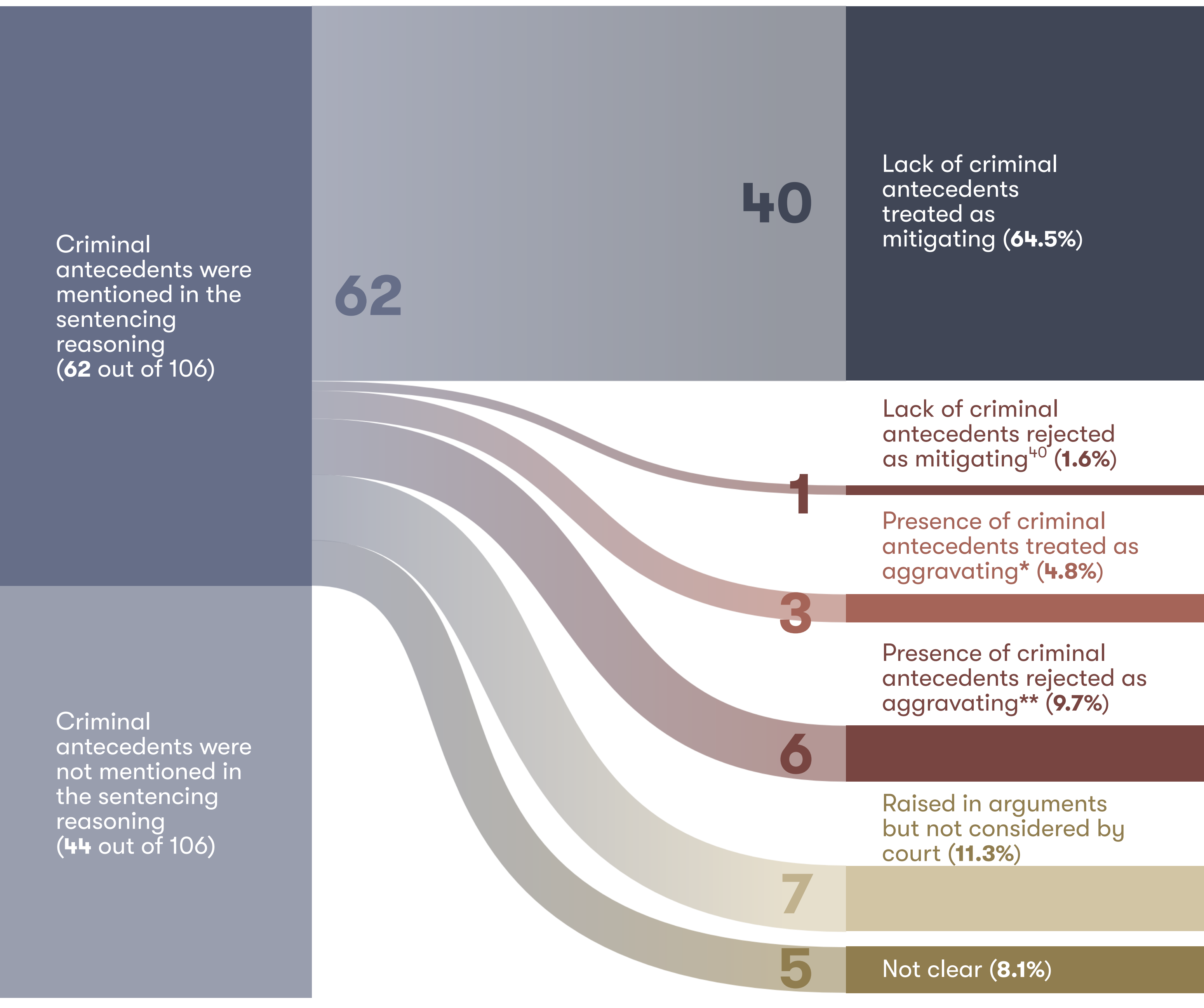
The relevance of prior criminal history or lack thereof, and the nature of their treatment in sentencing, has been a subject of much scholarly debate.[39] The treatment of prior criminal history as a sentencing factor has however largely been unquestioned in capital sentencing jurisprudence at the Supreme Court. This is presumably on account of the invocation of the utilitarian sentencing aim of 'reformation and rehabilitation' in ***Bachan Singh***, and the inherently incapacitative nature of the death penalty as a form of punishment. Such a penological framework asks whether an offender will continue to engage in repeated criminal behaviour so as to be a menace to society or whether there is a probability of reformation and rehabilitation.



## A. Commutations

### Figure 20: Treatment of Criminal Antecedents in Commutations

Criminal antecedents were mentioned in the sentencing reasoning of only 62 (58.5%) of 106 judgments where death sentences were commuted, of which 40 (64.5%) judgments accepted the lack of criminal antecedents as a relevant mitigating circumstance.




*In these judgments, prior convictions were treated as aggravating.
**In these judgments, pending cases/convictions unrelated to the crime in question/prior acquittals were rejected as aggravating circumstances.

In 3 commutation judgments, the presence of criminal antecedents (prior convictions) was accepted as aggravating.[41] However, in 2 of them the sentence was commuted as the previous offences provided the motive for the current crime, contributing to the disturbed mental state in which the same was committed.[42] In the third judgment, the sentence was commuted on account of the offender's mental illness, but the offender's prior criminal history was used to impose a sentence of imprisonment for the whole of the offender's life without remission.[43]

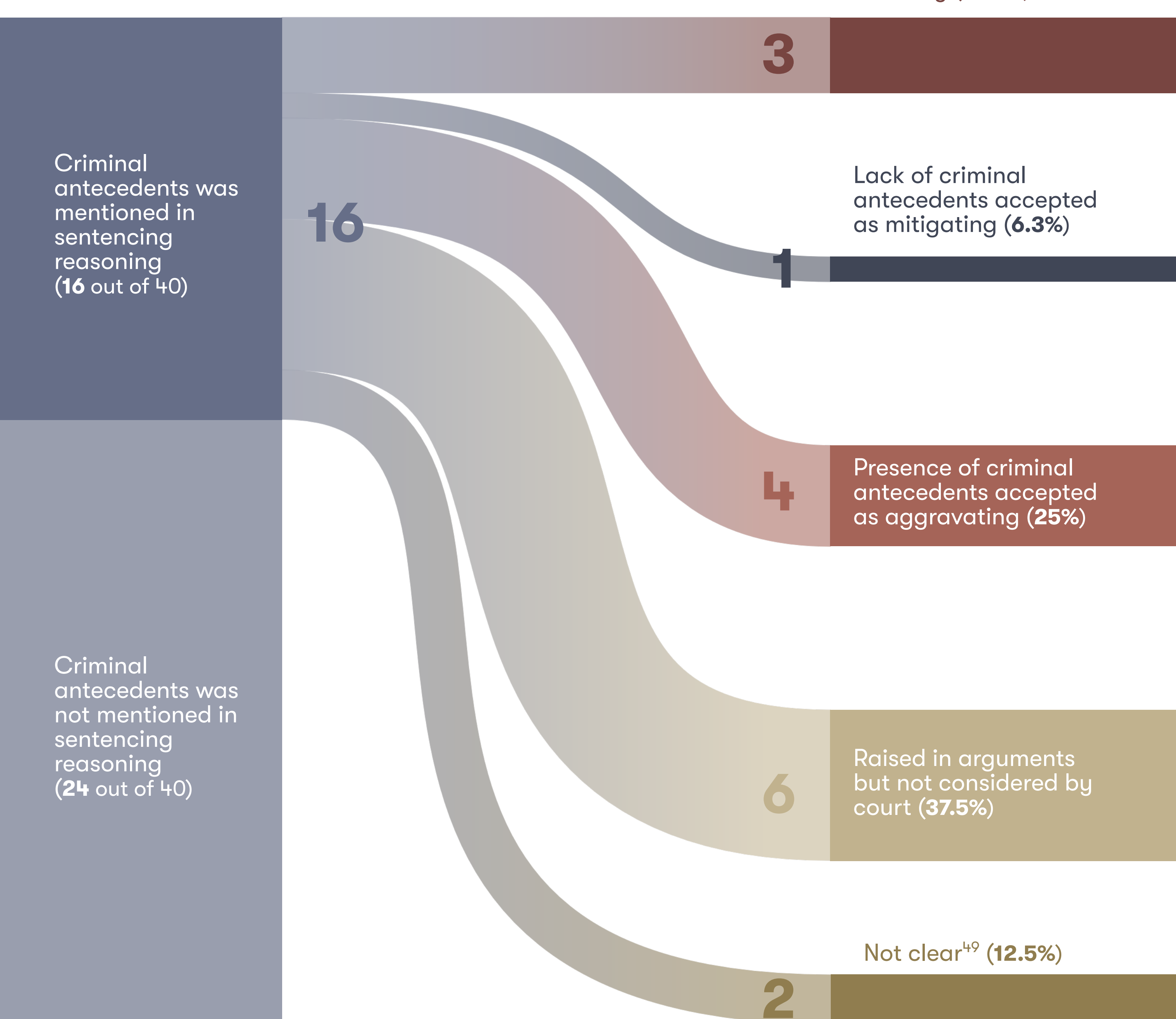
The presence of criminal antecedents was rejected as an aggravating circumstance in 6 commutation judgments.[44] In 5 of them, the criminal antecedents of the offenders were in the nature of pending cases,[45] and prior acquittals,[46] and thus deemed irrelevant on account of the presumption of innocence. In the sixth, the prior conviction for murder was not treated as an aggravating circumstance as the same did not display "a pattern discernible across both the cases", as the offender did not have an intention to cause death while committing the latest offence.[47] This approach is in line with the utilitarian justification for the consideration of prior criminal history, which necessarily requires a link between prior offending and the current offending that speaks to whether an offender is a career criminal or shows a pattern of reoffending.[48]



## B. Confirmations

### Figure 21: Treatment of Criminal Antecedents in Confirmations

The consideration of the absence of prior antecedents figured less prominently in confirmation judgments than commutation judgments. Presence or absence of criminal antecedents was mentioned as a sentencing factor in only 16 (40%) out of all 40 confirmations.



Of the 15 judgments in which criminal antecedents were mentioned, 5 did not even engage with the absence of criminal antecedents as a mitigating circumstance despite being raised in arguments by the defence counsel.[50] Given the importance of the sentencing aim of reformation within the ***Bachan Singh*** framework, the failure to consider the absence of criminal antecedents as a relevant sentencing factor is concerning.

The absence of criminal antecedents when considered as part of sentencing reasoning in confirmation judgments, was rejected as mitigating, due to the brutal nature of the offence in 3 judgments.[51] 1 judgment accepted it as mitigating but effectively disregarded mitigation as a concept for certain classes of offences.[52]

The presence of criminal antecedents was accepted as an aggravating circumstance in 4 confirmation judgments. In 3 of these, prior convictions were treated as aggravating.[53] In 1 judgment, however, pending criminal cases were treated as aggravating,[54] contradicting established precedent.

# Equity Factors and Compassionate Grounds

Additional sentencing factors that are in the nature of equity and/or compassionate grounds have been considered by the Supreme Court in capital cases. These include old age, physical or mental illness, existence of dependents and the length of incarceration. While the relevance of these sentencing factors have not been satisfactorily articulated by the Supreme Court, they have been considered by some judgments to reflect a 'humane approach' to sentencing,[55] seemingly congruent with ***Bachan Singh***'s call to exercise compassion when deciding whether the death sentence is the appropriate punishment in a given case. By and large, when treated as mitigating circumstances, these factors were considered along with other mitigating circumstances to furnish grounds for commutation, and have not by themselves been considered significant enough to commute death sentences to life imprisonment.

However, the absence of a normative grounding has resulted in inconsistent approaches towards the consideration of such sentencing factors in capital cases.

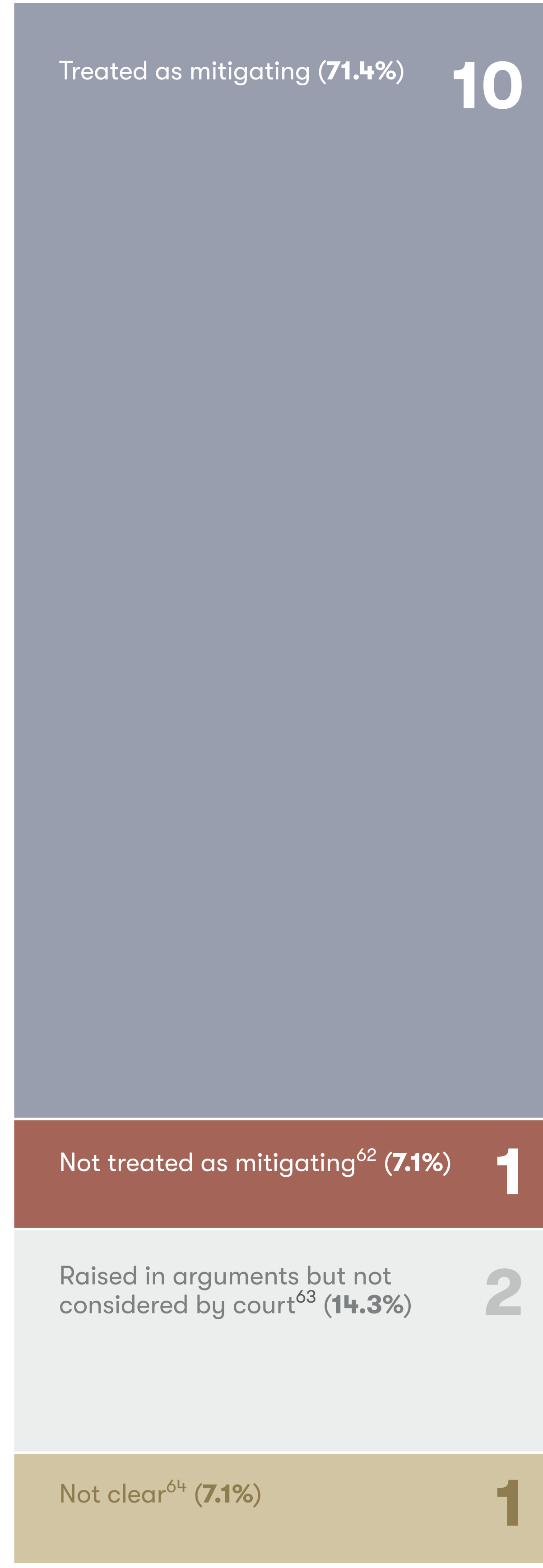
## Delay/Length of Incarceration

The consideration of delay or the length of incarceration as mitigating circumstances or grounds for commutation of a death sentence has been uncertain territory for the Supreme Court. In ***T.V. Vatheeswaran v. The State of Tamil Nadu***,[56] delay of two years between the imposition of a sentence of death by the trial court and the hearing of the case by the Supreme Court, was held to be a ground for commutation on account of the cruel nature and dehumanising effects of prolonged incarceration under a sentence of death. ***Sher Singh v. State of Punjab***,[57] largely agreed with ***Vatheeswaran***, that a death sentence may become inexecutable on account of prolonged delay, but differed on the narrow issue of the 2 year-limit. Finally, a 5-judge bench in ***Smt. Triveniben v. State of Gujarat***,[58] held that only executive delay would qualify as a ground for commutation of a death sentence, and judicial delay would not render a judgment upholding the death sentence unconstitutional and inexecutable ***on that ground alone***. It was observed that mental torture would not be acute until the death sentence is finally confirmed by the Supreme Court,[59] and that the time taken during the judicial process is meant to ensure a fair trial.[60] Note however, that narratives of death row prisoners have shown that anxiety due to the 'uncertainty of death' sets in soon after being sentenced to death, and not just after the rejection of mercy petitions.[61]

During the study period, the Supreme Court accepted lengthy periods of incarceration on death row as a mitigating circumstance in 10 commutations,[62] and rejected the same as mitigating in 2 judgments (1 commutation and 1 confirmation).[70] In ***Yakub Abdul Razak Memon v. State of Maharashtra***,[71] while 20 years of incarceration was accepted as mitigating for 10 prisoners, whose death sentences were commuted, the same was not accepted as mitigating for Yakub, whose culpability was deemed to be greater than others, with the court observing that "a commanding position and a crime of 'utmost gravity' ordinarily merit the extreme penalty even accounting for the guilty plea and mitigating factors."

It must be noted that in all the judgments in which length of incarceration or period spent on death row was treated as mitigating, the same was not the only ground for commutation, but was considered in combination with other mitigating circumstances.[72] However, contrary to the rather favourable treatment of delay in the judgments where the same was considered, 2 judgments enhanced sentences of life imprisonment to death penalty, despite considerable lapse of time since the occurence of the crime.[73]

### Figure 22: Was Delay/Length of Incarceration Treated as Mitigating?

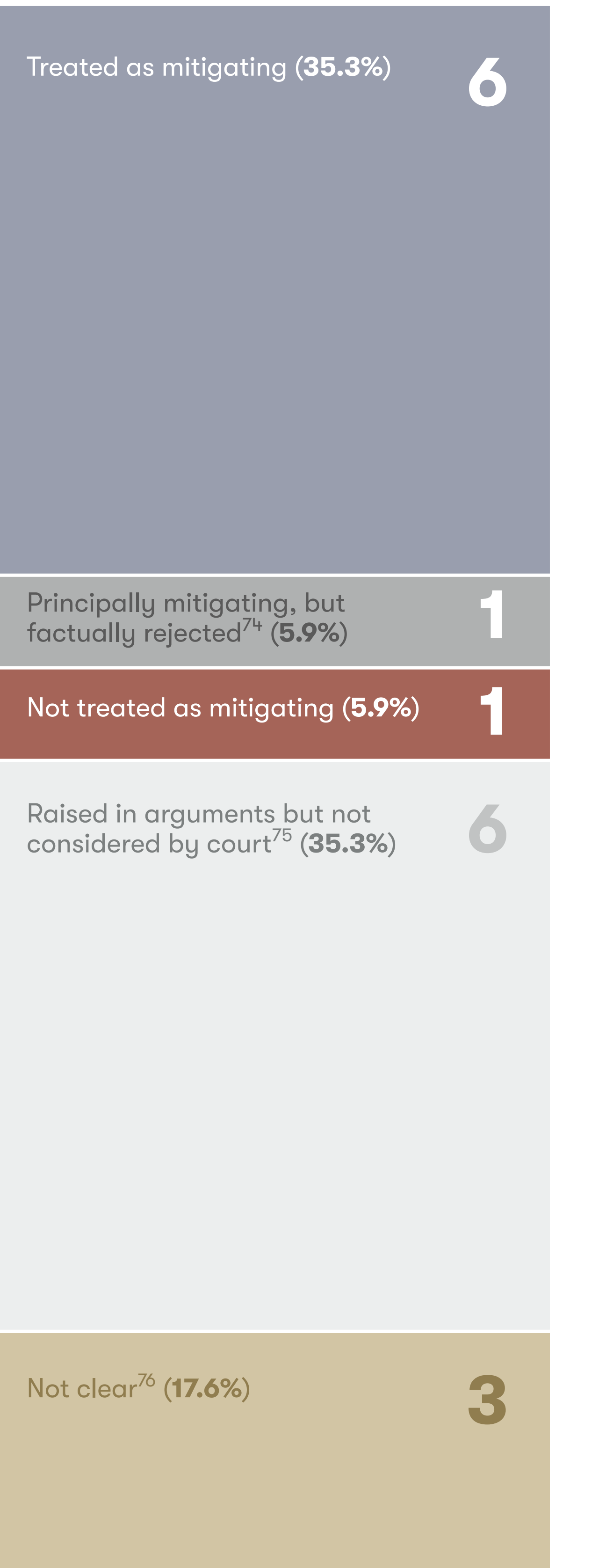


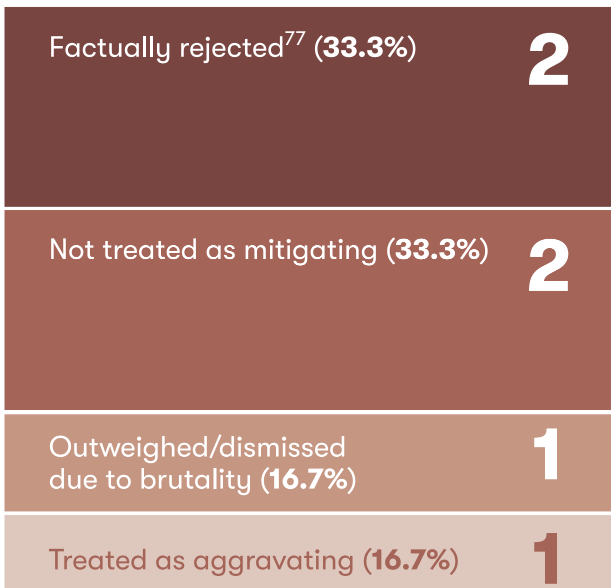
## Dependents

The existence of dependents/family members of the offender was treated as a mitigating circumstance in 6 commutation judgments,[78] while it was rejected as a mitigating circumstance in 3 judgments (1 commutation and 2 confirmation judgments).[79] In 1 confirmation judgment, it was outweighed by the brutality of the crime,[80] while in another, the murder of a child, in the nature of child sacrifice, was considered particularly aggravating as the accused themselves had young children.[81]

However, the principled basis on which the existence of dependents/family members has been accepted or rejected as a sentencing factor seems unclear. It is not clear whether the impact of execution on family members is relevant in and of itself; or the relevance of the same lies in the fact that it is indicative of the possibility of reformation and rehabilitation, given that family members can serve as significant support systems for the rehabilitation of offenders.[82] In fact, the Supreme Court has not sought to look at evidence of family impact at all, and has merely restricted itself to the consideration of the mere factum of the existence of dependents. Hence, Supreme Court jurisprudence on mitigation on account of the existence of dependents is ambiguous, and of little guidance to courts below. Furthermore, this lack of clarity also opens up scope for inconsistency in the treatment of dependents as a sentencing factor in individual cases.

### Figure 23: Was Existence of Dependents Treated as Mitigating?



## Other Equity Factors (Old Age, Pregnancy, Mental & Physical Illness)

Old age has typically been accepted as a mitigating circumstance in commutations.[83] Similarly, post-conviction physical[84] and mental illness[85] have been recognised as grounds for commutation, on account of being equity factors that increase the onerousness of a given form of punishment, making it disproportionate in impact. In 1 judgment, pregnancy was considered as irrelevant to the question of sentencing, with a bench of the Supreme Court observing that "such compassionate grounds are present in most cases and are not relevant in considering commutation of death sentence."[86]

The recognition of post-conviction mental illness as a ground for commutation is not concerned with the mental state of the offender at the time of commission of the crime but with the onset of mental illness during incarceration, post-conviction. For commutation on grounds of mental illness alone, the Supreme Court has set a high standard, by requiring "the accused to prove by a preponderance of clear evidence that he is suffering with [sic] severe mental illness", which prevents them from understanding or comprehending the nature and purpose behind the imposition of such punishment.[87] This is a test of 'executability', and not a consideration of whether the onset of mental illness while on death row places an additional burden, making the impact of the same punishment more onerous for a given offender.[88]

Consequently, the current jurisprudence conflates the mitigating effect of mental illness at the appellate stage with questions of executability. At the appellate stage, the issue before the Supreme Court is whether mental illness makes the death sentence a disproportionate, and consequently, inappropriate punishment.[89] Executability is an issue at the stage of post-mercy, where the death penalty has already been deemed appropriate but the court is called upon to examine whether execution would violate the fundamental right to life, in light of supervening circumstances, including any mental illness. Furthermore, a requirement of severity was not articulated in ***Shatrughan Chauhan v. Union of India***,[90] which recognised mental illness as a supervening circumstance at the post-mercy stage, where 'executability' became a relevant question.

It is pertinent to note that the principled basis for the treatment of post-conviction mental illness as a ground for commutation is different from what was imagined in ***Bachan Singh*** to be the relevance of the mental condition/health of an offender at the time of commission of the offence. ***Bachan Singh*** included within its illustrative list of mitigating circumstances two factors, namely, whether the crime was committed under the influence of extreme mental or emotional disturbance; and whether the offender was suffering from a mental defect that had impaired his capacity to appreciate the criminality of his conduct.[91] These mitigating circumstances have the effect of diminishing the culpability of the offender, as they imply impairment of decision-making ability or inability to understand the full consequences of one's actions at the time of committing the crime.[92] Diminished responsibility due to mental stress or emotional disturbance was recognised as a mitigating circumstance in a few judgments of the Supreme Court.[93] However, other mental defects, broadly falling within the categories of intellectual disabilities, brain injuries, or cognitive impairments,[94] were not considered in any of the judgments delivered during the study period. This is indicative of the absence of a robust jurisprudence on mental health and mitigation at the Supreme Court.

Even recently, in ***Manoj v State of Madhya Pradesh***,[95] where guidelines were laid down for the collection and presentation of mitigating circumstances relating to the offender, psychiatric evaluation was considered necessary only for the purpose of assessing the probability of reformation, and not to ascertain the question of diminished culpability.

