

# The Pakistan Capital Punishment Study

A Study of the Capital Jurisprudence of the Supreme Court  
of Pakistan



March 2019

# The Pakistan Capital Punishment Study: A Study of the Capital Jurisprudence of the Supreme Court of Pakistan

## About the Foundation for Fundamental Rights (FFR)

The Foundation for Fundamental Rights is an organisation of attorneys and socially active individuals working towards the advancement, protection and enforcement of fundamental human rights. We represent those who have been denied their rights to due process due to drone strikes in Waziristan, forced disappearances in the cities of Pakistan, and the excesses of the Pakistani state and foreign governments. For more information, please visit [www.rightsadvocacy.org](http://www.rightsadvocacy.org).

## About Reprieve

Reprieve is a non-profit that provides free legal and investigative support to some of the world's most vulnerable people: those facing execution, and those victimised by states' abusive counter-terror policies – rendition, torture, extrajudicial imprisonment and extrajudicial killing. For more information, please visit [www.reprieve.org.uk](http://www.reprieve.org.uk).

## THE PAKISTAN CAPITAL PUNISHMENT STUDY

### A Study of the Capital Jurisprudence of the Supreme Court of Pakistan

<b>Executive Summary</b> .....	<b>1</b>
<b>Introduction</b> .....	<b>3</b>
<b>Methodology</b> .....	<b>3</b>
<b>I. Miscarriages of Justice in the Lower Courts</b> .....	<b>5</b>
1. Supreme Court Jurisprudence: By the Numbers .....	5
2. Supreme Court Jurisprudence: Behind the Numbers .....	7
A. Lower Courts Rely on Unreliable Witness Testimony .....	8
B. Lower Courts Sentence Accused to Death Who Have Not Been Properly Identified .....	10
C. Lower Courts Impose Death Sentences Despite a Lack of Evidence .....	11
D. Lower Courts Rely on Evidence That Was Planted or Manipulated by Police .....	13
E. Lower Courts Arbitrarily Apply Death Sentences While Acquitting Co-accused on the Same Evidence .....	15
F. Lower Courts Impose Death Sentences Despite Prosecutors’ Failure to Establish “Intention, Guilty Mind or Motive” of the Accused.....	17
G. Lower Courts Rely on Confessions That Are Involuntary, Retracted or Obtained Using Improper Procedure .....	18
<b>II. Supreme Court – Setting Standards for Capital Sentencing</b> .....	<b>21</b>
1. The Supreme Court Has Limited the Death Penalty to the Most Serious Crimes .....	21
2. The Supreme Court Has Established a Presumption in Favour of Life Sentences Over the Death Penalty.....	23
3. The Supreme Court Does Not Uphold Death Sentences For Drug Offences .....	25
4. The Supreme Court Gives Weight to Mitigating Factors in Capital Cases .....	26
A. Type and Gravity of the Offence .....	27
B. Lesser Participation .....	28
C. Lack of Premeditation .....	28
D. Provocation.....	28
E. Social and Familial Circumstances.....	29
F. Partial Compromise with the Victim’s Family .....	29
G. Age of the Offender.....	29
H. Acting Under the Influence of an Elder .....	29
I. Mental State of the Accused .....	30
J. Capacity for Reform.....	30

K. Time Spent on Death Row .....	30
<b>III. Costs of a Broken System .....</b>	<b>33</b>
<b>IV. Conclusion and Recommendations .....</b>	<b>35</b>
<b>ANNEX 1: Quantitative Findings .....</b>	<b>37</b>
<b>ANNEX 2: Annual Death Sentences Awarded .....</b>	<b>37</b>
<b>References.....</b>	<b>38</b>

## Executive Summary

The Pakistan Capital Punishment Study is the result of a two-year long research and analysis project undertaken by lawyers and academics at the Foundation for Fundamental Rights ('FFR') in Pakistan and international legal non-profit organization, Reprieve.

In writing this study, experts at FFR and Reprieve conducted a qualitative and quantitative analysis of the capital jurisprudence emerging out of the Supreme Court of Pakistan ('the Supreme Court') from the years 2010 to 2018 inclusive.

The Pakistan Capital Punishment Study is divided into four sections.

Section I provides a detailed analysis of 310 Supreme Court capital judgments from 2010 - 2018, drawing out trends in Supreme Court judgments in capital cases. Section I.1 consists of a quantitative data analysis of the 310 Supreme Court capital judgments and Section I.2 provides a qualitative analysis of the reasons behind the findings in Section I.1 with some recommendations for reform. The analysis shows that the Supreme Court is either acquitting or commuting a large majority (73%) of the death penalty cases it reviews. The acquittal rate is 39%, meaning by projection that almost 2 in 5 death row inmates in Pakistan received unsafe convictions and may be innocent.