The foregoing section dealt with the broad categories of offender-related circumstances that have been considered in capital sentencing judgments of the Supreme Court. The discussion above demonstrates a sore lack of normative understanding of the impact of various offender-related circumstances on broader questions of culpability and capacity of reformation. While some commutation judgments made some sort of a link, the doctrinal confusion is far from ameliorated in light of other commutation judgments simply mentioning mitigating circumstances while commuting death sentences, as though they are part of a checklist, and confirmation judgments failing to mention them at all or improperly considering them when mentioned.

## ENDNOTES

**1** Austin Lovegrove, 'The Pernicious Impact of Perceived Public Opinion on Sentencing: Findings from an Empirical Study of the Public's Approach to Personal Mitigation in Exploring Aggravation and Mitigation at Sentencing' in *Mitigation and Aggravation at Sentencing* (Julian V Roberts ed., 2011) 189-190.

**2** Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* 124 (2016).

**3** Ashworth and Von Hirsch, 'Appendix 1 - Equity Factors in Sentencing' in *Proportionate Sentencing: Exploring the Principles* (2005), 166 (Equity factors are defined by them as "departures from normal proportionality criteria when compassion seems appropriate for the offender's predicament, particularly where the offender is specially vulnerable or is experiencing other suffering").

**4** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [207].

**5** Jose B. Ashford & Melissa Kupferberg, 'Assessing Culpability' in *Death Penalty Mitigation: A Handbook for Mitigation Specialists, Investigators, Social Scientists, and Lawyers* (2013).

**6** Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* 124 (2016).

**7** Ashworth and Von Hirsch, 'Appendix 1 - Equity Factors in Sentencing' in *Proportionate Sentencing: Exploring the Principles* (2005), 171-176 ("If the offender cannot legitimately undergo moral reflection on their blameworthiness, then retributive punishment cannot be truly retributive").

**8** Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69].

**9** Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Arvind Singh v. State of Maharashtra [2020 SCC OnLine SC 400].

**10** Mulla and Anr. v. State of Uttar Pradesh [(2010) 3 SCC 508]; Babasaheb Maruti Kamble v. State of Maharashtra [(2019) 13 SCC 640].

**11** Shankar Kisanrao Khade v. State of Maharashtra [(2013) 5 SCC 546].

**12** Mohinder Singh v. State of Punjab [(2013) 3 SCC 294]; Ashok Debbarma @ Achak Debbarma v. State of Tripura [(2014) 4 SCC 747]; Tattu Lodhi v. State of Madhya Pradesh [(2016) 9 SCC 675]; Nand Kishore v. State of Madhya Pradesh [(2019) 16 SCC 278]; Dattatraya @ Datta Ambo Rokade v. State of Maharashtra [(2020) 14 SCC 290]; Sachin Kumar Singhraha v. State of Madhya Pradesh [(2019) 8 SCC 371].

**13** Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Arvind Singh v. State of Maharashtra [2020 SCC OnLine SC 400].

**14** *infra* Figure 26.

**15** Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67].

**16** Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1] (offset by lack of remorse); B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124] (offset by criminal history).

**17** Sunder Singh v. State of Uttaranchal [(2010) 10 SCC 611]; Manoharan v. State [(2019) 7 SCC 716]; Ishwari Lal Yadav and Ors. v. State of Chhattisgarh [(2019) 10 SCC 423].

**18** Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; Sonu Sardar v. State of Chhattisgarh [(2012) 4 SCC 97]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632].

**19** Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421].

**20** Md. Mannan v. State of Bihar [(2011) 5 SCC 317]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2012) 4 SCC 37]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253].

**21** Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2012) 4 SCC 37].

**22** Manoharan v. State [(2020) 5 SCC 782].

**23** Mulla & Anr v. State of Uttar Pradesh [(2010) 3 SCC 508] [80-81].

**24** Jose B. Ashford & Melissa Kupferberg, 'Assessing Character, Criminal Propensities, and Sociocultural Deprivation' in *Death Penalty Mitigation: A Handbook for Mitigation Specialists, Investigators, Social Scientists, and Lawyers* (2013).

**25** [(2014) 1 SCC 129].

**26** National Law University, Delhi, Death Penalty India Report (NLU Delhi Press 2016) Volume II, 101, 109 ("According to the national figures, 74.1% of the prisoners sentenced to death in India are economically vulnerable according to their occupation and landholding....76% of prisoners sentenced to death in India are backward classes and religious minorities.")

**27** Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498]; Haru Ghosh v. State of West Bengal [(2009) 15 SCC 551]; Sushil Kumar @ Lucky v. State of Punjab [(2009) 10 SCC 434]; Dilip Premnarayan Tiwari and Anr. v. State of Maharashtra [(2010) 1 SCC 775]; Mulla and Anr. v. State of Uttar Pradesh [(2010) 3 SCC 508]; Kamleshwar Paswan v. Union Territory of Chandigarh [(2011) 11 SCC 564]; Ramesh v. State of Rajasthan [(2011) 3 SCC 685]; Purna Chandra Kusal v. State of Orissa [(2011) 15 SCC 352]; Sham @ Kishor Bhaskarrao Matkari v. State of Maharashtra [(2011) 10 SCC 389]; Absar Alam @ Afsar Alam v. State of Bihar [(2012) 2 SCC 728]; Sanjay Paswan @ Firangi Paswan v. State of Jharkhand [Criminal Appeal No(s). 1971-972 of 2011]; Mohinder Singh v. State of Punjab [(2013) 3 SCC 294]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215]; Ram Deo Prasad v. State of Bihar [(2013) 7 SCC 725]; Sunil Damodar Gaikwad v. State of Maharashtra [(2014) 1 SCC 129]; Vyas Ram @ Vyas Kahar and Ors. v. State of Bihar [(2013) 12 SCC 349]; Mahesh Dhanaji Shinde v. State of Maharashtra [(2014) 4 SCC 292]; Ashok Debbarma @ Achak Debbarma v. State of Tripura [(2014) 4 SCC 747]; Shyam Singh @ Bhima v. State of Madhya Pradesh [(2017) 11 SCC 265]; Kamlesh @ Ghanti v. State of Madhya Pradesh [Criminal Appeal No(s). 1720-1721 of 2014]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800]; Nand Kishore v. State of Madhya Pradesh [(2019) 16 SCC 278]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Manoj Suryavanshi v. State of Chhattisgarh [(2020) 4 SCC 451]; Irappa Siddappa Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136]; Bhagchandra v. State of Madhya Pradesh [2021 SCC OnLine SC 1209]; Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421].

**28** Santosh Kumar Singh v. State thr. CBI [(2010) 9 SCC 747].

**29** The socio-economic background of the victim and accused was compared to conclude that the accused was not in a dominating position vis a vis the victim, Sushil Sharma v. State of NCT of Delhi [(2014) 4 SCC 317].

**30** Absar Alam @ Afsar Alam v. State of Bihar [(2012) 2 SCC 728]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215].

**31** Kamleshwar Paswan v. Union Territory of Chandigarh [Criminal Appeal No(s). 1720-1721 of 2014] (Note that this was not a case where socio-economic background furnished motive for the crime, but where the psycho-social impact of general economic pressures was treated as mitigating).

**32** Ashok Debbarma @ Achak Debbarma v. State of Tripura [(2014) 4 SCC 747]; Mohinder Singh v. State of Punjab [(2013) 3 SCC 294]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800]; Vyas Ram @ Vyas Kahar and Ors. v. State of Bihar [(2013) 12 SCC 349]; Sunil Damodar Gaikwad v. State of Maharashtra [(2014) 1 SCC 129]; Haru Ghosh v. State of West Bengal [(2009) 15 SCC 551]; Mahesh Dhanaji Shinde v. State of Maharashtra [(2014) 4 SCC 292]; Ramesh v. State of Rajasthan [(2011) 3 SCC 685]; Dilip Premnarayan Tiwari and Anr. v. State of Maharashtra [(2010) 1 SCC 775]; Sushil Kumar @ Lucky v. State of Punjab [(2009) 10 SCC 434]; Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498].

**33** Mulla and Anr. v. State of Uttar Pradesh [(2010) 3 SCC 508]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800]; Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249]; Shyam Singh @ Bhima v. State of Madhya Pradesh [(2017) 11 SCC 265]; Mahesh Dhanaji Shinde v. State of Maharashtra [(2014) 4 SCC 292]; Sanjay Paswan @ Firangi Paswan v. State of Jharkhand [Criminal Appeal No(s). 1971-972 of 2011]; Ramesh v. State of Rajasthan [(2011) 3 SCC 685].

**34** Ram Deo Prasad v. State of Bihar [(2013) 7 SCC 725]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800]; Nand Kishore v. State of Madhya Pradesh [(2019) 16 SCC 278].

**35** Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1].

**36** Manoharan v. State [(2020) 5 SCC 782] (rejected due to the shrewdness of the accused, demonstrated by him retracting his confession); Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1] (rejected due to shrewdness as generally observed by the bench).

**37** Manoharan v. State [(2019) 7 SCC 716].

**38** Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632] and Saleem and Anr. v. State of Uttar Pradesh [Review Petition (Crl.) No(s). 632-633 of 2015] (offender was educated and a school-teacher); B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124] (offender was an ex-police officer).

**39** See Julian V Roberts, 'The Role of Criminal Record in the Sentencing Process' (1997) 22 *Crime and Justice* 303.

**40** Arvind Singh v. State of Maharashtra [2020 SCC OnLine SC 400].

**41** Haru Ghosh v. State of West Bengal [(2009) 15 SCC 551]; Mohinder Singh v. State of Punjab [(2013) 3 SCC 294]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1] (all of these were convictions).

**42** Haru Ghosh v. State of West Bengal [(2009) 15 SCC 551]; Mohinder Singh v. State of Punjab [(2013) 3 SCC 294].

**43** Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1].

44 Shankar Kisanrao Khade v. State of Maharashtra [(2013) 5 SCC 546]; Birju v. State of Madhya Pradesh [(2014) 3 SCC 421]; Yogendra @ Jogendra Singh v. State of Madhya Pradesh [(2019) 9 SCC 243]; Jawed Khan @ Tingrya v. State of Maharashtra [Criminal Appeal No(s). 622-623 of 2016]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460].

45 Shankar Kisanrao Khade v. State of Maharashtra [(2013) 5 SCC 546]; Birju v. State of Madhya Pradesh [(2014) 3 SCC 421]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460].

46 Jawed Khan @ Tingrya v. State of Maharashtra [Criminal Appeal No(s). 622-623 of 2016].

47 Yogendra @ Jogendra Singh v. State of Madhya Pradesh [(2019) 9 SCC 243]. Additionally, in Mulla and Anr. v. State of Uttar Pradesh [(2010) 3 SCC 508], the court noted that the convicts had no criminal antecedents despite a prior acquittal having been raised. The absence of criminal antecedents was treated as a mitigating circumstance, instead of the court just rejecting existence of criminal antecedents as aggravating.

48 See Julian V Roberts, 'The Role of Criminal Record in the Sentencing Process' (1997) 22 *Crime and Justice* 303, 332.

49 Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Manoharan v. State [(2019) 7 SCC 716].

50 State of U.P. v. Sattan @ Satyendra and Ors. [(2009) 4 SCC 736]; Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Ravi v. State of Maharashtra [(2019) 9 SCC 622]. (Note that in Shivu & Anr v. R.G. High Court of Karnataka and Anr. [(2007) 4 SCC 713], the prosecution cited earlier rape attempts as aggravating in arguments. However, the court did not consider the same in its sentencing reasoning).

51 Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Manoharan v. State [(2020) 5 SCC 782].

52 Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215].

53 Ishwari Lal Yadav and Ors. v. State of Chhattisgarh [(2019) 10 SCC 423]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2011) 3 SCC 85].

54 Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631].

55 Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215] [910].

56 T.V. Vatheeswaran v. The State of Tamil Nadu [AIR 1983 SC 361].

57 Sher Singh v. State of Punjab [(1983) 2 SCC 344].

58 Smt. Triveniben v. State of Gujarat [(1989) 1 SCC 678].

59 Ibid [75].

60 Ibid [71].

61 Project 39A, Deathworthy: A Mental Health Perspective of the Death Penalty (NLU Delhi Press 2020) 59, 194-215 [Hereinafter 'Deathworthy'].

62 M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800].

63 Gurvail Singh @ Gala and Anr. v. State of Punjab [(2013) 2 SCC 713]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421].

64 Md. Mannan v. State of Bihar [(2019) 16 SCC 584].

65 Jagdish v. State of Madhya Pradesh [(2009) 9 SCC 495].

66 Sunder Singh v. State of Uttaranchal [(2010) 10 SCC 611].

67 Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215].

68 Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421].

69 Mulla and Anr. v. State of Uttar Pradesh [(2010) 3 SCC 508]; Ramesh v. State of Rajasthan [(2011) 3 SCC 685]; Sham @ Kishor Bhaskarrao Matkari v. State of Maharashtra [(2011) 10 SCC 389]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215; Vyas Ram @ Vyas Kahar and Ors. v. State of Bihar [(2013) 12 SCC 349]; Mahesh Dhanaji Shinde v. State of Maharashtra [(2014) 4 SCC 292]; Sushil Sharma v. State of NCT of Delhi [(2014) 4 SCC 317]; Rakesh Manohar Kamble @ Niraj Ramesh Wakekar v. State of Maharashtra [Criminal Appeal No. 1767 of 2014]; Dnyaneshwar Suresh Borkar v. State of Maharashtra [(2019) 15 SCC 546]; Irappa Siddappa Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029].

70 Sunder Singh v. State of Uttaranchal [(2010) 10 SCC 611]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800].

71 Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215].

72 Ibid [911] (In *Yakub*, while long delay was considered as one of the mitigating circumstances, it was observed that the court would attach less significance to it in comparison to other mitigating circumstances).

73 State of U.P. v. Sattan @ Satyendra and Ors.[(2009) 4 SCC 736]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667].

74 Mulla and Anr. v. State of Uttar Pradesh [(2010) 3 SCC 508].

75 Sangeet and Anr. v. State of Haryana [(2013) 2 SCC 452]; Gurvail Singh @ Gala and Anr. v. State of Punjab [(2013) 2 SCC 713]; Dharam Deo Yadav v. State of Uttar Pradesh [(2014) 5 SCC 509]; Viran Gyanlal Rajput v. State of Maharashtra [(2019) 2 SCC 311]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Dnyaneshwar Suresh Borkar v. State of Maharashtra [(2019) 15 SCC 546].

76 Rajesh Kumar v. State through Govt. of NCT of Delhi [(2011) 13 SCC 706]; Sushil Sharma v. State of NCT of Delhi [(2014) 4 SCC 317]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1].

77 Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652].

78 Haru Ghosh v. State of West Bengal [(2009) 15 SCC 551]; Surendra Mahto v. State of Bihar [Criminal Appeal No. 211 of 2009]; Sanjay Paswan @ Firangi Paswan v. State of Jharkhand [Criminal Appeal No(s). 1971-972 of 2011]; Yakub Abdul Razak Memon v. State of Maharashtra[(2013) 3 SCC 215]; Manoj Suryavanshi v. State of Chhattisgarh [(2020) 4 SCC 451]; Santosh Kumar Singh v. State thr. CBI [(2010) 9 SCC 747].

79 Shankar Kisanrao Khade v. State of Maharashtra [(2013) 5 SCC 546]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Manoharan v. State [(2020) 5 SCC 782].

80 Mukesh v. State for NCT of Delhi [(2018) 8 SCC 149].

81 Ishwari Lal Yadav and Ors. v. State of Chhattisgarh [(2019) 10 SCC 423].

82 Rachel King & Katherine Norgard, 'What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings' (1999) 26 *Florida State University Law Review* 1119, 1154.

83 Mulla and Anr. v. State of Uttar Pradesh [(2010) 3 SCC 508]; Babasaheb Maruti Kamble v. State of Maharashtra [(2019) 13 SCC 640].

84 Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215; Irappa Siddappa Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029].

85 Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584].

86 Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632].

87 Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1] [70].

88 Deathworthy, 55-57.

89 Ibid.

90 Shatrughan Chauhan v. Union of India [(2014) 3 SCC 1].

91 Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [206].

92 Deathworthy, 49.

93 Des Raj v. State of Punjab [(2007) 12 SCC 494]; Haru Ghosh v. State of West Bengal [(2009) 15 SCC 551]; Sushil Kumar @ Lucky v. State of Punjab [(2009) 10 SCC 434]; Dilip Premnarayan Tiwari and Anr. v. State of Maharashtra [(2010) 1 SCC 775]; Kamleshwar Paswan v. Union Territory of Chandigarh [(2011) 11 SCC 564]; Absar Alam @ Afsar Alam v. State of Bihar [(2012) 2 SCC 728]; Brajendrasingh v. State of Madhya Pradesh [(2012) 4 SCC 289]; Sunil Damodar Gaikwad v. State of Maharashtra [(2014) 1 SCC 129]; Sushil Sharma v. State of NCT of Delhi [(2014) 4 SCC 317]; Santosh Maruti Mane v. State of Maharashtra [(2019) 19 SCC 797]; Manoj Suryavanshi v. State of Chhattisgarh [(2020) 4 SCC 451].

94 Deathworthy, 54.

95 [2022 SCC OnLine SC 677].

# E. Role of Reformation in Capital Sentencing

While laying down an illustrative list of mitigating circumstances, ***Bachan Singh*** also included the 'probability that the accused can be reformed and rehabilitated' as one of the mitigating circumstances to be considered. The placement of the probability of reformation in the list of mitigating circumstances has caused significant confusion about the role and importance of the sentencing aim of reformation within the ***Bachan Singh*** framework. Often the probability of reformation has been treated as just one mitigating circumstance among many, and sometimes (especially in recent decisions) it has been treated as a determinative consideration on the question of sentence.

The latter reading takes into account the fact that ***Bachan Singh*** placed the onus upon the State to prove ***by evidence***, the 'improbability' of reformation, thereby raising a presumption in favour of offenders' capacity to reform. Further, within ***Bachan Singh***'s framework, the death sentence is only called for when life imprisonment is unquestionably foreclosed. This implies that the death penalty is only appropriate when life imprisonment no longer serves any of the purposes of punishment recognised in ***Bachan Singh***, i.e., life imprisonment is disproportionate in relation to the extreme culpability of the offender, and the sentencing aim of reformation is not open for the given offender. The death penalty is a final and irrevocable punishment, in addition to being a complete repudiation of an individual's capacity to reform. Hence, the importance of reformation within the ***Bachan Singh*** framework is undeniable. This section looks at the way in which the Supreme Court has understood and given effect to the sentencing aim of reformation in its capital sentencing jurisprudence.

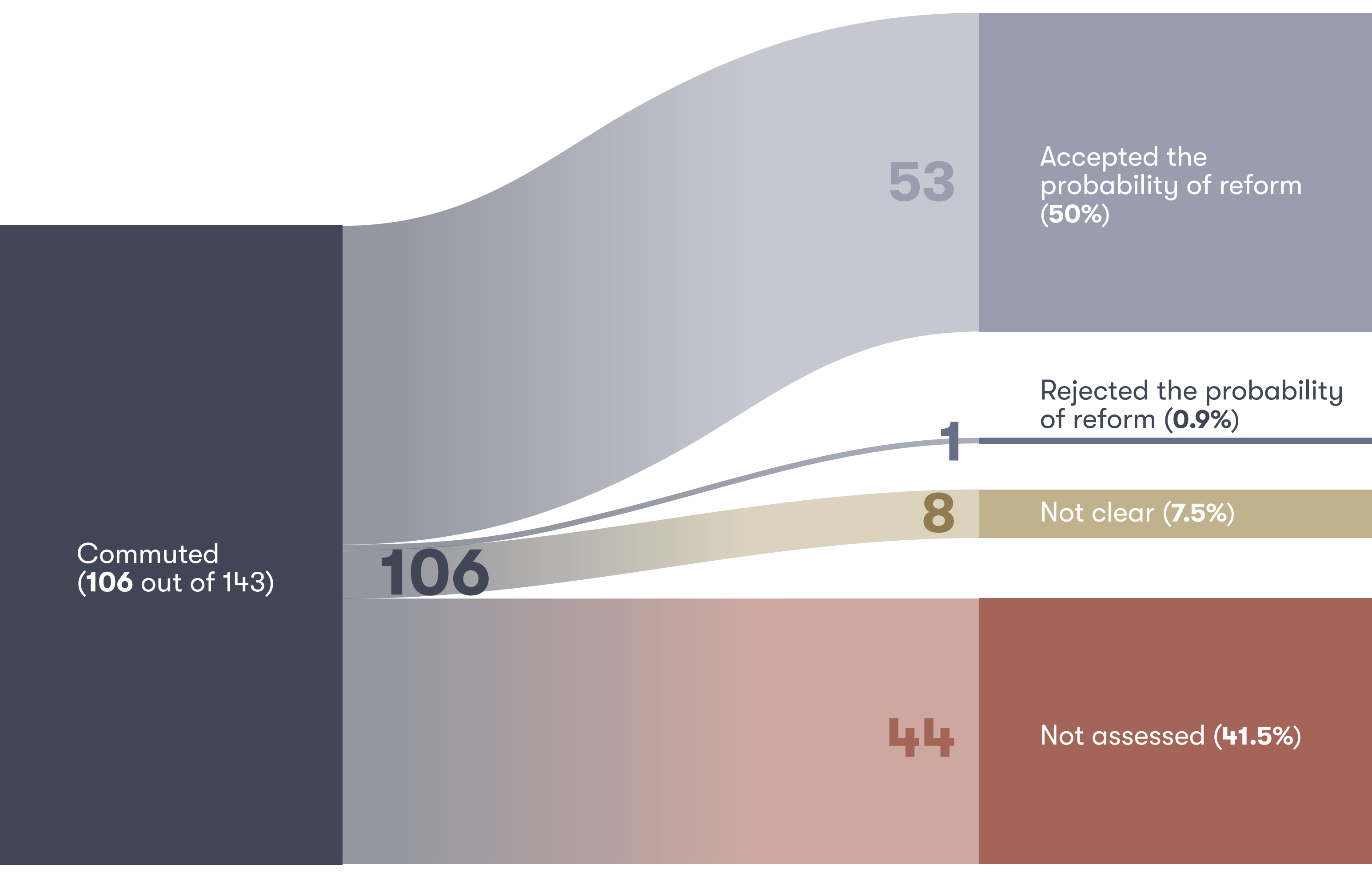


## Assessment of Offenders' Probability of Reformation

Supreme Court's capital sentencing case law has not consistently subscribed to ***Bachan Singh***'s emphasis on the sentencing aim on reformation. Several judgments have undermined the importance of reformation as a penological purpose in death penalty sentencing and considered it expendable in favour of other sentencing purposes. In a number of decisions, the sentencing aim of reformation has been subordinated to that of crime-centric proportionality, deterrence, and society-centric goals,[1] with some judgments even citing the observation in ***Mahesh v. State of Uttar Pradesh***[2], that courts should impose the harshest punishment in appropriate cases as "society appreciates the language of deterrence more than the reformative jargon."[3] Other judgments however, have treated the probability of reformation as a determinative question.[4] This form of vacillation has therefore meant that the probability of reformation has not been consistently assessed in individual cases.

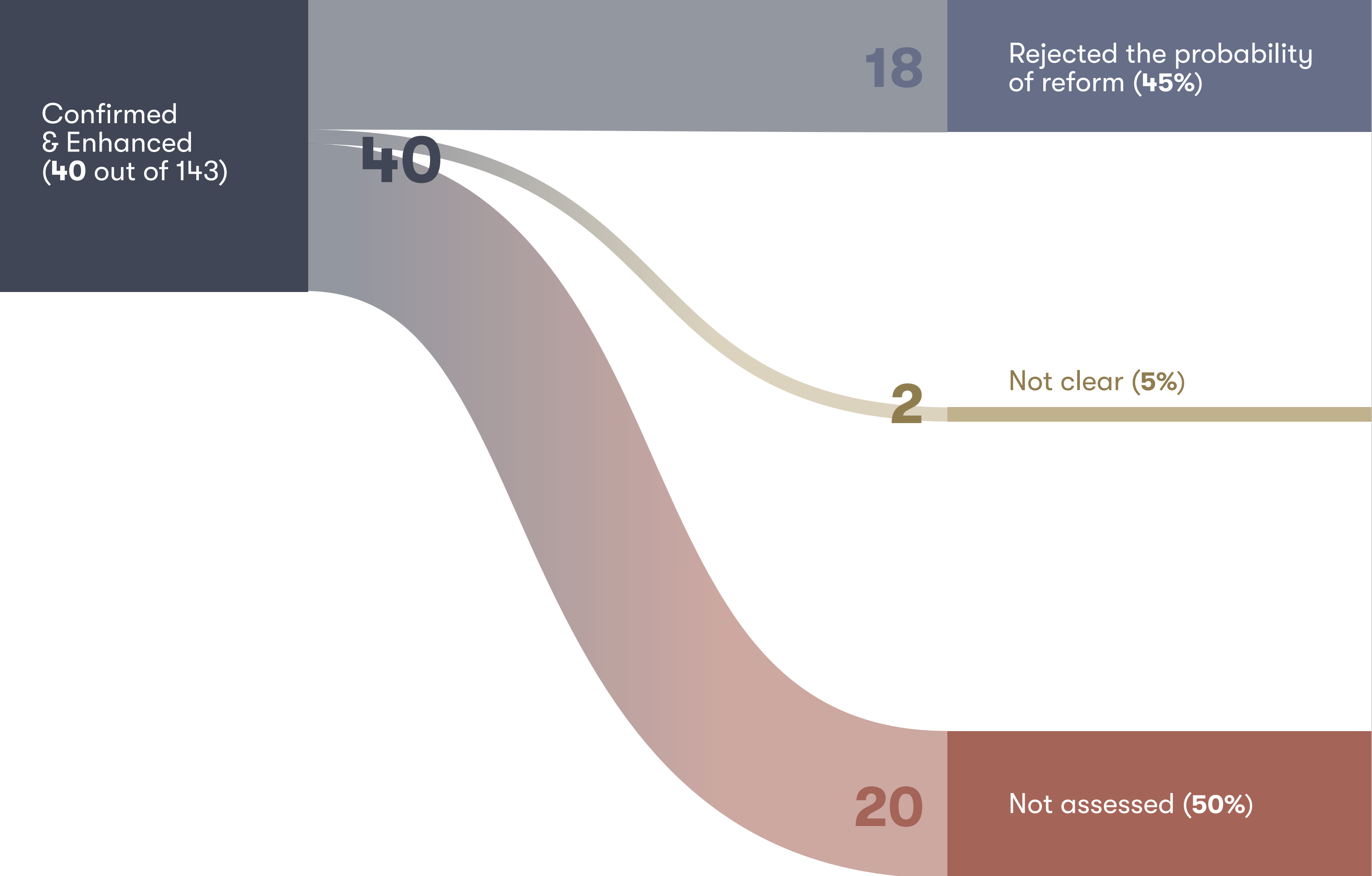
### Figure 24: Assessment of the Probability of Reformation in Commutations

In 44 (41.5%) of 106 commutation judgments, an assessment of the probability of reformation was not undertaken. Given that life imprisonment is the default punishment, this may not be much of a concern, if the judgment concludes that moral culpability of the offender ***prima facie*** calls for the same. In such a case, the assessment of the capacity of reformation may not be required.



## Figure 25: Assessment of the Probability of Reformation in Confirmations

However, worryingly, given that death penalty can be imposed only when there are special reasons and the alternative of life imprisonment is unquestionably foreclosed, 20 (50%) of all 40 confirmation judgments did not assess the probability of reformation of the offenders involved before confirming their death sentences.[5]






## Figure 26: Reasons for Accepting the Probability of Reformation*

In all but 1 commutation judgment,[6] where the probability of reformation was assessed, it was concluded that there existed a probability of reformation and rehabilitation of the offender(s) involved.

Total [judgments where the probability of reformation was accepted] = **53**

| Reason | Number | Percentage |
|---|---|---|
| Absence of Criminal Antecedents | 28 | (52.3%) |
| Young age | 22 | (41.5%) |
| Prosecution did not discharge its burden to show an improbability of reformation | 21 | (39.6%) |
| Conduct in prison | 15 | (28.3%) |
| No lower court finding on the question | 14 | (26.4%) |
| Socio-economic background | 9 | (16.9%) |
| No reason to believe that the accused cannot be reformed | 6 | (11.3%) |
| Expression of remorse[7] | 5 | (9.4%) |
| Ties with community and family | 3 | (5.7%) |
| Post-crime conduct | 2 | (3.8%) |
| No reasons provided | 2 | (3.8%) |
| Crime not brutal or brutality of crime not established | 1 | (1.9%) |
| Overall conduct | 1 | (1.9%) |

*Since the same judgment could have adopted multiple reasons for accepting that the offender was capable of reform, these categories are not all mutually exclusive.

The absence of criminal antecedents was the most common reason for arriving at the conclusion that there was a probability that the offender could be reformed. Other offender-related circumstances, such as young age, socio-economic background, ties with community and family members etc., were also some of the other factors treated as relevant to the assessment of the probability of reformation.

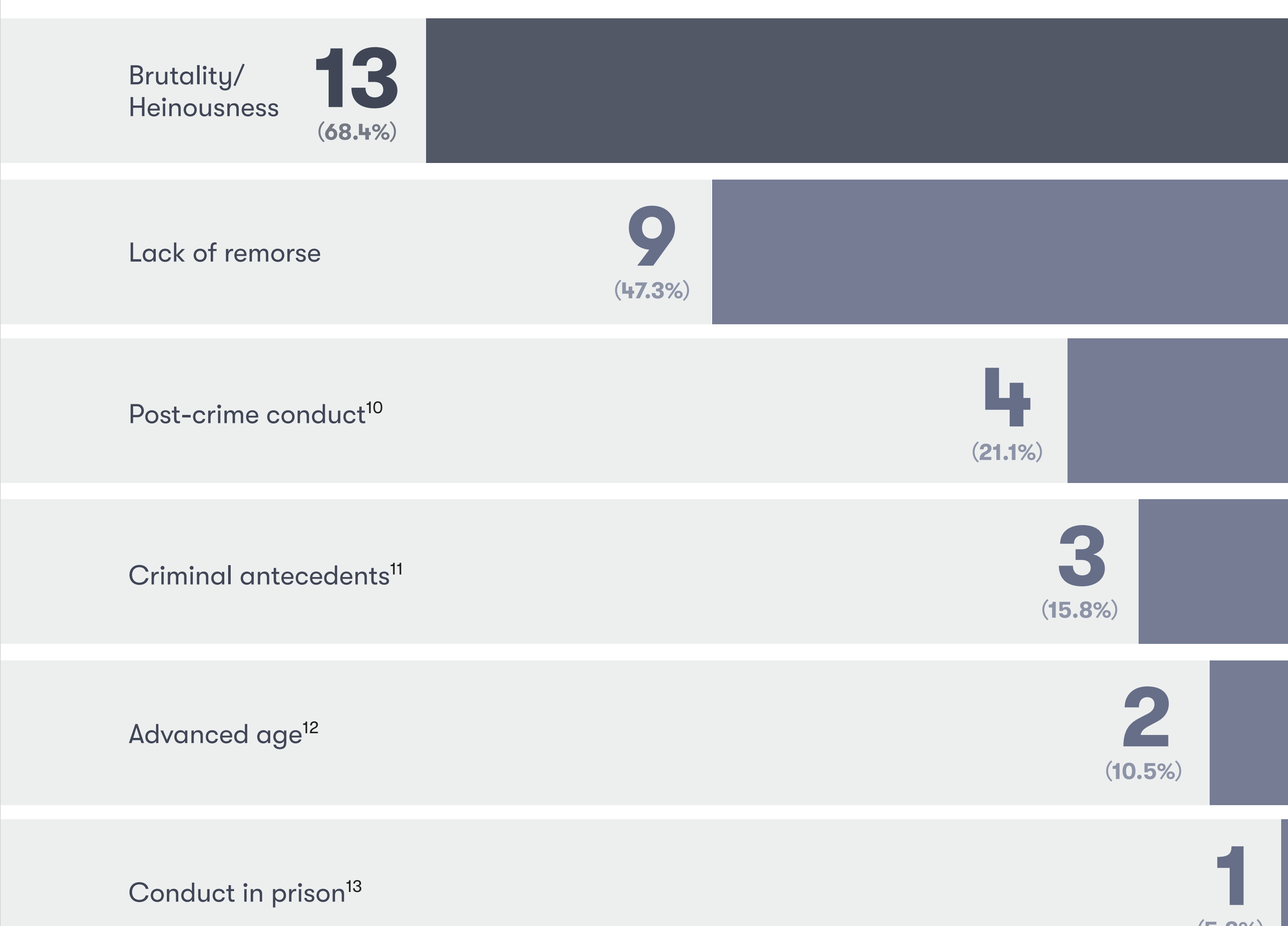
The failure of the prosecution to discharge the burden to prove the improbability of reformation (39.6%), the failure of courts below (trial court and high court) to assess the probability of reformation (26.4%), and the absence of reasons to believe that an offender is incapable of reformation (11.3%), were other grounds for accepting the probability of reformation at the Supreme Court. These numbers are indicative of a breakdown of the ***Bachan Singh*** framework at the courts below, which continue to impose and uphold death sentences without regard for offenders' probability of reformation.

With several commutation judgments criticising or at least noting the failure of courts below to specifically determine whether reformation is improbable, before imposing/confirming the death sentence,[8] the Supreme Court's own failure to do so in half of its confirmation judgments (see figure 25),[9] is clear evidence of the hollow nature of the sentencing framework that the Supreme Court has developed to guide sentencing discretion in capital cases.



## Figure 27: Reasons for Rejecting the Probability of Reformation*

The probability of the offender's reformation was rejected or reformation was found to be improbable in 1 commutation and 18 confirmation judgments, within which 68.4% invoked the brutality of the crime to arrive at the said conclusion.




In relation to the assessment of offenders' probability of reformation, the Supreme Court bench in ***Deepak Rai and Another v. State of Bihar***,[14] observed that it had "an imperfect ability to predict the future...[but] the law prescribe[d] for the future, based upon its knowledge of the past", presumably indicating that while a backward looking assessment (based on criminal antecedents in that case) of the probability of reformation presented conceptual and practical difficulties, that is what the law required sentencing judges to do.[15] Later judgments of the Supreme Court have, however, made it clear that the assessment of the probability of reformation should not be undertaken in a backward looking manner, with reference to the crimes that the offender may have committed,[16] as

*Since the same judgment could have adopted multiple reasons for rejecting offenders' capacity for reform, these categories are not all mutually exclusive.

the assessment of an individual's capacity for reformation is necessarily a 'forward-looking' enterprise.

This confusion however, remains unresolved, given that the brutal or heinous nature of the crime and its manner of commission has been the most commonly invoked reason (68.4%)[17] for rejecting the probability of reformation in confirmation judgments during the period of this study. Lack of remorse was the next most commonly invoked reason (47.3%).[18]

## Remorse

The nebulous and imprecise nature of 'remorse' as a sentencing factor increases the scope for arbitrary and unprincipled sentencing.

The expression of remorse or lack thereof has been gleaned from various sources by the Supreme Court. There have also been judgments where repentance[19] as well as remorselessness[20] were ascertained, without providing any reasons for such a conclusion. It is pertinent to note that while confessions of guilt have been deemed to be an expression of remorse,[21] the retraction of the same,[22] and worse still, the exercise of the right to remain silent when questioned under Section 313 of the CrPC,[23] and the denial of guilt,[24] have been treated as indicating a lack of remorse. In 3 confirmation judgments, the lack of remorse was concluded from the circumstances surrounding the crime itself or its immediate aftermath, for the purpose of rejecting the probability of reformation.[25] In this way 'remorselessness', a seemingly offender-related circumstance, is disingenuously elicited from crime-related factors.

Despite carrying intuitive appeal, the question of whether an offender is remorseful is a highly subjective assessment.[26] The subjectivity involved may be best demonstrated through an examination of the reasoning in ***Manoharan v State***.[27] In this case, the 2-judge majority construed the retraction of the incriminating parts of the accused's confession to indicate a lack of remorse, as well as a 'heightened possibility of recidivism'. The dissenting opinion took an entirely contradictory approach. Even while agreeing with the majority that the retraction could not be 'believed', the dissenting judge considered the retraction "an afterthought [made] on advice propelled by fear that the appellant in view of his admission may face the gallows", and consequently saw no reason to deny the benefit of the original confession being a mitigating circumstance. The shrewdness of the offender, in retracting the confession, was however, not just used by the majority as an indicator of remorselessness but was also used to summarily reject the offender's poor socio-economic status as a relevant mitigating circumstance in the case.

The performative element inherent in a circumstance such as 'remorse' cannot be overlooked. A convict who is not expressive or suffers from mental illness or is otherwise unable to display repentance through actions or words, may be treated more harshly than one who can.[28] Consequently, the consideration of 'remorse' in such an unsystematic and superficial manner, not only creates inconsistency and indeterminacy in sentencing, but also, given the subjectivity involved in its assessment, creates the danger of 'remorse' becoming a vehicle for crime-centric reasoning. Thus, while expression of remorse may be treated as a mitigating circumstance in appropriate circumstances — something that even ***Bachan Singh*** endorsed[29] — it is dangerous to treat the absence thereof, as an aggravating circumstance that points to a diminished probability of reformation.



# Evidence on Reformation

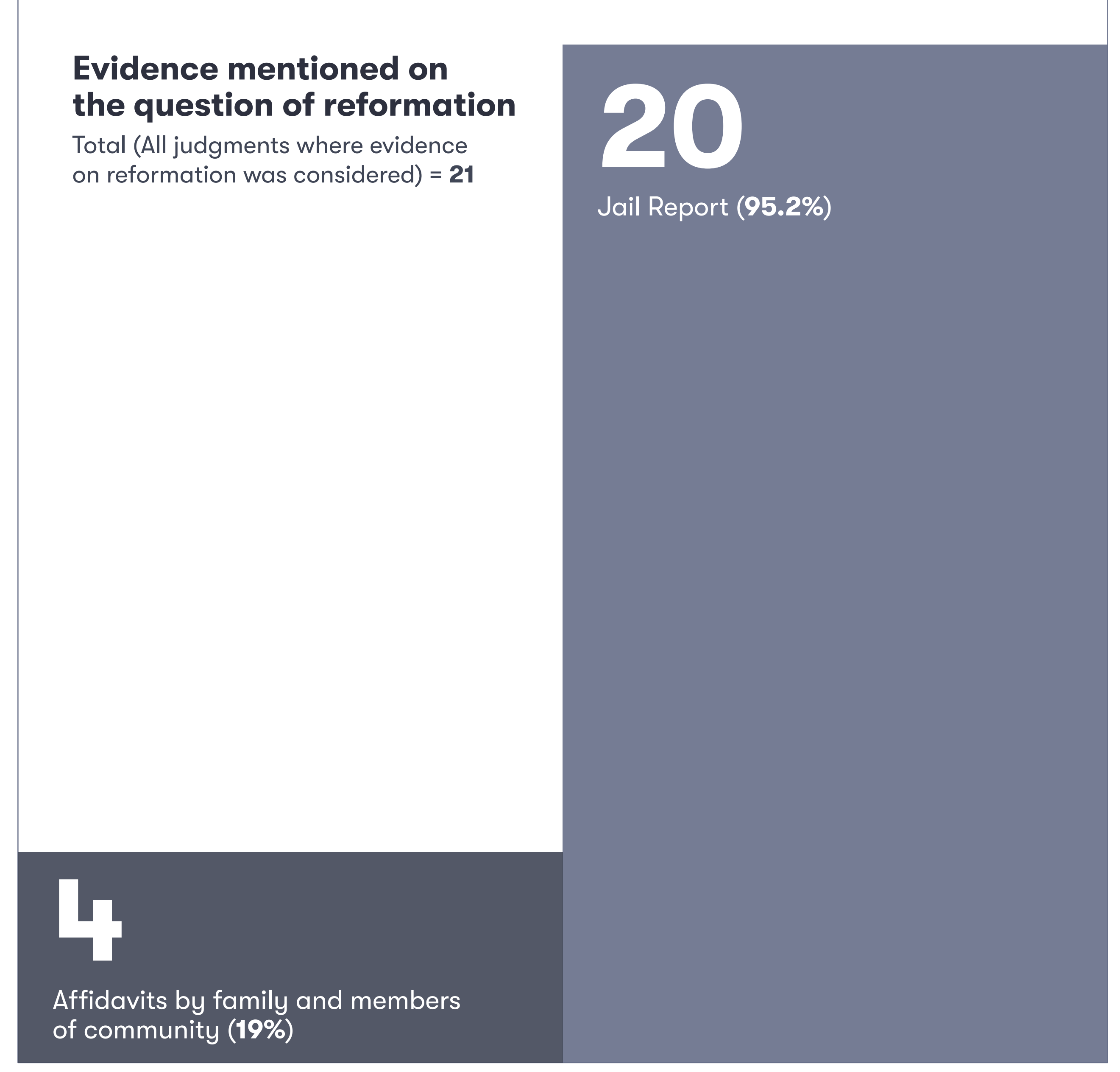
## Figure 28: Evidence Mentioned on the Question of Reformation

***Bachan Singh*** required that the State prove, ***by evidence***, that there is no probability of reformation and rehabilitation and that the offender will continue to commit criminal acts of violence so as to constitute a continuing threat to society. In certain judgments, the Supreme Court observed that the question of reform cannot be answered without evidence,[30] with judges calling for the use of evidence in the nature of Probation Officer's reports in capital cases.[31] In ***Chhanu Lal Verma v. State of Chattisgarh***,[32] and ***Rajendra Pralhadrao Wasnik v. State of Maharashtra***,[33] prison conduct, psychiatric evaluation, and contacts with family, were said to be necessary evidentiary requirements when determining whether there was a probability of reformation. The same was reiterated more recently in 2022, in the judgment ***Manoj v State of Madhya Pradesh***.[34]

This is a mere 14.7% of all 143 sentencing judgments.

## Figure 29: Nature of Evidence Mentioned on the Question of Reformation*

What ought to be an evidence-based inquiry has therefore largely been undertaken without reference to relevant material and has consequently become an exercise dependent on judges' intuitions. In only 21 judgments was evidence on the question of reformation (excluding that of backward-looking sentencing factors such as crime-related circumstances and criminal antecedents) referred to. 95.2% of these judgments relied on evidence of conduct in prison (i.e., jail reports).[35] Only 4 judgments (19%) relied on affidavits by family members that spoke to the personality of offenders and their life history.[36] Such limited reliance on evidence regarding the personality and lives of offenders undermines the intent behind the introduction of a separate sentencing hearing, which contemplates the consideration of material that is not strictly related to the crime, given that crime-related circumstances are otherwise available to court at the stage of determination of guilt for the purpose of conviction.



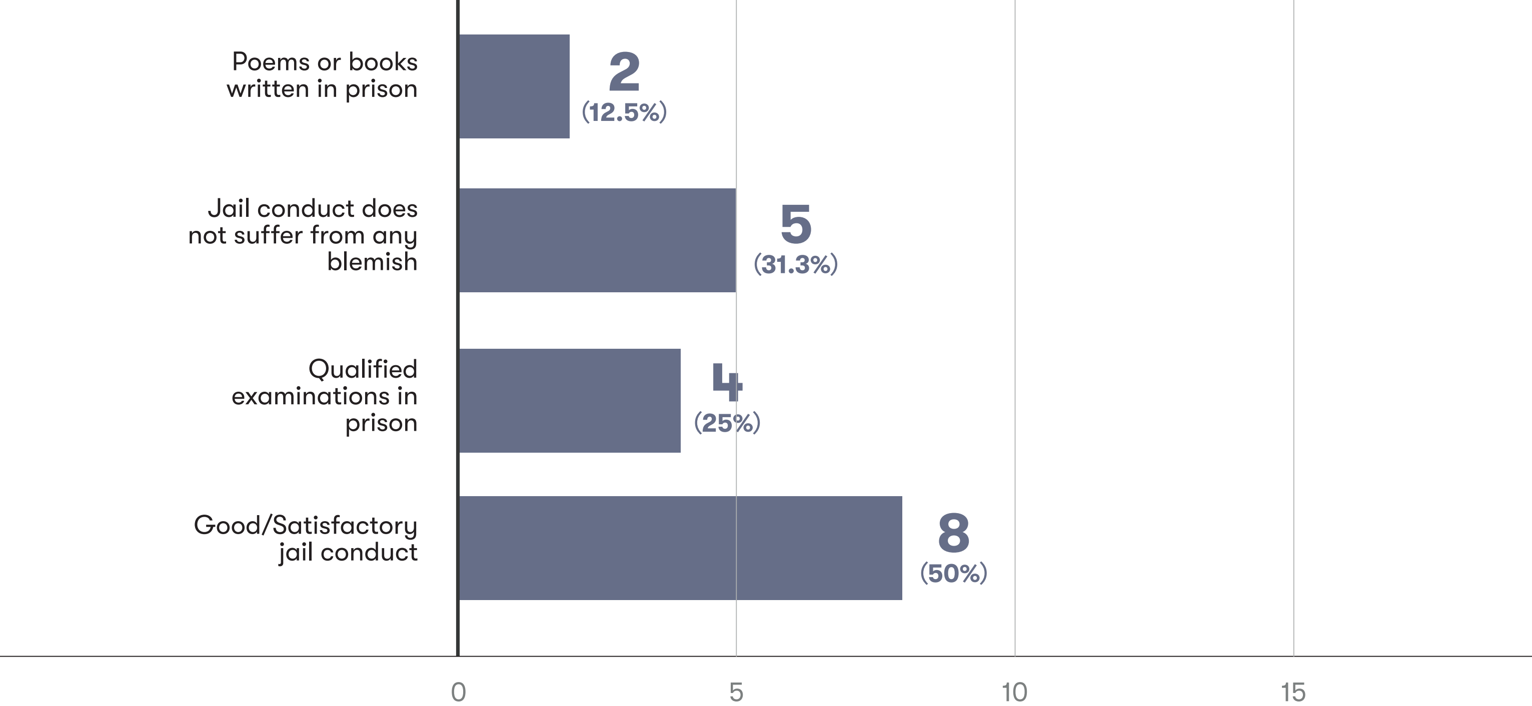

*Since the same judgment could have considered more than one form of evidence/material on the question of reformation, the two categories are not mutually exclusive.

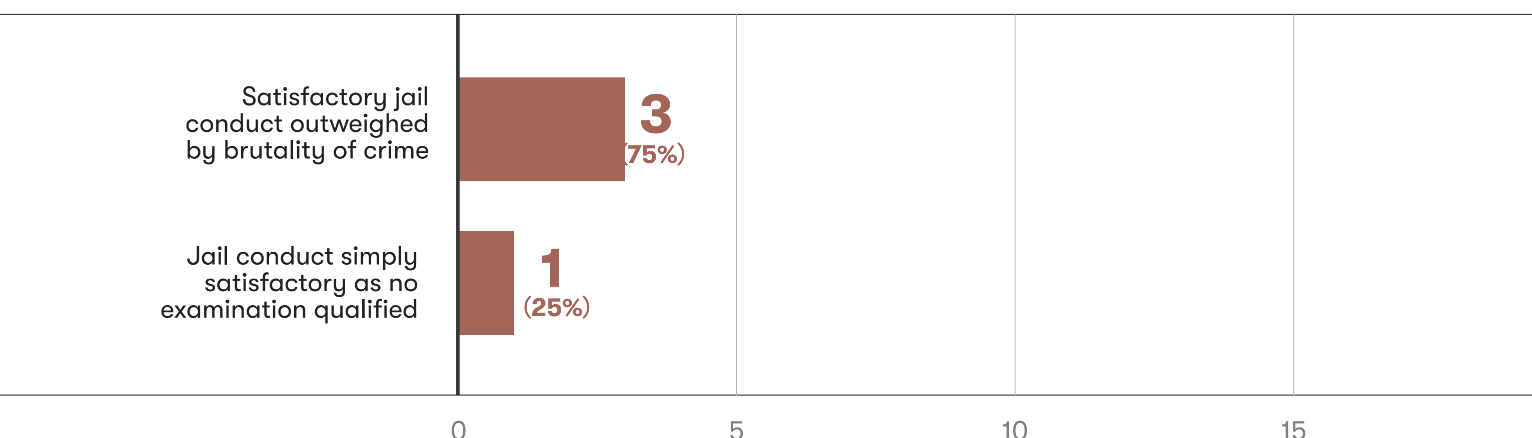


# Conduct in Prison

## Figure 30: Treatment of Conduct in Prison as a Sentencing Factor*

It is also concerning that only 20 judgments considered post-conviction conduct in prison as a relevant mitigating circumstance; of which only 4 were confirmation judgments (10%). This in itself indicates that the sentencing aim of reformation, a forward-looking assessment, has been rarely so assessed.




*Since the same judgment could have adopted multiple formulations of good/bad prison conduct, these categories are not all mutually exclusive.

Good conduct in prison, assessed in diverse ways, has been considered by the Supreme Court for the purpose of concluding in favour of the possibility of reform. On the other hand, the absence of 'good' conduct was used in 1 confirmation judgment to rule against the probability of reformation,[38] while in 3 others, the mitigating impact of good conduct in prison was found to have been outweighed by the brutality of the crime.[39]

The relevance of conduct in prison for the assessment of the capacity of reformation is undeniable. However, there is no consistency within judgments as to how a jail report is to be assessed, so as to conclude that prison conduct is in fact 'good' or 'satisfactory'.[40] As is clear from figure 30, judgments operate along a spectrum, beginning with the lack of evidence of unworthy conduct,[41] and ending with actual and positive signs of reformation such as writing poems or qualifying examinations.[42] This fails to provide clarity on what sentencing judges should be looking for when evaluating prison conduct for the purpose of assessing prisoners' capacity for reformation and rehabilitation. More importantly, it does not clarify how 'blemishes' in the jail record are to be treated, and whether any kind of 'blemish' disqualifies a prisoners' jail record from being considered a mitigating circumstance.