Section II provides a detailed analysis of the Supreme Court's approach to sentencing in capital cases, finding that the Supreme Court has limited the death penalty to the most serious crimes and has established a presumption in favour of life sentences over the death penalty. It also provides a summary of eleven of the most common mitigating factors that the Supreme Court considers when deciding to commute an inmate's death sentence to life or a term of years. The analysis reveals that lower courts are approaching capital cases in ways that are at odds with Supreme Court jurisprudence, such as by sentencing individuals to death for low level, non-lethal offences like drug offences.

Section III considers the costs of Pakistan's broken capital system to the individual, to society and to the State.

Finally, Section IV of the report provides conclusions and recommendations for reform to address the issues identified in the sections above.

The **main findings** of the study are as follows:

- In the 310 judgments reviewed between 2010 and 2018, the Supreme Court overturned death sentences in 78% of cases – either acquitting the accused, commuting the sentence, or ordering a review. From 2015 to the end of 2018, this increased to 83%. In 2018, the last year on record, the Supreme Court upheld the death penalty in only 3% of its reported capital cases, overturning the death sentence or ordering a review in 97% of capital cases.
- Between 2010 and 2018, 39% of the Supreme Court's reported judgments were acquittals. Thus nearly two in every five prisoners sentenced to death in the study were determined to have been wrongfully convicted and may be innocent of the crime for which they were convicted and sentenced to death. The average accused spends an average of 10 years under the Damoclean sword of a death sentence before having his case heard by the Supreme Court.
- Between 2010 and 2018, 35% of the Supreme Court's judgments resulted in commutations, and an additional 4% of the cases resulted in a review of the death sentence (a retrial, remand, or leave to appeal). This means that in 39% of cases, the Supreme Court decided that the original death sentence was unsafe.

### **Acquittals and Commutations:**

- In 70% of the acquittals, the Supreme Court cited unreliable witness testimony as a reason for overturning the death sentence handed down by the lower courts. The most common issues cited in the Supreme Court judgements for the acquittals were the lower courts' reliance on chance witnesses with no explanation for why they were at the scene of the crime (47% of all acquittals) and witnesses whose testimony contradicted the physical evidence (44% of all acquittals).
- In 74% of the acquittals, the Supreme Court found that the trial court had imposed a death sentence without sufficient evidence to prove the guilt of the accused.
- In 65% of the acquittals, the Supreme Court noted serious doubts about reliability of the police investigation. The most common issues with police investigations were evidence that appeared planted, manipulated, or otherwise doubtful (53% of all acquittals) and unexplained delays in registration of the First Information Report (32% of all acquittals).
- In 40% of the acquittals and 61% of the commutations, the Supreme Court overruled the lower courts' death sentence in part because the prosecution had failed to prove motive, intent, or guilty mind of the accused.
- In 28% of the acquittals, the Supreme Court held that lower courts had unjustly sentenced an accused to death while acquitting his co-accused on the same evidence.

### **Death Row Numbers:**

- The average prisoner spends 11 years on death row before execution.<sup>1</sup> Since the lifting of the moratorium, at least 13 prisoners have been executed after spending more than twenty years on death row—effectively being executed after already serving a de facto life sentence.
- The Supreme Court upholds death sentences only for lethal offences—every judgment dealing with a non-lethal offence ended with the Supreme Court overturning the conviction or commuting the death sentence. Despite this fact, lower courts continue to regularly impose death sentences for non-lethal offences, even to low-level drug mules.
- No death sentence for drug offences was upheld by the Supreme Court in the 310 reported judgments from the years 2010 - 2018.
- Recent official figures put Pakistan's death row population at 4,688. Extrapolating from the acquittals data from 2010 - 2018, some 39% of individuals on death row (some 1,828 individuals) could be found to be innocent of the crime for which they were sentenced to death if their cases reached the Supreme Court; extrapolating from the commutations and review data from 2010 - 2018, a further 39% or 1,828 individuals may have been given death sentences which would be found to be unsafe if their cases reached the Supreme Court.
- Death row prisoners spend on average 10 years waiting before their case reaches the Supreme Court. If, extrapolating from the data from 2010 - 2018, 74% of death sentences could ultimately be overturned by the Supreme Court (either through acquittal (39%) or commutation (35%)) this means that there could be as many as 3,469 prisoners who the Supreme Court would ultimately rule should not be on death row, but who may languish there for a decade before their cases reach the Supreme Court.