Furthermore, the treatment of the absence of good conduct or merely satisfactory conduct in prison as an aggravating circumstance,[43] which is then used to reject the probability of reformation, flies in the face of the presumption in favour of reformation within the ***Bachan Singh*** framework. Using crime-based aggravating circumstances to outweigh the impact of satisfactory prison conduct or progress during incarceration,[44] renders the requirement of considering offenders' probability of reformation superfluous, as it erroneously coflates the distinct questions of desert or culpability with that of offenders' capacity for reformation. It also ignores the deleterious effects of incarceration under death row and underestimates the kind of resilience required to simply live under conditions of death row. To require evidence of positive signs of reformation that are in the nature of activities that judges deem good or productive, is a misreading of the ***Bachan Singh*** framework, which is simply concerned with the '***probability***' of reformation, and does not mandate positive evidence of reformation already having been undergone.[45]

A proper reading of ***Bachan Singh*** suggests that probability of reformation is a determinative consideration and an independent step in the sentencing process. The need for an evidence-based assessment of the probability of reformation, with the onus being on the State to disprove the same, is sufficient indication that only when the prospect of reformation and rehabilitation is found to be non-existent, can the exceptional punishment of death be imposed. This section however, demonstrates that the Supreme Court has even not managed to consistently subscribe to this normative principle, let alone conduct the complex evidence-based enquiry into offenders' capacity for reformation envisaged within the ***Bachan Singh*** framework.



## ENDNOTES

**1** Shivu & Anr v. R.G. High Court of Karnataka [(2007) 4 SCC 713]; Mohan Anna Chavan v. State of Maharashtra [(2008) 7 SCC 561]; Bantu v. State of Uttar Pradesh [(2008) 11 SCC 113]; Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [(2008) 15 SCC 269]; State of U.P. v. Sattan @ Satyendra [(2009) 4 SCC 736]; C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667].

**2** Mahesh v. State of Madhya Pradesh [(1987) 3 SCC 80]

**3** C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69].

**4** Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460].

**5** Shivu & Anr v. R.G. High Court of Karnataka [(2007) 4 SCC 713]; Mohan Anna Chavan v. State of Maharashtra [(2008) 7 SCC 561]; Bantu v. State of Uttar Pradesh [(2008) 11 SCC 113]; Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [(2008) 15 SCC 269]; State of U.P. v. Sattan @ Satyendra [(2009) 4 SCC 736]; M.A. Antony @ Antappan v. State of Kerala [(2009) 6 SCC 220]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667]; Jagdish v. State of Madhya Pradesh [(2009) 9 SCC 495]; Vikram Singh and Ors. v. State of Punjab [(2010) 3 SCC 56]; Ajay Kumar Pal v. State of Jharkhand [(2010) 12 SCC 118]; Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567]; Sunder Singh v. State of Uttaranchal [(2010) 10 SCC 611]; Surendra Koli v. State of Uttar Pradesh [(2011) 4 SCC 80]; Mohd. Arif @ Ashfaq v. State of NCT of Delhi [(2011) 13 SCC 621]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2012) 4 SCC 37]; Sunder @ Sundararajan v. State by Inspector of Police [(2013) 3 SCC 215]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Khushwinder Singh v. State of Punjab [(2019) 4 SCC 415].

**6** Shankar Kisanrao Khade v. State of Maharashtra [(2013) 5 SCC 546].

**7** This includes judgments where making a confession was treated as indicative of the probability of reformation.

**8** Nand Kishore v. State of Madhya Pradesh [(2019) 16 SCC 278]; Dattatraya @ Datta Ambo Rokade v. State of Maharashtra [(2020) 14 SCC 290]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800]; B Kumar @ Jayakumar @ Left K.R @ S. Kumar v. Inspector of Police [(2015) 2 SCC 346]; Om Nath v. State of Uttar Pradesh [Criminal Appeal No(s). 2452-2453 of 2010]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136]; Rajesh Kumar v. State through Govt . of NCT of Delhi [(2011) 13 SCC 706]; Sukhlal v. State of Madhya Pradesh [Criminal Appeal No(s). 1563-1564 of 2018]; Sunil v. State of Madhya Pradesh [(2017) 4 SCC 393]; Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249]; Ramesh v. State of Rajasthan [(2011) 3 SCC 685]; Rameshbhai Chandubhai Rathod v. State of Gujarat [(2011) 2 SCC 764]; Parsuram v. State of Madhya Pradesh [(2019) 8 SCC 352]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460].

**9** This phenomenon was not just observed in judgments delivered in the earlier half of the study period. It was also noted in more recent decisions, such as Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1], and Khushwinder Singh v. State of Punjab [(2019) 4 SCC 415].

**10** Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2011) 3 SCC 85].

**11** Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2011) 3 SCC 85].

**12** Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; Shankar Kisanrao Khade v. State of Maharashtra [(2013) 5 SCC 546].

**13** Manoharan v. State [(2020) 5 SCC 782].

**14** [(2013) 10 SCC 421].

**15** Ibid [94].

**16** Swapan Kumar Jha @ Sapan Kumar v. State of Jharkhand [(2019) 13 SCC 579] [19] ("[I]t is a dangerous presumption that a perpetrator of such an act is incapable of reform and rehabilitation just by virtue of having committed the crime, and indeed flies in the face of the concept of reform to begin with."); Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69] [33] ("[T]he State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. Facts, which the Courts, deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials); Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460] [47] "Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated").

**17** Ram Singh v. Sonia & Ors. [(2007) 3 SCC 1]; Prajeet Kumar Singh v. State of Bihar [(2008) 4 SCC 434]; Md. Mannan v. State of Bihar [(2011) 5 SCC 317]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2011) 7 SCC 125]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [(2011) 14 SCC 401]; Sonu Sardar v. State of Chhattisgarh [(2012) 4 SCC 97]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 63]; Manoharan v. State [(2019) 7 SCC 716]; Ishwari Lal Yadav and Ors. v. State of Chhattisgarh [(2019) 10 SCC 423].

**18** B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2011) 3 SCC 85]; Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 6 SCC 652]; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Manoharan v. State [(2019) 7 SCC 716]; Ravi v. State of Maharashtra [(2019) 9 SCC 622]; Manoharan v. State [(2020) 5 SCC 782].

**19** Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 3 SCC 215].

**20** Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253].

**21** Mithu Kalita v. State of Assam [Criminal Appeal No. 1219 of 2006]; Sunil Damodar Gaikwad v. State of Maharashtra [(2014) 1 SCC 129].

**22** Manoharan v. State [(2019) 7 SCC 716].

**23** Ravi v. State of Maharashtra [(2019) 9 SCC 622].

**24** Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632].

**25** Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632].

**26** See Bryan H. Ward, 'Sentencing without Remorse', (2006) 38 *Loyola University Chicago Law Journal* 131.

**27** Manoharan v. State [(2019) 7 SCC 716].

**28** Bryan H. Ward, 'Sentencing without Remorse', (2006) 38 *Loyola University Chicago Law Journal* 131, 134-136.

**29** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [208].

**30** Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460] [31-47].

**31** Birju v. State of Madhya Pradesh [(2014) 3 SCC 421] [20]; Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69] [33].

**32** Chhannu Lal Verma v. State of Chhattisgarh [(2019) 12 SCC 438] [16].

**33** Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460] [45].

**34** [2022 SCC OnLine SC 677].

**35** Assis Dominic Warawale and Anr. v. State of Maharashtra [Criminal Appeal No(s). 1092 of 2006]; Sandesh @ Sainath Kailash Abhang v. State of Maharashtra [[(2013) 2 SCC 479]; Mahesh Dhanaji Shinde v. State of Maharashtra [(2014) 4 SCC 292]; Shyam Singh @ Bhima v. State of Madhya Pradesh [2017 4 SCC (Cri) 302]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Mukesh and Anr. v. State for NCT of Delhi [(2017) 6 SCC 1]; Babasaheb Maruti Kamble v. State of Maharashtra [(2019) 13 SCC 640]; Jitendra @ Jeetu v. State of Madhya Pradesh [(2019) 13 SCC 646]; Rakesh Manohar Kamble @ Niraj Ramesh Wakekar v. State of Maharashtra [Criminal Appeal Nos. 1767 of 2014]; Chhannu Lal Verma v. State of Chhattisgarh [(2019) 12 SCC 438]; Santosh Maruti Mane v. State of Maharashtra [(2019) 19 SCC 797]; Vijay Raikwar v. State of Madhya Pradesh [(2019) 4 SCC 210]; Jawed Khan @ Tingrya v. State of Maharashtra [Criminal Appeal No(s). 622-623 of 2016]; Dnyaneshwar Suresh Borkar v. State of Maharashtra [(2019) 15 SCC 546]; Manoharan v. State [(2020) 5 SCC 782]; Irappa Siddappa Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136]; Bhagchandra v. State of Madhya Pradesh [2021 SCC OnLine SC 1209]; Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421].

**36** Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249]; Bhagchandra v. State of Madhya Pradesh [2021 SCC OnLine SC 1209]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136]; Mohinder Singh v. State of Punjab [(2013) 3 SCC 294] (here, there was no affidavit but contact with family was generally considered).

**37** In Vijay Raikwar v. State of Madhya Pradesh [(2019) 4 SCC 210], while good/satisfactory conduct was considered as a mitigating circumstance, the same was not linked to probability of reformation. Hence, only 15 judgments treated good conduct in prison as a circumstance favouring the accused's probability of reformation, as depicted in Fig no. 25.

**38** Manoharan v. State [(2020) 5 SCC 782].

**39** Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Mukesh and Anr. v. State for NCT of Delhi [(2017) 6 SCC 1]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421].

**40** Some judgments, without explaining why, simply concluded that the offender's jail conduct was good or satisfactory. Rakesh Manohar Kamble @ Niraj Ramesh Wakekar v. State of Maharashtra [Criminal Appeal Nos. 1767 of 2014]; Chhannu Lal Verma v. State of Chhattisgarh [(2019) 12 SCC 438]; Santosh Maruti Mane v. State of Maharashtra [(2019) 19 SCC 797]; Vijay Raikwar v. State of Madhya Pradesh [(2019) 4 SCC 210]; Jawed Khan @ Tingrya v. State of Maharashtra [Criminal Appeal No(s). 622-623 of 2016]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136]; Bhagchandra v. State of Madhya Pradesh [2021 SCC OnLine SC 1209]; Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249].

**41** Babasaheb Maruti Kamble v. State of Maharashtra [(2019) 13 SCC 640]; Jitendra @ Jeetu v. State of Madhya Pradesh [(2019) 13 SCC 646]; Sandesh @ Sainath Kailash Abhang v. State of Maharashtra [(2013) 2 SCC 479]; Shyam Singh @ Bhima v. State of Madhya Pradesh [2017 4 SCC (Cri) 302].

**42** Assis Dominic Warawale and Anr. v. State of Maharashtra [Criminal Appeal No(s). 1092 of 2006]; Mahesh Dhanaji Shinde v. State of Maharashtra [(2014) 4 SCC 292]; Dnyaneshwar Suresh Borkar v. State of Maharashtra [(2019) 15 SCC 546]; Irappa Siddappa Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029].

**43** Manoharan v. State [(2020) 5 SCC 782].

**44** Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Mukesh and Anr. v. State for NCT of Delhi [(2017) 6 SCC 1].

**45** In Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460] [43-45], the Supreme Court clarified that the standard for whether an accused can or cannot be reformed is that of 'improbability' or 'probability' instead of 'impossibility' or 'possibility'.

# F. Foreclosure of the Alternative of Life Imprisonment

The death penalty is an exceptional punishment, requiring a determination of whether a person is not just culpable, as in responsible for the crime, but their moral culpability is so extreme as to make them 'deathworthy'. This is operationalised within the ***Bachan Singh*** framework by requiring the death penalty to be imposed only if the case is rarest of rare and the alternative of life is unquestionably foreclosed. ***Bachan Singh*** therefore, does not require a simplistic weighing of mitigating circumstances against aggravating circumstances, such that the mere outweighing of mitigating circumstances is sufficient for the death penalty to be imposed. It also does not call for the death sentence when life imprisonment is simply 'inadequate' but only when it is 'unquestionably foreclosed'.[1]

In 2009, a 2-judge bench in ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra***, interpreted this requirement to mean that the death sentence may only be imposed when life imprisonment is completely futile and serves no sentencing purpose.[2] Additionally, it observed that life imprisonment, as a form of punishment, is capable of serving different penological goals in different degrees, while the irrevocability of a death sentence means that the penological goal of reformation and rehabilitation is completely out of question. Consequently, ***Bariyar*** held that, in the context of the death penalty, the traditional understanding of proportionality of punishment and culpability does not apply; for the death sentence to be imposed, it has to be shown that there is no probability of reformation and rehabilitation.[3]

This link between reformation and the alternative of life imprisonment has been concretised in several commutation judgments of the Supreme Court,[4] with recent judgments specifically emphasising the sentencing court's _duty_ to elicit information regarding offenders' amenability to reformation, so as to satisfy itself, before imposing/confirming the death sentence, that the sentencing aim of reformation is unachievable, rendering life imprisonment unquestionably foreclosed.[5]

This chapter demonstrates how this distinct requirement of unquestionably foreclosing the alternative of life imprisonment has been overlooked in confirmation judgments.



## Consideration of the Alternative of Life Imprisonment

### Figure 31: Whether Life Imprisonment Was Found to be Unquestionably Foreclosed in Confirmations

8 (20%) out of 40 confirmation judgments did not engage with the alternative of life imprisonment at all.[6] This is even though a very low standard was employed to identify judgments where the alternative of life was engaged with. If the judgment revealed some contemplation of the lesser punishment of life imprisonment, such as to say that there will be a "failure of justice in case death sentence is not awarded" or the "the depraved acts of the accused call for only one sentence that is death sentence", the response to the question of whether the alternative of life imprisonment was engaged with, was treated as a 'yes'.

Even within the 32 judgments which were identified as having dealt with the alternative of life imprisonment, the language of 'foreclosure' was only used in the sentencing reasoning of 3 judgments.[7] Thus, a crucial requirement of the ***Bachan Singh*** framework, which actually makes the death penalty an exceptional punishment, has been sidelined in a large majority of the Supreme Court's confirmation judgments. It may be pertinent to note that the same was also found to be true of death sentences imposed by trial courts.[8]

**In Confirmations, was the Alternative of Life Imprisonment Engaged With?**

Total [All confirmation judgments] = **40**

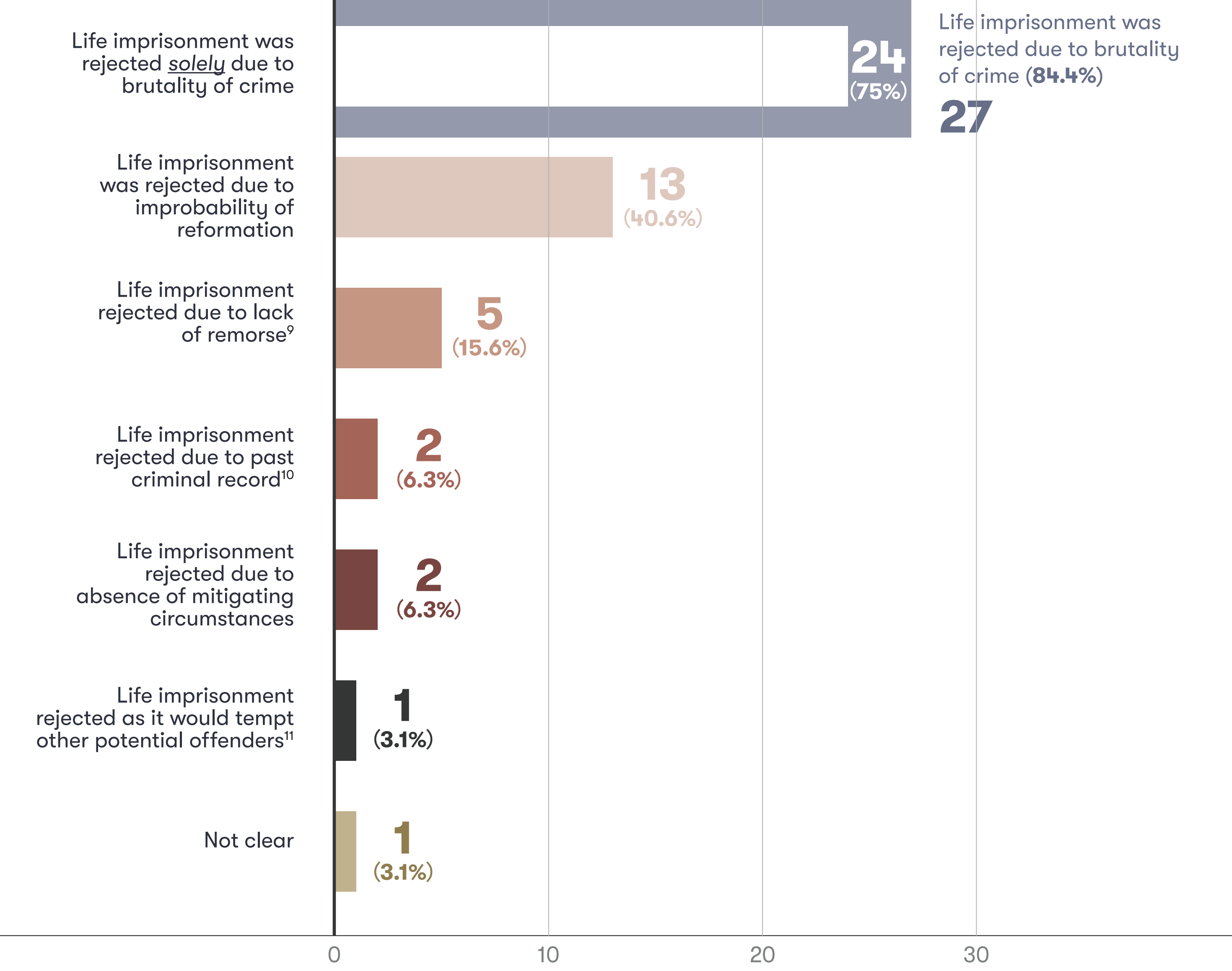
32
Yes (**80%**)

8
No (**20%**)

# Reasons for Rejecting the Alternative of Life Imprisonment in Confirmations

## Figure 32: Why was the Alternative of Life Imprisonment Rejected?*

Total [All confirmation judgments that engaged with the alternative of life imprisonment] = **32**




*Given that the same judgment could have adopted multiple reasons for rejecting the alternative of life imprisonment, these categories are not all mutually exclusive.



The data demonstrates that the requirement of unquestionably foreclosing life imprisonment, before imposing the exceptional and irrevocable sentence of death, has been rendered superfluous and devoid of independent content. It has been conflated with a crime-centric conception of proportionality or the question of desert. 24 (75%) of the 32 judgments[12] that engaged with the alternative of life imprisonment rejected the latter, solely based on crime-based aggravation or brutality.[13] This further implies that in cases where the death sentence is confirmed, the focus of sentencing is overwhelmingly on the crime, in ignorance of the ***Bachan Singh*** framework. Even within the 13 judgments where the inappropriateness of imposing the alternative of life imprisonment was seemingly linked to the improbability of reformation, 9 judgments improperly used the brutality of the crime to reject offenders' probability of reformation.[14]

In 2 judgments, the alternative of life imprisonment was rejected due to an absence of mitigating circumstances. In 1 of them, the judgment did not mention any offender-related mitigating circumstances,[15] and in the other,[16] offender-related circumstances were mentioned only as aggravating factors. This revealingly shows that if judges are keen on imposing the death penalty, even the most preliminary requirement of the ***Bachan Singh*** framework, i.e., the liberal and expansive consideration of mitigating circumstances before confirming the sentence of death, may be overlooked.

Further, the discussion in the previous section on the treatment of remorse as a sentencing factor, would suggest that the usage of the perceived absence of remorse, to reject capacity for reformation or as a sign of extreme depravity, makes the choice between life imprisonment and the death sentence extremely subjective.

This section shows that there is a lack of consensus at the Supreme Court as to what the assessment of whether the alternative of life imprisonment is unquestionably foreclosed actually entails. This form of confusion gives a free-hand to sentencing judges to either ignore the need for such an assessment or otherwise pick and choose the formulation they wish to employ; the choice being purely outcome-driven. Confirmation judgments overwhelmingly rely on crime-based aggravation alone to foreclose life imprisonment, while commutation judgments endorse ***Bariyar***'s framework wherein life imprisonment is unquestionably foreclosed only when there is ***clear evidence*** that an offender is unfit for any rehabilitative scheme.

## ENDNOTES

**1** Trial Court I Report, 19-20 (*Machhi Singh* lowered the threshold for rejecting the alternative of life imprisonment from one of 'unquestionable foreclosure' to one of 'inadequacy' of punishment. This is not just a semantic squabble. The standard of 'inadequacy' implies a relationship of simple equivalence between the gravity of the crime and the punishment, encouraging the use of crime-centric proportionality to guide the choice of sentence. The standard of 'unquestionable foreclosure' however, ensures that the enquiry does not stop at determining if the death sentence is proportionate to the gravity of the crime, but also requires an assessment of whether life imprisonment will be futile, as the offender is incapable of ever reforming).

**2** Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498] [64-66].

**3** Ibid [158-159]

**4** Assis Dominic Warawale and Anr. v. State of Maharashtra [Criminal Appeal No(s). 1092 of 2006]; Ramesh v. State of Rajasthan [(2011) 3 SCC 685]; Rajesh Kumar v. State through Govt . of NCT of Delhi [(2011) 13 SCC 706]; Mohinder Singh v. State of Punjab [(2013) 3 SCC 294]; Om Nath v. State of Uttar Pradesh [Criminal Appeal No(s). 2452-2453 of 2010]; Sushil Sharma v. State of NCT of Delhi [(2014) 4 SCC 317]; Mahesh Dhanaji Shinde v. State of Maharashtra [(2014) 4 SCC 292]; Sanjay Paswan @ Firangi Paswan v. State of Jharkhand [Criminal Appeal No(s). 1971-972 of 2011]; Chhannu Lal Verma v. State of Chhattisgarh [(2019) 12 SCC 438]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460].

**5** Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136]; Bhagchandra v. State of Madhya Pradesh [2021 SCC OnLine SC 1209]; Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249].

**6** Shivu & Anr v. R.G. High Court of Karnataka and Anr.[(2007) 4 SCC 713]; M.A. Antony @ Antappan v. State of Kerala [(2009) 6 SCC 220]; Vikram Singh and Ors. v. State of Punjab [(2010) 3 SCC 56]; Ajay Kumar Pal v. State of Jharkhand [(2010) 12 SCC 118]; Sunder Singh v. State of Uttaranchal [(2010) 10 SCC 611]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2012) 4 SCC 37]; Ishwari Lal Yadav and Ors. v. State of Chhattisgarh [(2019) 10 SCC 423]; Ishwari Lal Yadav and Ors. v. State of Chhattisgarh [(2019) 10 SCC 423]; Saleem and Anr. v. State of Uttar Pradesh [Review Petition (Crl.) No(s). 632-633 of 2015].

**7** Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Ravi v. State of Maharashtra [(2019) 9 SCC 622] (Note that since the goal was to record the standard for rejecting the alternative of life imprisonment that was actually employed when confirming the death sentence, the mere mention of the standard of 'foreclosure' by way of lip-service, in general discussions on the law or precedents, has not been treated as the usage of such standard).

**8** Trial Court I Report, 36.

**9** B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2011) 3 SCC 85]; Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1]; Manoharan v. State [(2019) 7 SCC 716]; Ravi v. State of Maharashtra [(2019) 9 SCC 622]; Manoharan v. State [(2020) 5 SCC 782].

**10** B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2011) 3 SCC 85]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124].

**11** Purushottam Dashrath Borate and Anr. v. State of Maharashtra [(2015) 6 SCC 652].

**12** Ram Singh v. Sonia & Ors. [(2007) 3 SCC 1]; Prajeet Kumar Singh v. State of Bihar [(2008) 4 SCC 434]; Mohan Anna Chavan v. State of Maharashtra [(2008) 7 SCC 561]; Bantu v. State of Uttar Pradesh [(2008) 11 SCC 113]; Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [(2008) 15 SCC 269]; State of U.P. v. Sattan @ Satyendra and Ors. [(2009) 4 SCC 736]; Ankush Maruti Shinde and Ors. v. State of Maharashtra [(2009) 6 SCC 667]; Atbir v. Govt. of NCT of Delhi [(2010) 9 SCC 1]; C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567]; Surendra Koli v. State of Uttar Pradesh [(2011) 4 SCC 80]; Md. Mannan v. State of Bihar [(2011) 5 SCC 317]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2011) 7 SCC 125]; Mohd. Arif @ Ashfaq v. State of NCT of Delhi [(2011) 13 SCC 621]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [(2011) 14 SCC 401]; Sonu Sardar v. State of Chhattisgarh [(2012) 4 SCC 97]; Sunder @ Sundararajan v. State by Inspector of Police [(2013) 3 SCC 215]; Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1]; Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421]; Mofil Khan and Anr. v. State of Jharkhand; Purushottam Dashrath Borate and anr. v. State of Maharashtra [(2015) 6 SCC 652]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 632]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Mukesh and Anr. v. State for NCT of Delhi and Ors. [(2017) 6 SCC 1]; Khushwinder Singh v. State of Punjab [(2019) 4 SCC 415].

**13** Note that when we say that the alternative of life imprisonment was rejected solely on account of the brutality of the crime, we also include judgments where the improbability of reformation was also determined solely on the basis of the crime and its features.

**14** Ram Singh v. Sonia & Ors. [(2007) 3 SCC 1]; Prajeet Kumar Singh v. State of Bihar [(2008) 4 SCC 434]; Md. Mannan v. State of Bihar [(2011) 2 SCC Cri 626]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2011) 7 SCC 125]; Ajitsingh Harnamsingh Gujral v. State of Maharashtra [(2011) 14 SCC 401]; Sonu Sardar v. State of Chhattisgarh [(2012) 4 SCC 97]; Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67]; Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253]; Manoharan v. State [(2019) 7 SCC 716].

**15** C. Muniappan and Ors. v. State of Tamil Nadu (2010) 9 SCC 567].

**16** Vasanta Sampat Dupare v. State of Maharashtra [(2015) 1 SCC 253].

# Other Issues in Capital Sentencing

This section deals with two pressing doctrinal questions relating to capital sentencing, one of which requires us to grapple with the irrevocable nature of the death sentence, while the other calls for deeper contemplation about the institutional role of the Supreme Court in ensuring that the irreversible sentence of death is only imposed following the due process of law.

The ***first*** question specifically pertains to the use of the nature and quality of evidence on which the offender's conviction stands, as a sentencing factor. The ***second*** question deals with the Supreme Court's understanding and treatment of sentencing defects, i.e., lower courts' non-compliance with the procedural mandates under the CrPC that are meant to function as due process safeguards.

## Quality of Evidence as a Sentencing Factor

Quality of evidence has been treated as a relevant sentencing factor by the Supreme Court in its capital sentencing case law. This is possibly on account of the irreversible nature of the death penalty as a form of punishment, and the consequent need for absolute certainty regarding the guilt of the offender. As such, some benches have deemed it to be unsafe to confirm a death sentence if the evidence on the basis of which an individual is convicted of a death-eligible offence is not foolproof or unimpeachable. Two issues have been discussed in this chapter. ***First***, the questions that have arisen with regard to the treatment of circumstantial evidence as a sentencing factor; and ***second***, the validity of the doctrine of residual doubt.

# Circumstantial Evidence

On the treatment of circumstantial evidence as a mitigating circumstance, the Supreme Court's position, by and large (with the exception of 1 confirmation judgment that found circumstantial evidence to be irrelevant to sentencing),[1] has been that while there is no hard and fast rule that circumstantial evidence is a ground for commutation,[2] ordinarily, the death penalty should not be awarded in a case where only circumstantial evidence is available against the accused.[3] Further, while 1 judgment held that circumstantial evidence, by itself, cannot be a ground for commutation,[4] in another judgment, the death sentence was commuted to life imprisonment on that ground alone.[5]

Judgments have also held that circumstantial evidence must lead to an 'exceptional case' for the death sentence to be imposed. However, it is unclear what is meant by 'exceptional case'. In ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra***, it was held that a rule of prudence should be adopted, such that no surmises or hypotheses must be required regarding the manner of commission of the crime in a case built on circumstantial evidence. It was further held, in light of the rule of prudence, that a case built on approver's evidence would not to invite the death penalty.[6]

In ***Rajendra Pralhadrao Wasnik v. State of Maharashtra***, however, exceptional circumstances were understood to mean exceptional reasons as laid down in ***Bachan Singh***, pertaining to both the crime and the offender.[7] Similarly, ***Shatrughana Baban Meshram v. State of Maharashtra*** inexplicably defined circumstantial evidence of 'unimpeachable' and 'exceptional' character as that which would convince "the judicial mind that the option of a sentence lesser than death penalty is foreclosed".[8] These judgments are rather confusing, given that exceptional reasons must exist for the death penalty to be imposed, regardless of the quality of evidence. This formulation renders the question of whether a conviction based on circumstantial evidence is a mitigating circumstance, entirely moot.

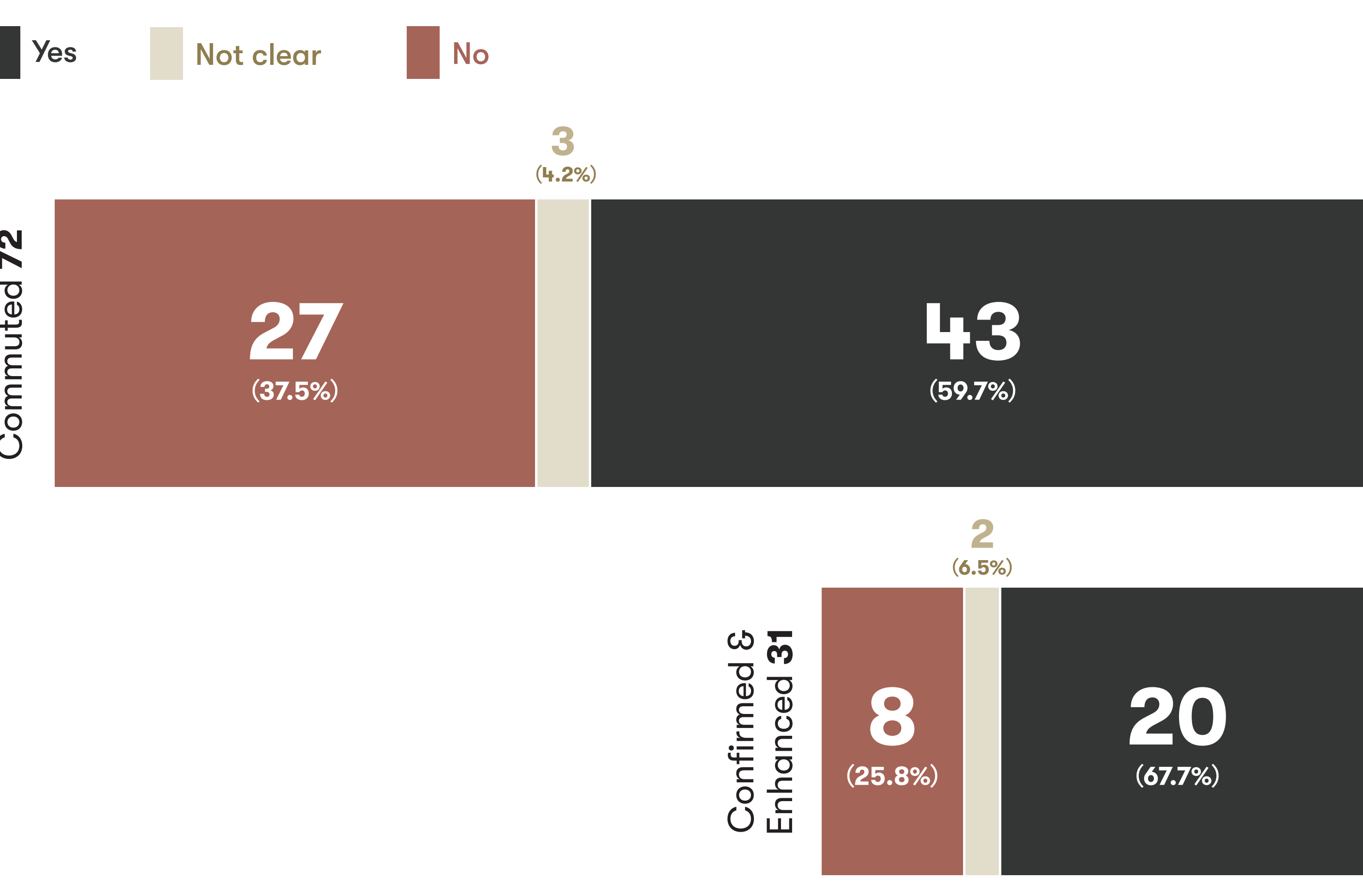


# The Nature of Evidence Based on Which the Accused was Convicted

In 101 (of 143) judgments, the Supreme Court independently examined the issue of conviction and the evidence available against the accused. These included 31 confirmation judgments and 72 commutation judgments. Despite the rule of prudence, in 67.7% of these 31 confirmation judgments, only circumstantial evidence was available against the offender, i.e., there was no eye-witness evidence.*

## Figure 33: Was Only Circumstantial Evidence Available Against the Accused?

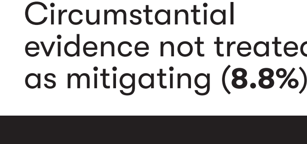
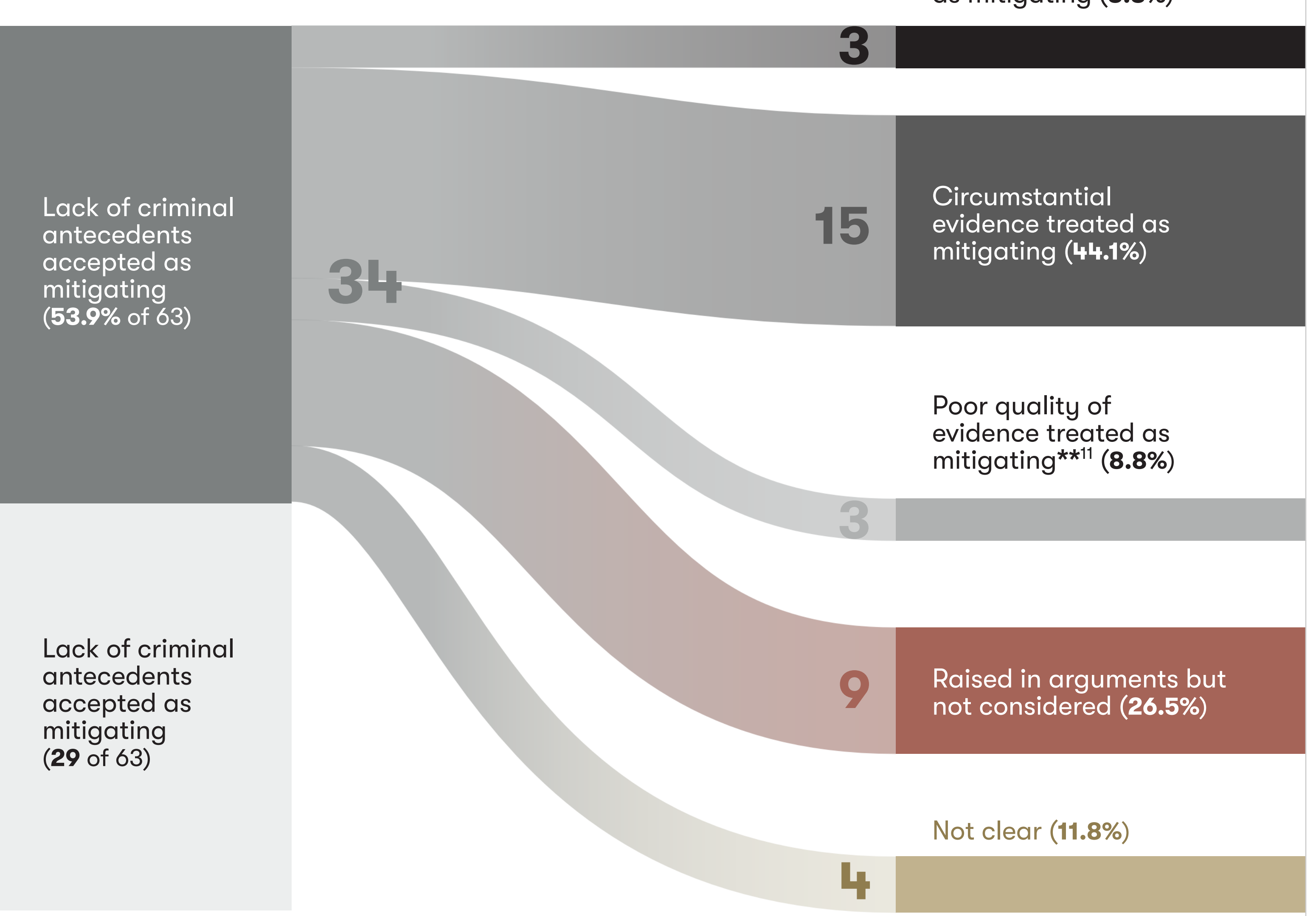
Total [judgments where evidence on conviction was re-appreciated by the Supreme Court] = **100**




*Note that this is only an estimate given that our source for this information was the Supreme Court judgment, which may not always accurately record the totality of evidence available against the accused.

### Figure 34: Treatment of Circumstantial Evidence as a Sentencing Factor*

34 judgments mentioned circumstantial evidence as a sentencing factor. Circumstantial evidence was treated as a mitigating circumstance in 15 of the 34 judgments where it was raised as a sentencing factor.[9] However, in a fair share of judgments it was not engaged with, even when it was raised by the defence counsel. In 3 confirmation judgments, where it was raised as a sentencing factor, it was not treated as a mitigating circumstance.[10]


*Note that figure 34 does not include judgments where the issue pertaining to evidence at sentencing was specifically framed in terms of the residual doubt doctrine. That has been discussed separately.
**These judgments also involved convictions based on circumstantial evidence, but the sentencing issue was framed more broadly as one of quality of evidence available and not just circumstantial evidence.



# Residual Doubt

The treatment of 'residual doubt' as a mitigating circumstance is premised on the view that in some cases, while the evidence at trial might be sufficient to arrive at a determination of guilt beyond a reasonable doubt, there may yet be room for 'lingering doubts' incompatible with the irrevocable sentence of death. Thus, a standard higher than 'beyond reasonable doubt' is sought to be adopted in cases where the death penalty is imposed. However, the Supreme Court's jurisprudence on the application of the theory of residual doubt to capital sentencing has been inconsistent.

The doctrine was first applied in ***Ashok Debbarma v. State of Tripura***,[12] where the death sentence was commuted to life imprisonment, due to residual doubt regarding the appellant's role in the killing of 15 people, as part of a large mob. The Supreme Court observed that it entertained residual doubt as to whether the appellant, the sole convict for this offence, could have executed such a crime alone. The theory of residual doubt was thereafter endorsed in other Supreme Court judgments.[13]

In 2020, however, the judgment in ***Shatrughna Baban Meshram v. State of Maharashtra***, found that, theoretically, the concept of "residual doubt" would not apply in a case based on circumstantial evidence, where circumstances must not only be individually proved, but must also form a consistent chain so conclusive as to rule out the possibility of any other hypothesis except the guilt of the accused.[14] As such, it was noted that the burden in such cases was already of a greater magnitude, and once the same was discharged, it would be implicit that any other hypothesis regarding the innocence of the accused would automatically stand ruled out. This position was also reiterated in a judgment delivered in 2022.[15]

The Supreme Court judgments that have rejected the doctrine of residual doubt have sought to differentiate from previous case law favouring the doctrine of residual doubt, on the basis of the peculiar circumstances of those cases. One possible difference or peculiarity could be that the residual doubt theory is only applicable when there is a doubt as to the manner of commission and not guilt of the offender. To illustrate, in ***Ashok Debbarma***, the residual doubt pertained to the degree of participation of the offender, i.e., 'how' the crime was committed, and not 'whether' it was committed.

However, this distinction does not stand when we look at other judgments which have endorsed the residual doubt theory. In ***Ravishankar @ Baba Vishwakarma v. State of Madhya Pradesh***, residual doubt was found to exist due to minor inconsistencies in witness testimonies, the failure of the prosecution to produce DNA evidence, and the possibility of the involvement of another suspect who absconded during investigation. Later, in ***Manoharan v. State***, it was held that the evidence available was sufficient to establish "guilt beyond any residual doubt", suggesting that it considered the theory to not just be applicable to doubts regarding the manner of commission but also the question of guilt. Further, while the judgments in ***Kalu Khan v. State of Rajasthan***[16] and ***Md. Mannan v. State of Bihar***[17] did not specifically invoke the theory of residual doubt, they took a similar approach as in ***Ravishankar***, holding that the quality of evidence available (circumstantial evidence, extra-judicial confessions on the basis of which recoveries were made or those corroborated by villagers, absence of forensic evidence etc.) introduced an uncertainty in the "culpability calculus".

It therefore appears that the position of the Supreme Court on the theory of residual doubt is mired in confusion, with two irreconcilable strands of jurisprudence having been adopted by benches of equal strength. In any case, the quality of evidence, whether or not one gives any credence to the theory of residual doubt, has been treated as a relevant sentencing factor. It presumably falls to individual judges to determine, in their discretion, whether the evidence is of such an unimpeachable nature as to completely disregard the need for caution when imposing the irrevocable punishment of death. This again opens up scope for subjectivity and consequently, arbitrary decision-making.



## ENDNOTES

**1** Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [2008) 15 SCC 269].

**2** Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka [(2008) 13 SCC 767]; Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498]; Ramesh v. State of Rajasthan [(2011) 3 SCC 685]; Tersem Singh v. State of Punjab [Criminal Appeal No(s). 42-43 of 2007]; Purna Chandra Kusal v. State of Orissa [(2011) 15 SCC 352]; Ram Deo Prasad v. State of Bihar [(2013) 7 SCC 725]; Shyam Singh @ Bhima v. State of Madhya Pradesh [(2017) 11 SCC 265]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388]; Ravishankar @ Baba Vishwakarma v. State of Madhya Pradesh [(2019) 9 SCC 689]; Manoharan v. State [(2020) 5 SCC 782]; Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596].

**3** Bishnu Prasad Sinha & Anr v. State of Assam [(2007) 11 SCC 467]; Sebastian @ Chevithiyan v. State of Kerala [(2010) 1 SCC 58]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460]; Shatrughana Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596].

**4** M.A. Antony @ Antappan v. State of Kerala [2010 SCC OnLine SC 27].

**5** Tersem Singh v. State of Punjab [Criminal Appeal No(s). 42-43 of 2007]. Note that there was another judgment which commuted the death sentence solely on account of the nature of evidence available against the accused. In that case, the sole eyewitness was a child. See Uttam Chakraborty and Anr. v. State of Assam [(2010) 14 SCC 518].

**6** Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498] [168].

**7** Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460] [29]..

**8** Shatrughana Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596] [50.2].

**9** Bishnu Prasad Sinha & Anr v. State of Assam [(2007) 11 SCC 467]; Sebastian @ Chevithiyan v. State of Kerala [(2010) 1 SCC 58]; Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra [(2009) 6 SCC 498]; Santosh Kumar Singh v. State thr. CBI [(2010) 9 SCC 747]; Ramesh v. State of Rajasthan [(2011) 3 SCC 685]; Tersem Singh v. State of Punjab [Criminal Appeal No(s). 42-43 of 2007]; Purna Chandra Kusal v. State of Orissa [(2011) 15 SCC 352]; Mohd Bin Beerankutti v. State of Karnataka [(2014) 14 SCC 493]; Kalu Khan v. State of Rajasthan [(2015) 16 SCC 492]; Shyam Singh @ Bhima v. State of Madhya Pradesh [(2017) 11 SCC 265]; Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460]; Dileep Bankar v. State of Madhya Pradesh [(2021) 1 SCC 718]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388]; Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596]; Dharam Deo Yadav v. State of Uttar Pradesh [(2014) 5 SCC 509].

**10** Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [2008) 15 SCC 269]; M.A. Antony @ Antappan v. State of Kerala [2010 SCC OnLine SC 27]; Manoharan v. State [(2020) 5 SCC 782]. (While in *Shivaji*, circumstantial evidence was principally treated as an irrelevant consideration, in *M.A. Antony* and *Manoharan*, the same was rejected as not mitigating, not in principle, but in the particular facts of the case].

**11** Sanaullah Khan v. State of Bihar [(2013) 3 SCC 52]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Ram Deo Prasad v. State of Bihar [(2013) 7 SCC 725].

**12** Ashok Debbarma @ Achak Debbarma v. State of Tripura [(2014) 4 SCC 747] [30-34].

**13** Manoharan v. State [(2020) 5 SCC 782] [62]; Ravishankar @ Baba Vishwakarma v. State of Madhya Pradesh [(2019) 9 SCC 689] [55-63]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388] [19].

**14** Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596] [77].

**15** Manoj Pratap Singh v. State of Rajasthan [2022 SCC OnLine SC 768] [173] (This confirmation judgment was delivered in 2022, and is not part of the dataset analysed in this report. However, it has been referred to for the sake of completeness).

**16** Kalu Khan v. State of Rajasthan [(2015) 16 SCC 492].

**17** Md. Mannan v. State of Bihar [(2019) 16 SCC 584].

# B. Treatment of Sentencing Defects

Appellate review of judicially imposed sentences involves the exercise of a deferential standard of review.[1] In capital sentencing, the Supreme Court has transcended its traditional role as an appellate court. In ***Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra***, it observed that in "a case of death sentence, we...examine the materials on record first hand...and come to our own conclusions on all issues of facts and law, unbound by the findings of the trial court and the High Court."[2]

This approach raises concerns about the erosion of due process guarantees, in cases where there have been procedural defects in the sentencing process. The Supreme Court's most common response to procedural irregularities, in terms of a failure to fulfil the requirements of Section 235 of the CrPC, i.e., holding a separate and effective sentencing hearing, has been to conduct an independent one itself, by commissioning evidence on sentence and allowing the defence to present fresh material before it. This results in the appeal before the Supreme Court turning into an independent proceeding, instead of a check against the arbitrary and capricious imposition of the death penalty by trial courts.

It is clear that this approach is in recognition of the fact that trial courts have completely failed to implement ***Bachan Singh***'s framework. Additionally, the death sentence being an extreme and exceptional punishment does justify a much wider scope of appellate review and a lower level of deference to lower court findings. However, it is pertinent to note that the procedural safeguards provided in the law become foreclosed to a person whose case is examined fully for the first time before the Supreme Court. A mandatory and separate sentencing hearing at the trial stage and subsequent appellate review by High Courts are crucial elements of the capital sentencing procedure under the CrPC. These, alongwith the duty to provide special reasons, are also due process requirements under Article 21,[3] in the absence of which, the imposition of a death sentence is unfair and unreasonable. Despite this, the Supreme Court has held that even the absence of 'special reasons' for death sentences imposed by trial courts can be remedied by the Supreme Court in an appeal under Article 136.[4]

## What Amounts to a Sentencing Defect or Non-Compliance with Section 235?

There appears to be some confusion as to what amounts to a sentencing defect. Same day sentencing, the most commonly raised procedural defect at the Supreme Court,[5] has been held to not be a sentencing defect in and of itself. The Supreme Court's practice heretofore, has been that of effectively condoning same day sentencing, as long as a real and effective hearing* on sentence is provided as per Section 235.[6] In recent decisions, however, the Supreme Court has been more open to treating same day sentencing as a failure of trial courts to provide meaningful opportunity to the accused under Section 235(2).[7] However, same day sentencing, by and large, is not presumptively understood to be a sentencing defect, and whether it becomes one, is to be assessed on a case to case basis."[8]

In the 2-judge bench decision in ***Rameshbhai Chandubhai Rathod v. State of Gujarat***,[9] Justice Ganguli, in his separate opinion, observed that a separate hearing on sentence should be held, even if the defence did not ask for it. Further, the duty of the sentencing court to comply with Section 235(2) would not alone be discharged by putting formal questions to the accused, and an active effort would have to be made to elicit arguments and material on sentence. The 3-judge bench to which the matter was referred, in light of Justices Ganguli and Pasayat disagreeing on the sentence, however, held that the observations of Justice Ganguli on sentencing defects were "too broad based" and could create "insurmountable challenges" for trial courts.[10] In later cases, the need for sentencing judges to actively elicit sentencing arguments and material/evidence on the question of sentence, in order to provide an effective and meaningful sentencing hearing, has been accepted,[11] but same day sentencing has not been taken to be a procedural defect in and of itself. In any case, it remains unclear whether a failure of trial courts to elicit mitigating circumstances alone would qualify as non-compliance with Section 235 of CrPC.

In ***Md. Mannan v. State of Bihar***, it was observed that the fact that the accused was not accompanied by a social worker meant that there was no effective sentencing hearing.[12] While significant, no other judgment has held such a requirement to be essential to the conduct of the sentencing hearing under Section 235(2).[13] The failure to allow the defendant an opportunity to submit affidavits or material on mitigating circumstances has also been understood to mean that there was no effective sentencing hearing.[14] However, none of these elements have been institutionalised as part of Section 235 CrPC, leaving the question of what amounts to non-compliance open, thereby also allowing appellate courts to overlook the failures of trial judges in individual cases.

The recent decision in ***Manoj v. State of Madhya Pradesh***,[15] which requires the State to collect and present mitigation evidence before trial courts, and also present material such as jail reports and psychiatric evaluation at every stage of appeal, also does not clarify if a failure of the State to do so in individual cases shall amount to a sentencing defect, in contravention of the procedure under the CrPC.

*It must be noted however, that in an order dated 19.09.2022, in the suo motu case "In Re Framing Guidelines Regarding Potential Mitigating Circumstances To Be Considered While Imposing Death Sentences", a 3-judge bench of the Supreme Court, referred the issue of same day sentencing, inter alia, to a bench of 5-judges. The 5-judge bench, it is hoped, will clarify what amounts to a real and effective hearing, including the question of how much time may be considered 'sufficient time' for the defence to collect and present material on mitigation.

# Curing Sentencing Defects

With respect to the curing of procedural defects in sentencing, two broad approaches have emerged. The ***first*** was originally adopted in ***Santa Singh v. State of Punjab***,[16] where on account of a failure to provide an effective hearing, the death sentence was set aside and the matter remitted to the trial court for a fresh decision on sentence, after following the procedure contemplated under Section 235. This approach was adopted only once during the study period,[17] even though it has been recognised as the normal rule by the Supreme Court.[18] It therefore remains good law, and is often cited in judgments, which nevertheless opt for the alternative approach laid down in ***Dagdu v. State of Maharashtra***,[19] whereunder any procedural irregularity can be remedied by the Supreme Court by providing the defence with the opportunity to make arguments and produce material on the question of sentence before it, in the interest of not causing further delay.[20] ***Dagdu***, also observed, that remand is not the rule, but the exception.[21] Further, it held that non-compliance with Section 235 was not a ground for commutation.[22]

However, the treatment of the failure of trial courts to conduct an effective hearing as a ground for commutation was seen in 1 judgment of the Supreme Court, which observed that since "[c]ontrary to the dictum of this Court...the petitioner was not given a real, effective and meaningful hearing on the question of sentence...[the] death sentence imposed on the petitioner is liable to be commuted to life imprisonment".[23] However, this approach has been specifically disavowed in other judgments.[24]

Where the procedure under the CrPC is not followed, the matter ideally ought to be remanded to the trial court, so that the question of sentence can be agitated and decided as per procedure, and the sentence thereby imposed can be appealed before two superior fora on substantive grounds. The scope of the appeal at the Supreme Court must remain expansive on account of the exceptional nature of the death penalty. However, the expansive scope of review by itself does not 'cure' the sentencing defect present at trial because the Supreme Court should anyway allow presentation of fresh mitigation evidence that the trial court did not have access to, given the evolving nature of an individual's personality and the need to justify the imposition of the death penalty at every stage.[25] Given the already long periods of time spent on death row by the time an appeal comes before the Supreme Court, a remand to the trial court or High Court may be excessively torturous for the death row prisoner. In such a case, whether non-compliance with Section 235, a violation of due process guarantees under Article 21, is not by itself a ground for commutation, becomes a pertinent question.



## ENDNOTES

**1** Julian V. Roberts, Umar Azmeh and Kartikeya Tripathi, 'Structured Sentencing in England and Wales: Recent Developments and Lessons for India', (2011) 23(1) *National Law School of India Review* 27, 35-36.

**2** Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra [(2012) 9 SCC 1] [5].

**3** Bachan Singh v. State of Punjab [(1980) 2 SCC 684] [166].

**4** Deepak Rai and Another v. State of Bihar [(2013) 10 SCC 421].

**5** It was raised as a sentencing defect in 11 judgments: B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Sukhlal v. State of Madhya Pradesh [Criminal Appeal No(s). 1563-1564 of 2018]; Chhannu Lal Verma v. State of Chhattisgarh [(2019) 12 SCC 438]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1]; Manoj Suryavanshi v. State of Chhattisgarh [(2020) 4 SCC 451]; Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596]; Irappa Siddappa Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029]; Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249]; Bhagchandra v. State of Madhya Pradesh [2021 SCC OnLine SC 1209].

**6** See Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1]; Manoj Suryavanshi v. State of Chhattisgarh [(2020) 4 SCC 451]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]. However, it appears that Chhannu Lal Verma v. State of Chhattisgarh [(2019) 12 SCC 438] treated same day sentencing as a procedural impropriety in and of itself, as the recording of guilt and conviction on the same day could presumptively be taken to mean that necessary time was not provided to the accused to furnish evidence relevant to sentencing and mitigation. Same day sentencing has an obvious impact on the nature and quality of arguments that are eventually presented before the court, and the court's engagement with the same. Our previous research found that an overwhelming number of trial court judgments that imposed the death sentence on the same day as recording of guilt, failed to consider any mitigating circumstances. See Trial Court I Report, 67-69.

**7** Bhagchandra v. State of Madhya Pradesh [2021 SCC OnLine SC 1209]; Lochan Shrivas v. State of Chhattisgarh [2021 SCC OnLine SC 1249].

**8** B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124].

**9** Rameshbhai Chandubhai Rathod v. The State of Gujarat [(2009) 5 SCC 740] [80-91] (separate opinion of Ganguly J.).

**10** Rameshbhai Chandubhai Rathod v. The State of Gujarat [(2011) 2 SCC 764] [13].

**11** Rajesh Kumar v. State through Govt. of NCT of Delhi [(2011) 13 SCC 706]; Ajay Pandit @ Jagdish Dayabhai Patel v. State of Maharashtra [(2012) 8 SCC 43]; Ram Deo Prasad v. State of Bihar [(2013) 7 SCC 725]; Babasaheb Maruti Kamble v. State of Maharashtra [(2019) 13 SCC 640]; Chhannu Lal Verma v. State of Chhattisgarh [(2019) 12 SCC 438]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Dattatraya @ Datta Ambo Rokade v. State of Maharashtra [(2020) 14 SCC 290]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1]; Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136].

**12** Md. Mannan v. State of Bihar [(2019) 16 SCC 584].

**13** Except Dattatraya @ Datta Ambo Rokade v. State of Maharashtra [(2020) 14 SCC 290] which cited the observation made in *Md. Mannan*.

**14** Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Dattatraya @ Datta Ambo Rokade v. State of Maharashtra [(2020) 14 SCC 290].

**15** Manoj v. State of Madhya Pradesh [2022 SCC OnLine SC 677].

**16** Santa Singh v. State of Punjab [AIR 1976 SC 2386].

**17** Ajay Pandit @ Jagdish Dayabhai Patel v. State of Maharashtra [(2012) 8 SCC 43].

**18** Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1] [82].

**19** Dagdu and others v State of Maharashtra [(1977) 3 SCC 68].

**20** Yakub Abdul Razak Memon v. State of Maharashtra [(2013) 13 SCC 1]; Mukesh v. State (NCT of Delhi) [(2017) 3 SCC 717]; Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596]; Irappa Siddappa Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1]; Manoharan v. State [(2020) 5 SCC 782]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [(2017) 4 SCC 124]

**21** Dagdu and others v State of Maharashtra [(1977) 3 SCC 68].

**22** Ibid [79-80].

**23** Dattatraya @ Datta Ambo Rokade v. State of Maharashtra [(2020) 14 SCC 290].

**24** Shatrughna Baban Meshram v. State of Maharashtra [(2021) 1 SCC 596]; Irappa Siddappa

Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029].

**25** See Manoj v. State of Madhya Pradesh [2022 SCC OnLine SC 677] [227-230].



# V. Exercise of Review Jurisdiction in Capital Cases

Prior to the 2014 decision in ***Mohd Arif @ Ashfaq v Registrar, Supreme Court of India***,[1] review petitions filed against Supreme Court judgments confirming death sentences in criminal appeals were dismissed 'by circulation', i.e., in judges' chambers, without an oral hearing in open court.

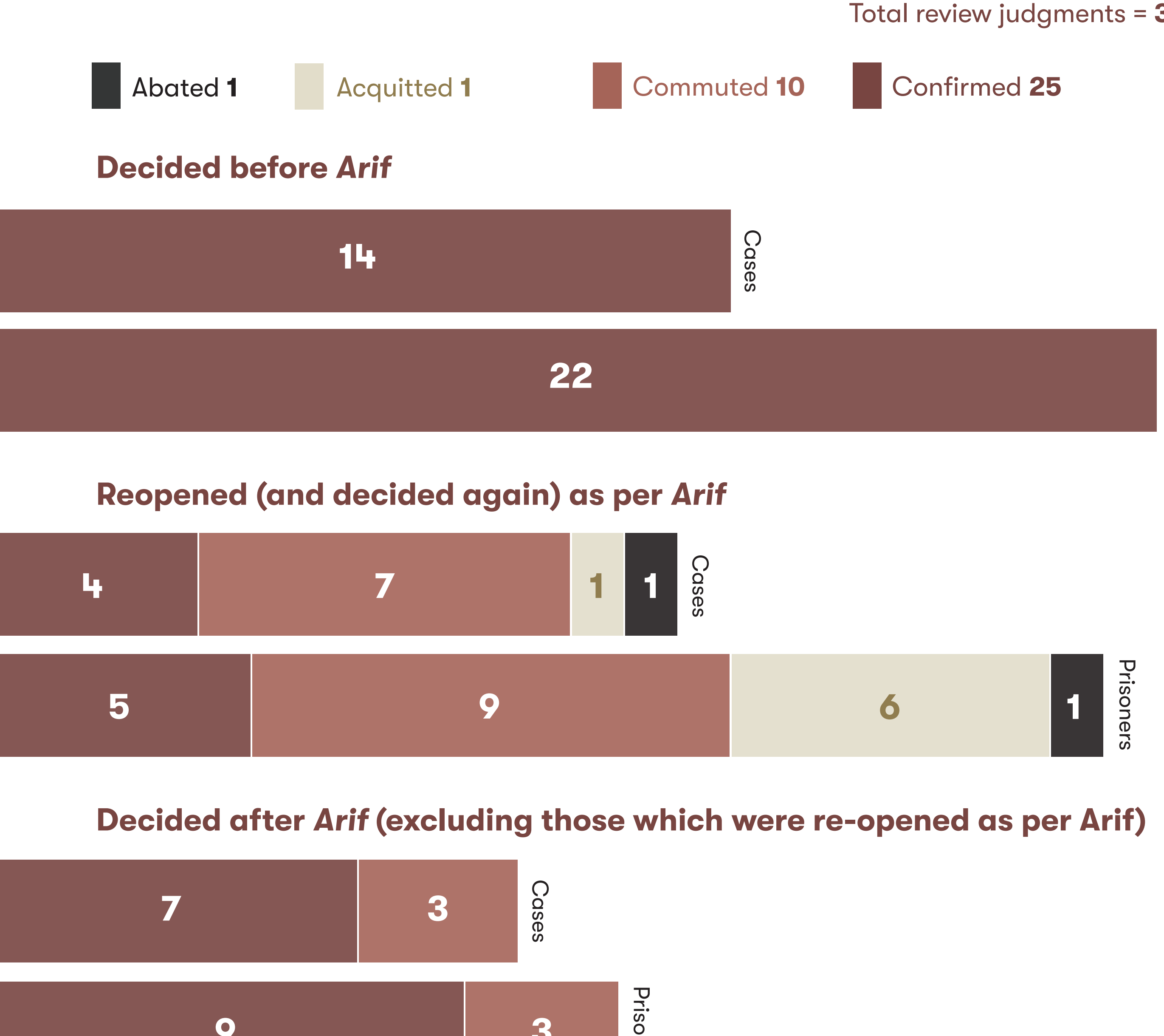
In ***Md. Arif***, the Supreme Court ordered that in cases where a review petition had already been dismissed, but the death sentence had not been executed, the petitioners could apply for the reopening of their review petitions within one month from the date of the judgment. However, this would not apply if the curative petition had also been dismissed.[2] Review petitions challenging death sentences confirmed in appeal were no longer to be decided by circulation, and would have to be given a limited oral hearing by a bench of 3 judges.

# A. Outcomes in Review Petitions

## Figure 35: Outcomes Before and After the *Md. Arif* Writ

All the 14 confirmation judgments falling within the category 'decided before Arif' were rendered in review petitions that were dismissed by circulation. 13 cases were re-opened and re-heard as a result of the Supreme Court's holding in the ***Md. Arif*** writ. The outcomes were as follows: 4 judgments resulted in confirmation of death sentences for 5 prisoners,[3] 7 judgments resulted in commutation of death sentences for 9 prisoners,[4] 1 judgment resulted in the acquittal of 6 prisoners,[5] and in 1, the case abated due to the death of the prisoner.[6]

Amongst the review petitions decided after the decision in the ***Md. Arif*** writ, there were 7 judgments involving 9 prisoners that ended in confirmation[7] and 3 judgments involving 4 prisoners ended in commutation.[8]






# B. The Inherent Arbitrariness of Capital Sentencing

On account of the irreversibility of the death penalty and the fact that different judical minds can arrive at different conclusions, the majority in ***Md. Arif*** observed that an oral hearing was necessarily called for, even if the scope of review of a death sentence affirmed by two appellate courts (High Court and Supreme Court) was very narrow.[9] Justice Chelameswar dissented, observing that review petitions, as a matter of procedure, are ordinarily heard by the same bench as the appeal. According to him, the possibility of different judicial minds arriving at different conclusions would therefore not arise, and consequently the right to make oral submissions in review petitions did not flow from the mandate of Article 21.[10]

The majority and dissent, despite taking diametrically opposite stances, revealingly acknowledged that death penalty sentencing at the Supreme Court is judge-centric. The said premise appears to underlie Chelameswar's rejection of the need for an oral hearing, while the majority curiously adopted the same to require oral hearings in review petitions filed against judgments confirming death sentences in appeals. The majority recognised the need to allow death row convicts every opportunity to challenge a death sentence, even if the chances of success are minimal, given that different judicial minds could come to different conclusions on the same set of facts.[11]

However, the judge-centric nature of capital sentencing undercuts the majority's reasoning. The stage of review is rendered almost superfluous for the purpose envisaged by the majority, i.e., a further reconsideration of a death sentence, when the same bench (as in criminal appeal) is called upon to decide the review petition. This is in fact demonstrated by the data. As predicted by Justice Chelameswar, when heard by the same bench as the appeal, review petitions resulted in the death sentence being maintained. 4 out of 11 confirmation judgments rendered at the stage of review had the same bench.[12] While the remaining 7 confirmation judgments in review were rendered by benches of different composition, it is relevant to note that in 1 of these judgments[13] one judge was common to both the benches that decided the review and the appeal, and in yet another, two judges were common to both benches.[14] On the other hand, all of the 10 judgments that resulted in commutation at the review stage, were rendered by benches having a different composition from the bench that decided the appeal.[15] Therefore, the data suggests that a review petition filed within 30 days of the judgment rendered in appeal, decided by the same bench, will not demonstrate considerable differences in approaches or outcome, unlike those decided by a different bench.

The judge-centric nature of capital sentencing is therefore, most starkly observed when one analyses the sentencing reasoning adopted in judgments deciding review petitions, that overturn an appellate confirmation.

## Figure 36: Whether the Bench in Criminal Appeal and Review Were Different?*

No Yes

**Acquittal**
Total judgements = **1**

**Commutation**
Total judgements = **10**

**Confirmation**
Total judgements = **11**

***First***, different judges construe the same facts differently. In ***C. Muniappan and Ors. v. State of Tamil Nadu***, for instance, the death sentences of three accused were confirmed at the appellate stage, on the ground that they, “after previous planning”, brutally torched a bus full of female students during a violent demonstration and that no mitigating circumstances could call for a lesser sentence than death.[16] However, a different bench in review, commuted the sentence, observing that “there was no premeditation or planning” as the crime occured in the course of a “mob frenzy”.[17]

***Second***, different benches also adopt different standards when conducting the sentencing exercise. For instance, in ***Mofil Khan and Anr. v. State of Jharkhand***, the bench in appeal confirmed the death sentences of the two accused while observing that the cruelty of the crime “eliminat[ed] possibility of being reformed or rehabilitated”.[18] On the other hand, in review, a different bench commuted the death sentences while observing that the probability of reformation may not be determined with reference to the crime, and placed the burden on the prosecution to prove by evidence that there was no probability of reformation.[19]

The discussion in this section shows that the bench composition significantly determines outcome in capital cases as different judges adopt different approaches to sentencing. It also reveals that the judge-centric nature of death penalty sentencing cannot be fixed through limited procedural safeguards, such as oral hearings at the stage of review, in the absence of a coherent sentencing framework.

*The 14 judgements which dismissed review petitions in chambers/by circulation, and the 1 judgement where the review petition abated on account of the prisoner's death have been excluded.



## ENDNOTES

**1** Mohd Arif @ Ashfaq v. Registrar, Supreme Court of India [(2014) 9 SCC 737].

**2** Ibid. The Supreme Court dismissed the review petition challenging *Md. Arif*'s holding that if a curative petition had also been dismissed, the review petition would not be allowed to be reopened for open court hearing. See Mohd Arif @ Ashfaq v Registrar, Supreme Court of India [(2019) 9 SCC 404].

**3** 4 confirmations for 5 prisoners in Surendra Koli v. State of Uttar Pradesh [2014 SCC OnLine SC 1714]; B.A. Umesh v. Regr. Gen. High Court of Karnataka [2011 SCC OnLine SC 5]; Yakub Abdul Razak Memon v. State of Maharashtra [2013 SCC OnLine SC 679]; Vikram Singh and Ors. v. State of Punjab [(2017) 8 SCC 518].

**4** 7 commutations for 9 prisoners in Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460]; C. Muniappan and Ors. v. State of Tamil Nadu [(2016) 12 SCC 325]; Dnyaneshwar Suresh Borkar v. State of Maharashtra [(2019) 15 SCC 546]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1].

**5** Ankush Maruti Shinde v. State of Maharashtra [(2019) 15 SCC 470].

**6** Shivaji @ Dadya Shankar Alhat v. State of Maharashtra [Crl MP. 21289 of 2014 in Review Petition (Crl.) No.431 of 2014].

**7** Sonu Sardar v. State of Chhattisgarh [Review Petition (Crl) No(s). 370-371 of 2014]; Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Mukesh v. State for NCT of Delhi [(2018) 8 SCC 149]; Vinay Sharma and Anr. v. State of NCT of Delhi [(2018) 8 SCC 186]; Manoharan v. State [(2020) 5 SCC 782]; Akshay Kumar Singh v. State (NCT of Delhi) [(2020) 3 SCC 431]; Saleem and Anr. v. State of Uttar Pradesh [Review Petition (Crl.) No(s). 632-633 of 2015].

**8** Babasaheb Maruti Kamble v. State of Maharashtra [(2019) 13 SCC 640]; Jitendra @ Jeetu v. State of Madhya Pradesh [(2019) 13 SCC 646] (for both, the ground taken in the review petition was that the SLP against the High Court's confirmation of death sentences was dismissed *in limine*); Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136].

**9** Mohd Arif @ Ashfaq v Registrar, Supreme Court of India [(2014) 9 SCC 737] [33-34].

**10** Ibid [72] (dissenting opinion of Chelameswar J.).

**11** Ibid [30].

**12** Vasanta Sampat Dupare v. State of Maharashtra [(2017) 6 SCC 631]; Mukesh v. State for NCT of Delhi [(2018) 8 SCC 149]; Vinay Sharma and Anr. v. State of NCT of Delhi [(2018) 8 SCC 186]; Manoharan v. State [(2020) 5 SCC 782].

**13** Saleem and Anr. v. State of Uttar Pradesh [Review Petition (Crl.) No(s). 632-633 of 2015].

**14** Akshay Kumar Singh v. State (NCT of Delhi) [(2020) 3 SCC 431].

**15** Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460]; C. Muniappan and Ors. v. State of Tamil Nadu [(2016) 12 SCC 325]; Dnyaneshwar Suresh Borkar v. State of Maharashtra [(2019) 15 SCC 546]; M.A. Antony @ Antappan v. State of Kerala [2018 SCC OnLine SC 2800]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1]; Babasaheb Maruti Kamble v. State of Maharashtra [(2019) 13 SCC 640]; Jitendra @ Jeetu v. State of Madhya Pradesh [(2019) 13 SCC 646]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136].

**16** C. Muniappan and Ors. v. State of Tamil Nadu [(2010) 9 SCC 567].

**17** C. Muniappan and Ors. v. State of Tamil Nadu [(2016) 12 SCC 325].

**18** Mofil Khan and Anr. v. State of Jharkhand [(2015) 1 SCC 67].

**19** Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136].

# VI. Procedural and Substantive Developments in Capital Cases

This chapter analyses important procedural and substantive legal developments, pertaining to the administration of the death penalty, that took place during the study period as a result of judicial decision-making. ***First***, the chapter considers the judicial recognition of 'fixed term' and 'full life' sentences, without the possibility of remission, and the implications of such an expansion of the range of alternatives to the death penalty. ***Second***, it maps the developments in the post-mercy jurisprudence at the Supreme Court. ***Third***, it reviews recent case law on the execution of death warrants, including the recognition of death row convicts' rights prior to execution. ***Finally***, it considers the Supreme Court's decision upholding the constitutionality of the death sentence as a punishment for kidnapping for ransom.



## A. Life Imprisonment Without Remission

In ***Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka***, a 3-judge bench of the Supreme Court created a special category of sentences, to be imposed in "extremely few number of cases", where the offence is not grave enough to attract the death penalty but life imprisonment (with the possibility of remission, or reduction of sentence, after a minimum period of 14 years of incarceration) is grossly inadequate and disproportionate.[1] In such cases, while commuting the death sentence, courts would have to specify that the offender would remain in prison for the rest of their natural life or for a specified term, without being entitled to any remission. This, as per the bench in ***Shraddananda***, would ensure that judges are not forced to confirm the death sentence merely on the ground that life imprisonment - open to remissions and premature release - is not a sufficient alternative for the realisation of the penological goal of incapacitation.[2] A 5-judge bench in ***Union of India v. Sriharan @ Murugan***, considered the validity of such judicial exclusion of statutory and regulatory remission by appellate courts.[3] It upheld the same by a 3:2 majority. ***Shraddananda***'s observations were also endorsed in ***Sriharan.***

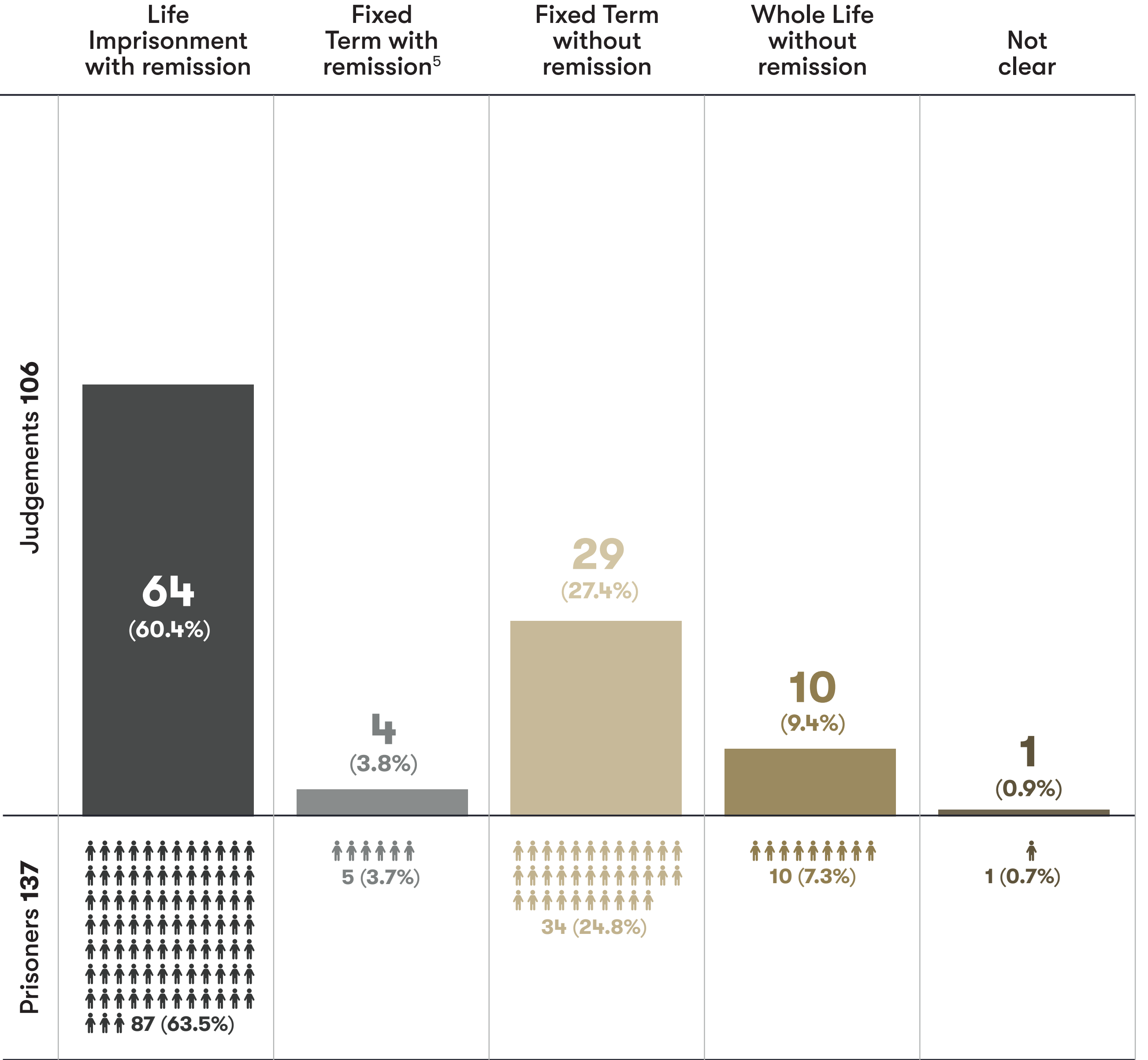
In effect, it was hoped that the formalisation of sentences of life imprisonment, without remission [hereinafter LWOR] would restrict the imposition of the death penalty, and ensure its application in exceptional cases, as envisaged within the ***Bachan Singh*** framework.

Besides LWOR sentences raising concerns bearing upon the separation of powers between the branches of government, in light of the judicial exclusion of the executive's powers of remission, and the consequent expansion of the range of alternatives to the death penalty provided under the statute,[4] they also have important implications for the nature of sentencing reasoning adopted in capital cases.

## Nature of Sentence Imposed on Commutation

A significant trend at the Supreme Court, over the period of study, has been the imposition of LWOR sentences on the commutation of death sentences. This expansion of the range of alternatives to the death penalty has widened the scope of the determination of whether life imprisonment is unquestionably foreclosed.

### Figure 37: In Cases Where Death was Commuted, What was the Sentence Imposed?*




39 (36.8%) of all commutation judgments pronounced a fixed term or whole life sentence without remission (9.4% imposing whole life without remission and 27.4% imposing a fixed term sentence without remission). A small proportion (3.8%) imposed a fixed term with remission.

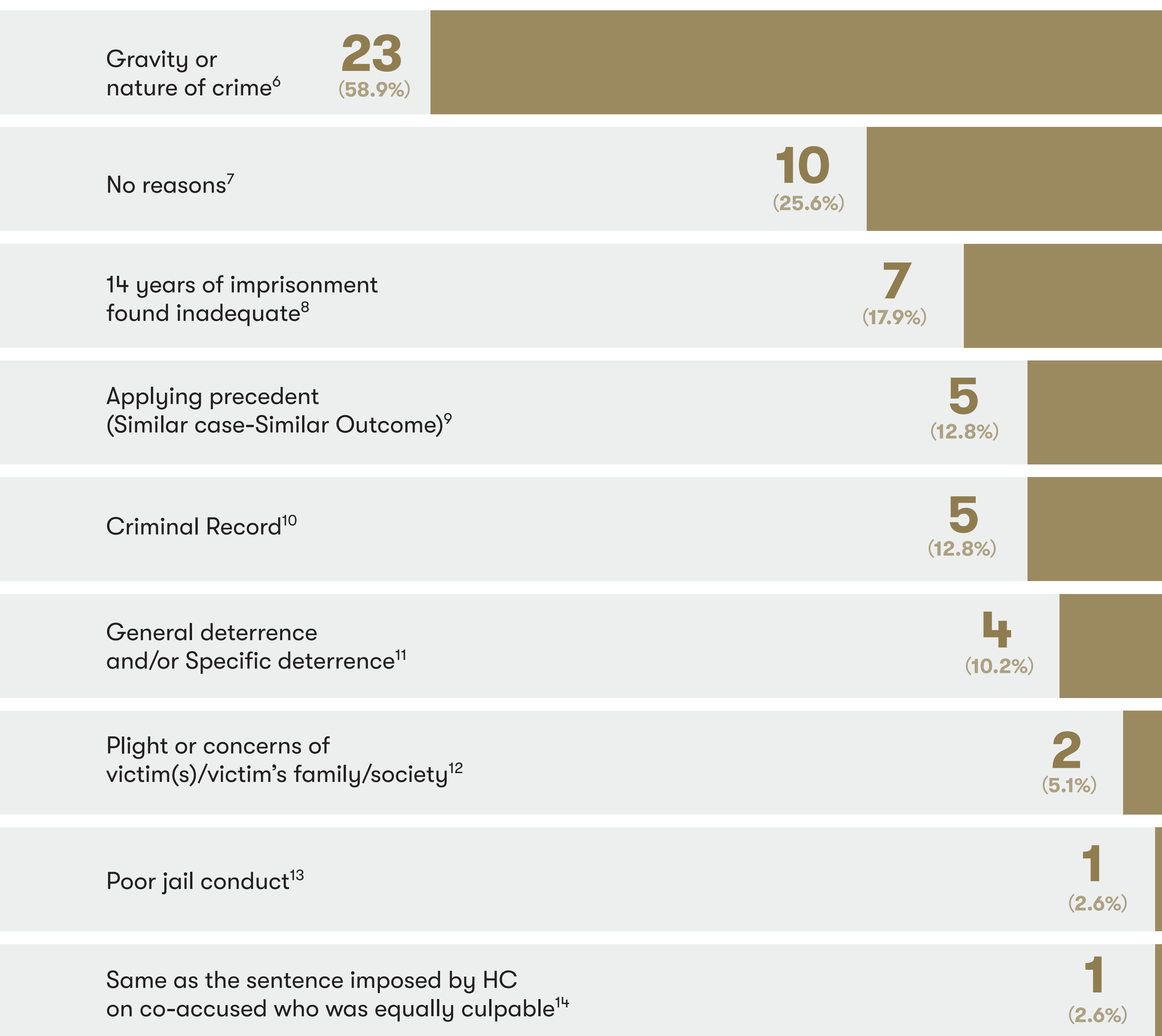
*Note that the percentages do not add up to a total of 100% as the same judgment could have ended in more than one type of sentence on commutation to life imprisonment, if multiple offenders were involved.



## Reasons for Excluding Remission

There is however, an absence of clear and principled guidance in case law on selecting the quantum of sentence and on choosing whether to foreclose remission or not.

### Figure 38: Why was LWOR Imposed?*




*Since the same judgment could have provided multiple reasons for imposing an LWOR sentence, these categories are not mutually exclusive.

Consequently, there seems to be a lack of clarity as to when the alternative of life can be said to be unquestionably foreclosed, such that the death sentence may be confirmed in accordance with ***Bachan Singh***'s dictum. This is especially due to LWOR commutations having reasoning very similar to confirmation judgments. For instance, in ***Sebastian @ Chevithiyan v. State of Kerala***,[15] the death sentence was commuted to life imprisonment for the rest of natural life as the accused's "continuance as a member of ordered society was uncalled for". The use of LWOR sentences for satisfying the penological goal of incapacitation calls into question the very need for the death penalty, given that the alternative of whole life without remission is always available.

Several other judgments commuted death sentences to LWOR sentences on grounds of brutality of the crime, poor, aggressive, and illegal conduct in prison, past conduct indicating recidivist tendencies etc. One would note that these are circumstances that have been widely employed to confirm the death penalty in other judgments. Several judgments also merely noted, without justification, that the crimes in question did not fall within the category of 'rarest of rare', but commuted the death sentence to life imprisonment for 30 years, without remission, on the basis of the gravity and the brutality of the offence.[16] Such poor reasoning in commutations, and the simultaneous imposition of LWOR sentences in light of the brutality of the crime or for no reason at all, makes the Supreme Court's jurisprudence a poor source of guidance. Given that trial courts are not empowered to imposed LWOR sentences,[17] such confused reasoning probably serves to increase the incidence of trial court imposed death sentences in seemingly 'brutal' cases, on account of the knowledge that appellate courts can impose LWOR sentences on commutation, if required.

Furthermore, it is important to recognise that an LWOR sentence is also a very harsh punishment, given that such long periods of incarceration effectively assume a lack of capacity for reformation for a considerable span of offenders' lives or for their entire lifetime. Therefore, the lack of any principled guidance on when such sentences can be resorted to, and the variations as to the reasons for their imposition, are deeply concerning.

It seems then, that the choice between the death sentence and LWOR sentences, is not based on principled considerations but on what the majority judgment in ***Sriharan*** referred to as the 'court's conscience'.[18] Whether or not the court's conscience is satisfied in favour of imposing the death penalty, in the absence of objective principles guiding sentencing discretion, is essentially a moral and subjective decision and not a judicial one. The reasoning in such cases is not principled but outcome-driven. As such, it follows that the expansion of the alternatives to the death penalty has made capital sentencing more arbitrary and unpredictable, while also leading to the imposition of harsher sentences of life imprisonment.



## ENDNOTES

**1** Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka [(2008) 13 SCC 767] [92-93].

**2** Ibid [92-93].

**3** Union of India vs. Sriharan alias Murugan and others [(2016) 7 SCC 1].

**4** Amartya Kanjilal, 'Life Imprisonment Without the Possibility of Release - The Many Constitutional Sins of Sriharan', September 8, 2018 <https://www.project39a.com/op-eds/2018/9/7/life-imprisonment-without-the-possibility-of-release-the-many-constitutional-sins-of-sriharan> (accessed on September 19, 2022)..

**5** Remission was not excluded specifically in 4 judgments: Dileep Bankar v. State of Madhya Pradesh [(2021) 1 SCC 718]; Mofil Khan and Anr. v. State of Jharkhand [2021 SCC OnLine SC 1136]; Bhagchandra v. State of Madhya Pradesh [2021 SCC OnLine SC 1209]; Sukhlal v. State of Madhya Pradesh [Criminal Appeal No(s). 1563-1564 of 2018].

**6** Swapan Kumar Jha @ Sapan Kumar v. State of Jharkhand [(2019) 13 SCC 579]; Parsuram v. State of Madhya Pradesh [(2019) 8 SCC 352]; Raju Jagdish Paswan v. State of Maharashtra [(2019) 16 SCC 380]; Md. Mannan v. State of Bihar [(2019) 16 SCC 584]; Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka [(2008) 13 SCC 767]; Sebastian @ Chevithiyan v. State of Kerala [(2010) 1 SCC 58]; Ashok Debbarma @ Achak Debbarma v. State of Tripura [(2014) 4 SCC 747]; Md. Jamiluddin Nasir and Aftab Ansari v. State of West Bengal [(2014) 7 SCC 443]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1]; [AIR 2019 SC 3031]; Gurvail Singh @ Gala and Anr. v. State of Punjab [(2013) 2 SCC 713]; Amar Singh Yadav v. State of Uttar Pradesh [(2014) 13 SCC 443]; Viran Gyanlal Rajput v. State of Maharashtra [(2019) 2 SCC 311]; Irappa Siddappa Murgannavar v. State of Karnataka [2021 SCC OnLine SC 1029]; Sachin Kumar Singhraha v. State of Madhya Pradesh [(2019) 8 SCC 371]; Selvam v. State Thr. Insp. of Police [(2014) 12 SCC 274]; Neel Kumar @ Anil Kumar v. State of Haryana [(2012) 5 SCC 766]; Sandeep v. State of U.P. [(2012) 6 SCC 107]; Rajkumar v. State of Madhya Pradesh [(2014) 5 SCC 353]; Tattu Lodhi v. State of Madhya Pradesh [(2016) 9 SCC 675]; Alber Oraon v. State of Jharkhand [(2014) 12 SCC 306]; Anil @ Anthony Arikswamy Joseph v. State of Maharashtra [(2014) 4 SCC 69]; Dattatraya @ Datta Ambo Rokade v. State of Maharashtra [(2020) 14 SCC 220].

**7** Arvind Singh v. State of Maharashtra [2020 SCC OnLine SC 400]; Babasaheb Maruti Kamble v. State of Maharashtra [(2019) 13 SCC 640]; Jitendra @ Jeetu v. State of Madhya Pradesh [(2019) 13 SCC 646]; Mohd Bin Beerankutti v. State of Karnataka [(2014) 14 SCC 493]; Madhu @ Madhuranatha and Anr v. State of Karnataka [(2014) 12 SCC 419]; Vijay Kumar v. State of Jammu and Kashmir [(2019) 12 SCC 791]; Ram Deo Prasad v. State of Bihar [(2013) 7 SCC 725]; Dharam Deo Yadav v. State of Uttar Pradesh [(2014) 5 SCC 509]; Manoj Suryavanshi v. State of Chhattisgarh [(2020) 4 SCC 451]; Ravishankar @ Baba Vishwakarma v. State of Madhya Pradesh [(2019) 9 SCC 689].

**8** Sachin Kumar Singhraha v. State of Madhya Pradesh [(2019) 8 SCC 371]; Parsuram v. State of Madhya Pradesh [(2019) 8 SCC 352]; Swapan Kumar Jha @ Sapan Kumar v. State of Jharkhand [(2019) 13 SCC 579]; Raju Jagdish Paswan v. State of Maharashtra [(2019) 16 SCC 380]; Viran Gyanlal Rajput v. State of Maharashtra [(2019) 2 SCC 311]; Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388]; Dilip Premnarayan Tiwari and Anr. v. State of Maharashtra [(2010) 1 SCC 775].

**9** Nand Kishore v. State of Madhya Pradesh [(2019) 16 SCC 278]; Sachin Kumar Singhraha v. State of Madhya Pradesh [(2019) 8 SCC 371]; Parsuram v. State of Madhya Pradesh [(2019) 8 SCC 352]; Raju Jagdish Paswan v. State of Maharashtra [(2019) 16 SCC 380]; Alber Oraon v. State of Jharkhand [(2014) 12 SCC 306].

**10** Rajendra Pralhadrao Wasnik v. State of Maharashtra [(2019) 12 SCC 460]; Sebastian @ Chevithiyan v. State of Kerala [(2010) 1 SCC 58]; Haru Ghosh v. State of West Bengal [(2009) 15 SCC 551]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1]; Birju v. State of Madhya Pradesh [(2014) 3 SCC 421].

**11** Raju Jagdish Paswan v. State of Maharashtra [(2019) 16 SCC 380]; Viran Gyanlal Rajput v. State of Maharashtra [(2019) 2 SCC 311]; Tattu Lodhi v. State of Madhya Pradesh [AIR 2016 SC 4295]; [(2016) 9 SCC 675]; Accused 'X' v. State of Maharashtra [(2019) 7 SCC 1].

**12** Swapan Kumar Jha @ Sapan Kumar v. State of Jharkhand [(2019) 13 SCC 579]; Sandeep v. State of U.P. [(2012) 6 SCC 107].

**13** Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388].

**14** Rakesh Manohar Kamble @ Niraj Ramesh Wakekar v. State of Maharashtra [Criminal Appeal No. 1767 of 2014].

**15** Sebastian @ Chevithiyan v. State of Kerala [(2010) 1 SCC 58]

**16** Neel Kumar @ Anil Kumar v. State of Haryana[(2012) 5 SCC 766]; Sandeep v. State of U.P. [(2012) 6 SCC 107]; Madhu @ Madhuranatha and Anr v. State of Karnataka [(2014) 12 SCC 419]; Alber Oraon v. State of Jharkhand [(2014) 12 SCC 306]; Selvam v. State Thr. Insp. of Police [(2014) 12 SCC 274].

**17** Union of India vs. Sriharan alias Murugan and others [(2016) 7 SCC 1] [104-105].

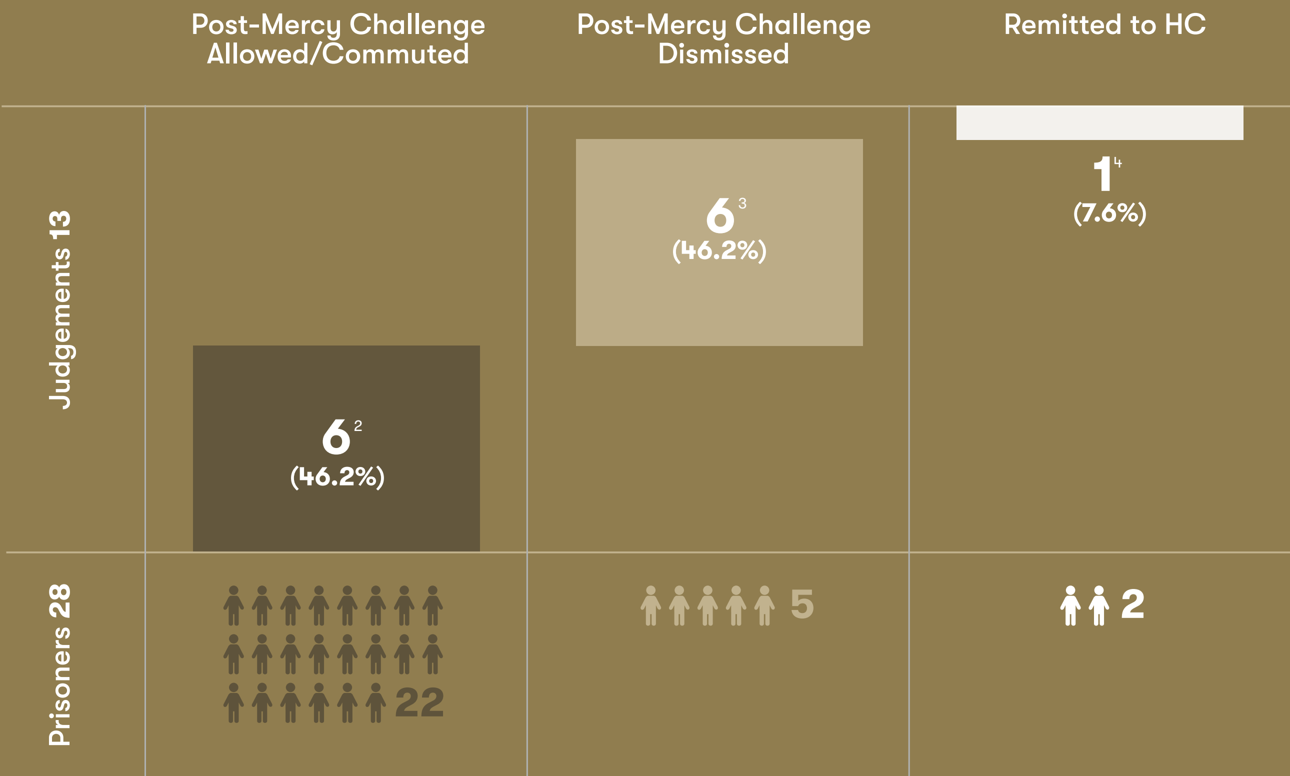
**18** Ibid [89, 104].

# B. Development of the Law on Post-Mercy Challenges

Enshrined under Article 161 and Article 72, the Governor of the State and the President of India, respectively, are empowered with wide and unfettered constitutional powers to 'grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence', based on the recommendations of the Council of Ministers of the State and Union governments. These executive powers are to be exercised independent of the judicial verdict on conviction and sentence, and involve a consideration of circumstances that go beyond the crime.

Courts have exercised great restraint in interfering with the powers of the executive to grant mercy, and have time and again refused to lay down guidelines which might define or limit the scope of executive discretion. While courts cannot question the executive's decision on merits, the ***manner of exercise*** of executive power under Article 161 and Article 72 can be challenged on limited grounds of judicial review, to ensure that, in the exercise of its constitutional duty, the executive has acted 'in the aid of justice and not in defiance of it'.[1]

Figure 39: Outcomes in Post-Mercy Challenges






A significant development in mercy jurisprudence has been the clarification of the law on delay and an initial articulation of other supervening circumstances as grounds for commutation of death sentences. Hearing a batch of writ petitions challenging the rejection of the mercy petition of 15 prisoners, a 3-judge bench of the Supreme Court, in ***Shatrughan Chauhan and Anr. v. Union of India and Ors.***[5] considered the implication of inordinate delay in deciding a mercy petition, and the non-consideration of supervening circumstances (delay, insanity, solitary confinement, reliance on ***per incuriam*** judgments) by the executive, on the validity of the death sentence. The court's focus in this judgment was on the law of delay, while the other supervening circumstances received limited attention.[6]

## A. Delay

The dehumanising impact of prolonged delay in the execution of a death sentence on a prisoner has been recognised as a substantive violation of the right to life.[7] The Supreme Court has also held that such delay amounts to torture, and is a violation of the 'fair, just, reasonable' standard under Article 21.[8]

In ***Shatrughan Chauhan***, the Supreme Court clarified that 'undue, inordinate and unreasonable' executive delay in deciding the mercy petition (or non-consideration of such delay by the executive when deciding said mercy petition) would alone be a sufficient ground for the commutation of a death sentence to life imprisonment.[9] Delays caused due to the accused or on account of the judicial process (appeals, reviews etc.) would not be considered in this context,[10] in recognition of the 5-judge bench decision in ***Smt. Triveniben v. State of Gujarat***.[11] While no time frame was imposed for deciding mercy petitions, the executive was expected to exercise its constitutional authority expeditiously.[12]

***Shatrughan Chauhan*** also clarified that the brutality or gravity of the offence were irrelevant factors for consideration in a post-mercy challenge, overruling the position adopted by a 2-judge bench earlier, in ***Devender Pal Singh Bhullar v. State (NCT) of Delhi***.[13] Though there was evidence of prolonged delay in ***Bhullar***'s case, which also had an impact on the mental health of the prisoner, the court had held that such grounds cannot be successfully invoked where the conviction is for offences under TADA, purported to be a distinct class of 'heinous offences' separate from offences under the IPC. Rejecting the reasonableness of creating this separate class of offences and imposing a mandatory death sentence for the same, ***Shatrughan Chauhan*** held that consideration of unreasonable delay as a supervening circumstance is open to all cases, including offences under TADA.[14]

Aggrieved prisoners are also not bound to show evidence of their suffering on account of delay when seeking commutation of their sentence on this ground at the post-mercy stage.[15] The mere fact of inordinate delay presumes an Article 21 violation - arising from the arbitrary and capricious nature of an execution after excessive suffering that is presumptively borne due to the sufferance of an additional punishment, i.e., long period of incarceration.[16]

Executive delay has been successfully raised as a ground for challenging the death sentence in 6 judgments in the period of study,[17] leading to the commutation of the death sentences of 17 prisoners. The period of delay has ranged from 3 years and 10 months to 12 years.

## B. Insanity

In ***Shatrughan Chauhan***, the Supreme Court, after considering domestic law, international conventions and comparative jurisprudence, held that 'insanity/mental illness/ schizophrenia' are important supervening circumstances which should be considered by the court when deciding the question of commutation of a death sentence to life imprisonment.[18] Insanity as a supervening circumstance does not pertain to the mental state of the prisoner at the time of offence, which would be an issue to consider at the time of determination of judicial verdict on guilt and sentence. Instead, the scope of this supervening circumstance includes subsequent deterioration of the mental health of the prisoner, making them unfit to be executed.

The court failed to explore the constitutional grounding of insanity as a supervening circumstance in depth; contrary to the detailed discussion on delay, and also did not explicitly discuss the implication of insanity as a sole ground for commutation of the death sentence. It merely held that Article 21 protection would be afforded to a prisoner who has been certified "insane" by a competent doctor, preventing their execution 'without further clarification from the competent authority about his mental problems'.[19] This court commuted the death sentence of ***Sundar Singh*** on the ground of schizophrenia alone;[20] and emphasised mental illness, amongst other grounds, as significant for commutation in ***Maganlal Barela***'s case.[21] Besides inordinate delay, ***Bhullar***'s death sentence was also commuted in a curative petition filed by his wife, on the additional evidence of mental illness.[22]



## ENDNOTES

**1** Shatrughan Chauhan and Anr. v. Union of India [(2014) 3 SCC 1] [22-26].

**2** V. Sriharan @ Murugan v. Union of India [(2014) 4 SCC 242]; Ajay Kumar Pal v. Union of India and Anr. [(2015) 2 SCC 478]; Mahendra Nath Das v. Union of India [(2013) 6 SCC 253]; Navneet Kaur v. Union of India [(2014) 7 SCC 264]; Jagdish v. State of Madhya Pradesh [(2020) 14 SCC 156]; Shatrughan Chauhan and Anr. v. Union of India (UOI) and Ors. [(2014) 3 SCC 1].

**3** Akshay Kumar Singh v. Union of India and Ors. [2020 SCC OnLine SC 454]; Mukesh Kumar v. Union of India and Ors. [Writ Petition (Criminal) No. 119 of 2020]; Pawan Kumar Gupta v. State of NCT of Delhi [2020 SCC OnLine SC 340]; Vinay Sharma v. Union of India and Ors [(2020) 4 SCC 391]; Devender Pal Singh Bhullar v. State (NCT of Delhi) [(2013) 6 SCC 195]; Devender Pal Singh Bhullar v. State of NCT of Delhi [Review Petition (Crl) No. 434 of 2013].

**4** Vikram Singh v. State of Punjab [Special Leave Petition (Crl) No(s). 9650-9651 of 2019].

**5** [(2014) 3 SCC 1].

**6** While *Shatrughan Chauhan*, relying on Sunil Batra v. Delhi Admn. [(1978) 4 SCC 494], recognised solitary confinement to be a violation of the right to life, it did not consider the import of this supervening circumstance as a ground for commutation of the death sentence. In Ajay Kumar Pal v. Union of India and Anr. [(2015) 2 SCC 478], however, the combined effect of inordinate delay (3 years and 10 months) along with the fact of solitary confinement of the prisoner was considered to be a deprivation of the right to life, resulting in the death sentence becoming inexecutable.

**7** T.V. Vatheeswaran v. The State of Tamil Nadu [AIR 1983 SC 361].

**8** Shatrughan Chauhan and Anr. v. Union of India and Ors. [(2014) 3 SCC 1] [61]; V. Sriharan @ Murugan v. Union of India [(2014) 4 SCC 242] [2-3].

**9** Shatrughan Chauhan and Anr. v. Union of India and Ors. [(2014) 3 SCC 1] [48].

**10** Ibid [44].

**11** [(1989) 1 SCC 678].

**12** Shatrughan Chauhan and Anr. v. Union of India and Ors. [(2014) 3 SCC 1] [47].

**13** Devender Pal Singh Bhullar vs. State (NCT) of Delhi [(2013) 6 SCC 195].

**14** Post the clarification of the law in *Shatrughan Chauhan*, a curative petition filed by Bhullar's wife was allowed in Navneet Kaur v. Union of India [(2014) 7 SCC 264], and his death sentence was commuted to life imprisonment. Previously, the Supreme Court had dismissed the writ petition filed by Bhullar against the executive rejection of his mercy petition, on grounds of inordinate delay and mental health issues (Devender Pal Singh Bhullar vs. State (NCT) of Delhi [(2013) 6 SCC 195]). It had also dismissed the review petition that was filed against the dismissal of the writ (Devender Pal Singh Bhullar vs. State (NCT) of Delhi [Review Petition (Crl) No. 434 of 2013]).

**15** V. Sriharan @ Murugan v. Union of India [(2014) 4 SCC 242] [21].

**16** Ibid.

**17** V. Sriharan @ Murugan v. Union of India [(2014) 4 SCC 242]; Ajay Kumar Pal v. Union of India and Anr. [(2015) 2 SCC 478]; Mahendra Nath Das v. Union of India [(2013) 6 SCC 253]; Navneet Kaur v. Union of India [(2014) 7 SCC 264]; Jagdish v. State of Madhya Pradesh [(2020) 14 SCC 156]; Shatrughan Chauhan and Anr. v. Union of India [(2014) 3 SCC 1].

**18** Shatrughan Chauhan and Anr. v. Union of India [(2014) 3 SCC 1].

**19** Ibid [87].

**20** Ibid [193-195].

**21** Ibid [224].

**22** Navneet Kaur v. Union of India [(2014) 7 SCC 264].

# C. The Law on Execution of Death Warrants

Quashing death warrants issued within 6 days of the Supreme Court confirming the death sentences imposed upon ***Shabnam*** and ***Saleem*** in appeal, a 3-judge bench of the court held that warrants for execution cannot be issued in haste, before the convict has had the opportunity to pursue all legal remedies available, including the constitutional remedy of clemency under Articles 72 and 161.[1] The same was not only considered an element of "procedure established by law" under Article 21 but was also described as a 'ray of hope' that may not be snatched away by the State.[2] Death row prisoners' right to dignity precluded their execution in an arbitrary and hurried manner, without allowing them to exhaust all legal remedies.[3]

While acknowledging that it is human nature to cling to the hope of staying alive and recognising the same as part of the right to live with dignity under Article 21, the Supreme Court endorsed certain mandatory procedural requirements:[4]

1. Provision of sufficient notice to convicts before the Sessions Court issues a death warrant, so as to enable them to consult lawyers and be represented during the proceedings, and making legal aid available, if required;
2. Ensuring that the warrant does not leave room for uncertainty, by specifying the exact date and time for execution, with a copy being made available to the convict; and
3. Ensuring a reasonable period between the issuance of the warrant and the date of execution to allow convicts reasonable opportunity to pursue legal recourse against the warrant and have a final meeting with family members.[5]

Additionally, the judgment noted ***Shatrughan Chauhan***'s direction[6] to ensure a gap of 14 days between the date of communication of the rejection of a mercy petition and the date scheduled for execution.[7]

However, in the same year, in ***Yakub Abdul Razak Memon v. State of Maharashtra***,[8] a death warrant issued on 30.04.2015, scheduling the prisoner's execution for 30.07.2015, was allowed to be executed. This was despite his second mercy petition having been rejected only on 29.07.2015, leaving him no opportunity to file a post-mercy challenge. The Supreme Court, in a midnight hearing, refused to quash the death warrant, on the ground that his first mercy petition (filed by his brother) had been rejected long before the date of his scheduled execution, which he had chosen not to challenge. He was deemed to have been given sufficient time between the rejection of mercy petition and his execution, in keeping with the procedure laid down in ***Shabnam*** and ***Shatrughan Chauhan***. The court observed that allowing the petitioner an opportunity to challenge the rejection of the second mercy petition would effectively keep the execution pending *ad infinitum*, without regard for the fact that the first mercy petition was not filed by the petitioner himself, and that fresh grounds had been raised in the second mercy petition.

Therefore, inspite of the irrevocable nature of the death penalty, the court chose to follow the letter and not the spirit of its judgment in ***Shabnam***; that the right under Article 21 would imply that until all possible avenues for overturning a death sentence are exhausted, and there remains hope that a death sentence may be converted to life imprisonment, a prisoner should not be executed.

## ENDNOTES

1 Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 702].

2 Ibid [12.2].

3 Ibid [12.4-20].

4 Peoples' Union for Democratic Rights (PUDR) v. Union of India [2015 SCC OnLine All 143].

5 Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 702].

6 Shatrughan Chauhan and Anr. v. Union of India (UOI) and Ors. [(2014) 3 SCC 1] [241.7].

7 Shabnam and Ors. v. State of Uttar Pradesh [(2015) 6 SCC 702].

8 Yakub Abdul Razak Memon v. State of Maharashtra [(2015) 9 SCC 552].

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# D. Constitutionality of Death Penalty for Non-Homicidal Offences: Kidnapping for Ransom

In 2015, a 3-judge bench, in ***Vikram Singh v State of Punjab***,[1] upheld the constitutionality of Section 364A of the IPC, which provides for the death penalty as an alternative punishment (the other option being life imprisonment) for the act of kidnapping or abducting any person and causing reasonable apprehension of death or hurt to such person or actually causing the same, in order to compel the Government or any foreign State or international inter-governmental organisation or ***any other person*** to do or abstain from doing any act or to pay a ransom.

The petitioners in the case had argued that the provision was meant to deal with kidnapping by terrorists for ransom to compel Governments/foreign States/international inter-governmental organisations to do any act, and did not apply to the kidnapping and demand for ransom by private individuals. The said interpretation was rejected by the court. It was alternatively argued by the petitioners that the death penalty for the offence of kidnapping/abduction for ransom was unconstitutional ***per se***.

Responding to this, the court held that the exercise of judicial discretion to impose either a sentence of life imprisonment or the death sentence would ensure that the sentence was not arbitrary, in the manner that mandatory death penalty was held to have been in ***Mithu v. State of Punjab***. It also observed that the application of the 'rarest of rare' doctrine would mean that the death penalty would only be imposed in cases where death is caused, or in cases of terrorism. However, no broad principle as to the constitutionality of the death penalty for non-homicidal offences was laid down, leaving the question open, given that ***Bachan Singh*** had upheld the constitutionality of the death penalty only in the context of murder under Section 302.

It was further observed that there was a presumption of constitutionality in favour of the validity of a statute, and the onus lay on the petitioners to prove that the same was ***ultra vires***. This is inconsistent with the 3-judge bench decision in ***Deena v. Union of India*** where, while dealing with the constitutionality of hanging as a method of execution, it was held that since the "***impugned statute, on the face of it, provides for a procedure for extinguishing life...not even the initial obligation to show the fact of deprivation of life or liberty rests on the petitioners. The State must establish that the procedure prescribed by Section 354(5) of the Code for executing the death sentence is just, fair and reasonable.***"[2]

Furthermore, the court held that while exercising judicial review over the quantum of punishment prescribed by penal statutes, courts must adopt a deferential standard of review. It adopted a low standard of review akin to Wednesbury reasonableness,[3] and

found that Section 364A was not 'grossly disproportionate' to the crime in question, as the parliament had deemed it necessary to prescribe stringent punishment due to rising cases of kidnapping and abduction for ransom.

Given the degree of infringement on fundamental rights — the death penalty being a total, absolute and irrevocable deprivation of the right to life under Article 21 — the adoption of such a deferential standard of review, with the onus of proving unconstitutionality on petitioners, is questionable. Moreover, the endorsement of a more stringent form of proportionality review in recent decisions,[4] may have rendered the approach taken in ***Vikram Singh*** unsustainable.



## ENDNOTES

**1** [AIR 2015 SC 3577].

**2** Deena v. Union of India [(1983) 4 SCC 645] [30]. Similarly, in Sunil Batra v. Delhi Admn. (1978) 4 SCC 494 [72, 226] the Supreme Court observed that when the total deprivation of a prisoner's liberty is challenged, the validatory burden is on the State.

**3** Puneet Dinesh, 'Review: Proportionality, Punishment and Judicial Review: A Response to Jeydev C.S.' July 12, 2017 <https://indconlawphil.wordpress.com/2017/07/12/proportionality-punishment-and-judicial-review-a-response-to-jeydev-c-s/> (accessed on 19 September, 2022).

**4** Puttaswamy (II) v. Union of India [(2019) 1 SCC 1]; Anuradha Bhasin v. Union of India [(2020) SCC Online SC 25].

# Major Developments

## Supreme Court Decisions (2007-2021)

### Developments in the Law Pertaining to the Sentencing Framework

Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498

S.B. Sinha, C. Joseph

Clarified that the death sentence could only be imposed where the State was able to prove that the offender is not amenable to any rehabilitative scheme, making the alternative of life imprisonment 'unquestionably foreclosed'.

Highlighted that within the ***Bachan Singh*** framework, the penological goal of reformation takes precedence over proportionality and social necessity.

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Sangeet and Anr. v. State of Haryana (2013) 2 SCC 452]

K.S. Panicker Radhakrishnan, M.B. Lokur

Noted that capital sentencing at the Supreme Court had become crime-centric (contrary to ***Bachan Singh***'s dictum).

Rejected the 'balancing' of aggravating and mitigating circumstances, and noted that ***Machhi Singh*** needed a 'relook'.

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Gurvail Singh @ Gala and Anr. v. State of Punjab (2013) 2 SCC 713

D. Misra, K.S. Panicker Radhakrishnan

Laid down a new framework, making the imposition of a death sentence appropriate only when 1) there are no mitigating circumstances (criminal test); 2) only aggravating circumstances (crime test); and 3) there is societal approval for the death penalty in a given case (the 'rarest of rare' or R-R test).

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Anil @ Anthony Arikswamy Joseph v. State Of Maharashtra (2014) 4 SCC 69
*and*
Birju v. State of Madhya Pradesh (2014) 3 SCC 421]

K.S. Panicker Radhakrishnan, V. Sen

Emphasised the importance of an evidence-based approach to the assessment of offenders' capacity for reformation, and the need for sentencing judges to call for additional materials, such as Probation Officers' Report.

Held that the absence of a psychological/psychiatric assessment of the offender did not lead to the conclusion that there is no probability of reform.

Relying on several Supreme Court decisions which noted inconsistencies in capital sentencing, and the 262nd Law Commission Report's conclusion that capital punishment had failed to achieve any constitutionally valid penological goal, Justice Kurien Joseph opined that the time had come to review the need for the death penalty. The other two judges did not agree with this view.

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Clarified that ***Bachan Singh*** required a showing of a mere 'probability' and not the 'possibility' of reformation, and re-emphasised the need to consider the question of reformation 'notwithstanding' the crime.

Materials such as prison conduct, psychiatric evaluation, and contacts with family, were stated to be necessary evidentiary requirements when determining the probability of reformation.

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Highlighted the onus on the State to present evidence that establishes the improbability of reformation before the death penalty may be imposed. Relied on affidavits of the prisoners' family and community members, in addition to relying on jail conduct reports to establish the probability of reform. Concretised the link between the need to establish an improbability of reformation and the foreclosure of life imprisonment.

### Recognition/Rejection of New Grounds for Commutation

Introduced the concept of 'residual doubt' (where lingering uncertainty persists, beyond 'reasonable doubt' but below 'absolute certainty') as a mitigating circumstance in Indian capital sentencing jurisprudence. This standard in capital cases was later endorsed in **Ravishankar @ Baba Vishwakarma v. State of Madhya Pradesh [(2019) 9 SCC 689]** (R.S. Reddy, R.F. Nariman, S. Kant) and **Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra [(2019) 9 SCC 388]** (I. Banerjee, M.M. Shantanagoudar, N.V. Ramana).

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Recognised post conviction mental illness as a mitigating factor for commutation of death sentence in cases of 'severe' mental illness. The mental illness must be certified by a medical professional to be serious enough to prevent the offender from comprehending the nature and purpose of the death sentence.

Shatrughna Baban Meshram v. State of Maharashtra (2021) 1 SCC 596

I. Malhotra, K. Murari, U.U. Lalit

Rejected the concept of 'residual doubt' as theoretically unsound. Court reasoned that for conviction in a case based on circumstantial evidence, circumstances must not only be individually proved or established, but must also form a consistent chain, ruling out the possibility of any other hypothesis except the guilt of the accused – a burden of high magnitude. Once this burden is discharged and conviction determined, it would be implicit that any other hypothesis or innocence of the accused has been ruled out.

## Other Procedural and Substantive Developments

Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka (2008) 13 SCC 767

A. Alam, B.N. Agrawal, G.S. Singhvi

Created a special category of life imprisonment. While commuting death sentence to life imprisonment, it was held that an appellate court may opt for a via media between life imprisonment simpliciter and the death sentence. Fixed term or whole life sentences, excluding statutory remission, could be imposed in cases where life imprisonment (including remission) was found to be inadequate, but the case was not grave enough for the death sentence.

Mohd. Arif alias Ashfaq v. Registrar, Supreme Court of India (2014) 9 SCC 737

J.S. Khehar, A.K. Sikri, R. F. Nariman, R.M. Lodha, J. Chelameswar (dissenting)

Held that review petitions filed against Supreme Court confirmation of death sentence in appeal, must be heard in open court; with retrospective effect.

Thus, in cases where a review petition had already been dismissed, but execution was pending, the petitioners could apply for the reopening of their review petitions (within one month from the date of this judgment).

Shatrughan Chauhan and Anr. v. Union of India (UOI) and Ors. (2014) 3 SCC 1

P. Sathasivam, R. Gogoi, and S.K Singh

Held that supervening circumstances like delay, solitary confinement, and insanity were relevant considerations at the post-mercy stage. Clarified that 'undue, unexplained and inordinate' executive delay in deciding the mercy petition could be a sole ground for commutation of the death sentence; and that the gravity and nature of offence would be irrelevant at the post-mercy stage.

Laid down procedural guidelines for consideration of mercy petitions and their disposal, as well as, the execution of death sentences.

Shabnam and Ors. v. State of Uttar Pradesh (2015) 6 SCC 70

A.K. Sikri, U.U. Lalit

Recognised that death row prisoners' right to dignity precluded their execution in an arbitrary and hurried manner. It would be impermissible for the Sessions Court to issue a death warrant prior to the exhaustion of all judicial and executive remedies. This decision reiterated guidelines for issuance of death warrants laid down by the Allahabad High Court in ***Peoples' Union for Democratic Rights (PUDR) v. Union of India & Ors.*** (2015) SCC Online All 143.



Vikram Singh and ors. v. State of Punjab (2015) 9 SCC 502

T.S. Thakur, R.K. Agarwal, A.K. Goel

Repelled a challenge against the death penalty for the offence of kidnapping for ransom, under Section 364A IPC. It found that the punishment of death was not 'grossly disproportionate' to this offence, as the parliament had deemed it necessary to prescribe stringent punishment due to rising cases of kidnapping and abduction for ransom.

Application of the provision would have to be in line with the 'rarest of rare' doctrine, and therefore the death penalty would be eligible only in cases of kidnapping with murder, and terror offences.

Union of India v. Sriharan alias Murugan and others (2016) 7 SCC 1

F.M.I. Kalifulla, P.C. Ghose, and H.L. Dattu (majority), A.M Sapre and U.U. Lalit (minority)

A 5-judge bench considered the validity of fixed term sentences without remission ( as per ***Shraddananda***) and upheld the same by a 3:2 majority. The majority clarified that remission could only be excluded by the High Courts or the Supreme Court. However, constitutional powers of remission under Articles 72 and 161 would be unaffected by such a sentence.

The dissenting judges, J. Lalit and J. Sapre, questioned the validity of these "new" sentences, which had the effect of encroaching on legislative powers.

Babasaheb Maruti Kamble v. State of Maharashtra [Review Petition (Crl) No. 588 of 2015]

AK. Sikri, A. Bhushan, I. Banerjee

Allowed the original criminal appeal to be restored, due to the ***in limine*** dismissal of the SLP against the High Court confirmation of death sentence, without a reasoned order on sentence. This effectively made it compulsory, rather than discretionary, to admit an SLP filed under Article 136, on the question of sentence, in a capital case.

Accused 'X' v. State of Maharashtra (2019) 7 SCC 1
*and*
Md. Mannan v. State of Bihar (2019) 16 SCC 584

I. Banerjee, M.M. Shantanagoudar, N.V. Ramana

Held that same day sentencing would not, in itself, vitiate the sentence, as long as the the convict was given a meaningful and effective hearing on the question of sentence.

Also held that the fact that the accused was not accompanied by a social worker (during sentencing) was a sentencing defect. The failure to allow the defendant an opportunity to submit affidavits or material on mitigating circumstances was also treated as non-compliance with Section 235(2) CrPC.

Chhannu Lal Verma v. State of Chattisgarh (2019) 12 SCC 438

D. Gupta, H. Gupta, K. Joseph (dissenting only on the need for reviewing the constitutionality of the death penalty)

Treated same day sentencing as a procedural impropriety in and of itself, based on the reasoning that the recording of guilt and conviction on the same day indicated that necessary time was not provided to the accused to furnish evidence relevant to sentencing and mitigation.

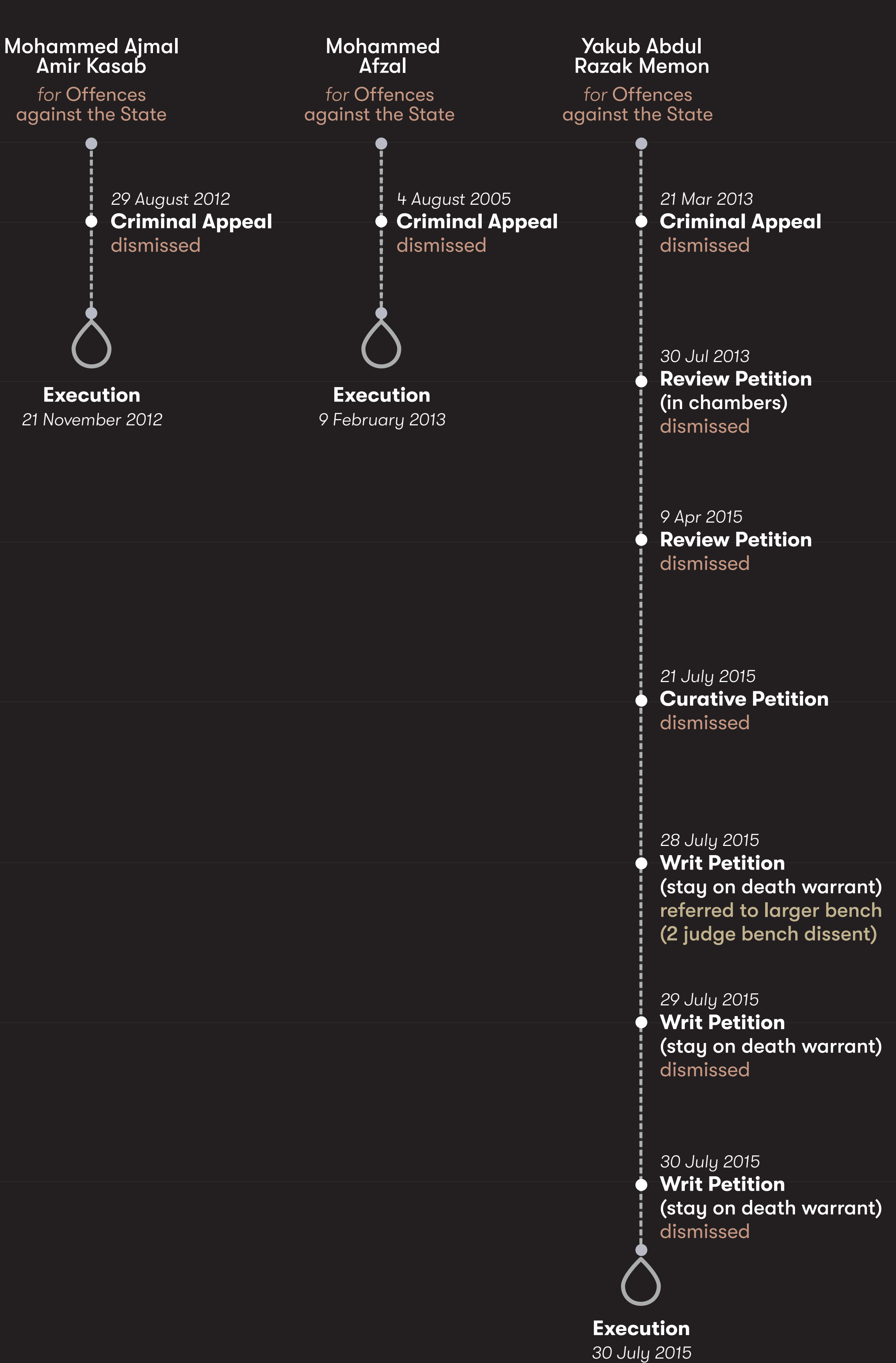
# List of Executions (2007-2021)

During the 15 year period of study, the following prisoners have been executed:

- Mohammed Ajmal Mohammad Amir Kasab
  Executed on *21 November 2012*
- Mohammed Afzal
  Executed on *9 February 2013*
- Yakub Abdul Razak Memon
  Executed on *30 July 2015*
- Mukesh
  Executed on *20 March 2020*
- Akshay Kumar Singh
  Executed on *20 March 2020*
- Pawan Kumar Gupta
  Executed on *20 March 2020*
- Vinay Sharma
  Executed on *20 March 2020*



**LIST OF EXECUTIONS** (2007-2021)



**LIST OF EXECUTIONS** (2007-2021)

# Conclusion

This report has attempted to map the important trends and developments in death penalty jurisprudence at the Supreme Court between 2007-2021. These past 15 years have witnessed significant procedural and substantive developments, including developments in capital sentencing; mandatory admission of Special Leave Petitions and oral hearings at the stage of review in capital cases; recognition of a new category of fixed term imprisonment excluding remission; expansion of post-mercy jurisprudence and the law on supervening circumstances; and introduction of detailed guidelines for the issuance of death warrant and procedure for execution. Several of these changes were introduced with the intention of ensuring that the death penalty is administered rarely and with 'care and humane concern', its validity in each case to be scrutinised through a robust system of judicial and executive checks. While recognising the importance of these developments, this report reveals that the problems of arbitrariness, as well as judge-centric and inconsistent reasoning in capital cases, highlighted in ***Lethal Lottery***, continue to persist at the Supreme Court.

Though numerically limited, this data report highlights the extent of qualitative variations in approaches to capital sentencing, including significant principled divergence in reasoning in commutation and confirmation decisions. There is a tendency for adjudication in confirmation cases to be heavily influenced by crime-centric factors, particularly the brutality of the offence, without effective engagement with offender-related circumstances. Even amongst commutation decisions, there are noteworthy variations in the mitigating circumstances considered, and some of their reasoning reflects a lack of clarity about the impact of different offender-related circumstances on the offender's moral culpability and probability of reform. The absence of normative coherence and procedural clarity, in the Supreme Court's capital sentencing jurisprudence, has resulted in sustained arbitrariness and judge-centric reasoning in the imposition of the death penalty. This data report confirms that the confusion in capital sentencing at the trial court is reflected in the Supreme Court as well. Further, the findings of this report suggest that inconsistencies at the Supreme Court trickle down and permeate capital sentencing in trial courts, contributing to the consistently high number of death sentences motivated by the gravity of the offence and public sentiment, with perfunctory reference to mitigating circumstances, if any at all. This can be attributed to the highest court's inability to adequately resolve doctrinal deviations from the ***Bachan Singh*** framework, and provide normative and procedural clarity for principled sentencing.

More recent developments at the Supreme Court in 2022 (after the period of study), indicate steps towards such a resolution. Certain benches of the

Supreme Court have increasingly acknowledged the breakdown of the ***Bachan Singh*** sentencing framework at trial courts, due to the complete absence or hollow consideration of mitigating circumstances, and have sought detailed mitigation information during the proceedings before them.[1] Confronted with grave lapses and inconsistencies in sentencing, a recent reference order in ***In Re: Framing Guidelines Regarding Potential Mitigating Circumstances***,[2] has called for a Constitution Bench to re-examine and articulate the contours of a real, effective and meaningful sentencing hearing for an accused convicted of a capital offence. This endeavour is likely to involve deeper engagement with questions of institutional capacity and the content of mitigation evidence to secure realisation of fairness in capital sentencing as envisaged by the ***Bachan Singh*** framework.

The Supreme Court, as the highest constitutional court, has a critical role to play in beginning to resolve the many lacunae and disparate threads in death penalty jurisprudence, and ensure due process in the administration of the death sentence. Unlike 1980, when the constitutionality of the death penalty under question in ***Bachan Singh***, today there is no longer a dearth of empirical evidence which might inform the judicial process of the fraught realities in the administration of the death sentence, as well as deeper faultlines in the criminal justice system. This report is an addition to this body of literature.

## ENDNOTES

**1** See National Law University Delhi, Annual Statistics Report 2021 (NLU Delhi 2022)

**2** Suo Moto Writ Petition (Crl) No. 1 of 2022

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