## Introduction

Pakistan has one of the world's largest death rows.<sup>2</sup> Recent official figures state that at least 4,688 prisoners are currently living under a sentence of death<sup>3</sup> in squalid, overcrowded conditions<sup>4</sup> and with the risk of 'accidental' execution where the Supreme Court has not yet decided their appeal. Typically, a prisoner waits for 10 years before his/her appeal is heard before the Supreme Court. Prisoners spend an average of 11 years on death row before being executed.<sup>5</sup>

Pakistan is the world's fifth most prolific executioner.<sup>6</sup> Since lifting its seven-year moratorium on capital punishment in December 2014, Pakistan has hanged more than 500 people, an average of two executions per week.<sup>7</sup> Between 2010 and 2018, over 2,788 people were sentenced to death by the trial courts—an average of over 300 people per year (Annex 2). These simple figures demonstrate that Pakistan's death row is likely to grow larger over the coming years, even with the current rate of executions.

According to FFR and Reprieve's study of the Supreme Court's jurisprudence, projecting from a large sample, nearly two in every five of the prisoners on death row may be innocent of the crimes for which they were convicted and sentenced to death, and nearly four out of every five will ultimately have their sentences overturned, commuted or reviewed.<sup>8</sup>

The Supreme Court jurisprudence reveals that trial courts repeatedly fail to follow the law and guidance established by the Supreme Court. As this study reveals, trial courts sentence defendants to death based on inadequate evidence that does not establish guilt beyond a reasonable doubt,<sup>9</sup> ignore mitigating evidence which should counsel against a death sentence<sup>10</sup> and follow outdated precedent rather than the Supreme Court's recent jurisprudence.<sup>11</sup>

These systemic flaws result in tragic and irreversible injustice: at least three individuals have been executed while their appeals were still pending, two of whom were eventually acquitted of all charges.<sup>12</sup> Others have died while awaiting appeals through which they were eventually acquitted,<sup>13</sup> and many have languished on death row for over a decade before finally being freed by the Supreme Court.<sup>14</sup>

When nearly four out of five cases that reach the Supreme Court are deeply flawed, it is safe to say that the current trial practice is broken – and is wasting an enormous amount of judicial energy and creating a large burden on the criminal justice system.

## Methodology

FFR and Reprieve reviewed 310 reported capital judgments of the Supreme Court of Pakistan between 2010 and 2018. These judgments were identified using the indexes of the following four law journals: *Pakistan Legal Decisions*, *Supreme Court Monthly Review*, *Pakistan Criminal Law Journal* and *Monthly Law Digest* for the years 2010 - 2018. Each publication includes an index that lists each case by the statutory provisions it references. Researchers used the indexes to identify each Supreme Court case in which a death-eligible statutory provision was involved.

For each of the cases thus identified, researchers read the case to identify whether the death penalty was ever applied to the accused, whether at the trial court or on appeal to the High Court or Supreme Court. Through this process, 310 cases were identified in which the accused had been sentenced to the death penalty at some stage of the proceedings. Each case was analysed, and researchers captured the number and names of accused, the criminal offence charged, the various courts involved and their rulings at each stage of the case, the broad reasons for the Supreme Court's decision, the verdicts for co-accused who were tried separately and, where available, the period of time each prisoner spent in

detention before his Supreme Court appeal. In judgments concerning more than one accused, the verdict for each accused was recorded as a separate data point.

Of these 310 judgments, researchers completed a further in-depth qualitative case review of 127 judgments which were handed down during 2015 – 2018, after Pakistan resumed executions in December 2014. These 127 judgments were grouped by verdict—acquittal, commutation or confirmation of a death sentence—and a fixed set of indicators was applied to analyse the reasoning behind the Supreme Court’s decisions in each group accordingly.

The approach allowed researchers to develop statistics on the Supreme Court’s capital jurisprudence over the course of eight years while identifying the points of law that led to each outcome, thereby mapping pervasive trends in the Supreme Court’s reasoning over time. A summary of the data, showing how often the Supreme Court handed down an acquittal, commuted a death sentence, ordered a case review, or upheld a death sentence in its reported cases over the years covered in the Study is provided in Annex 1.



## I. Miscarriages of Justice in the Lower Courts

“*Both the trial court and High Court disregarded . . . important aspects of the case and ignored the basic tenet of criminal law, which is to establish the guilt of the accused beyond a reasonable doubt.*

Justice Qazi Faez Isa, *Ali Sher v. the State* (2015 SCMR 142)

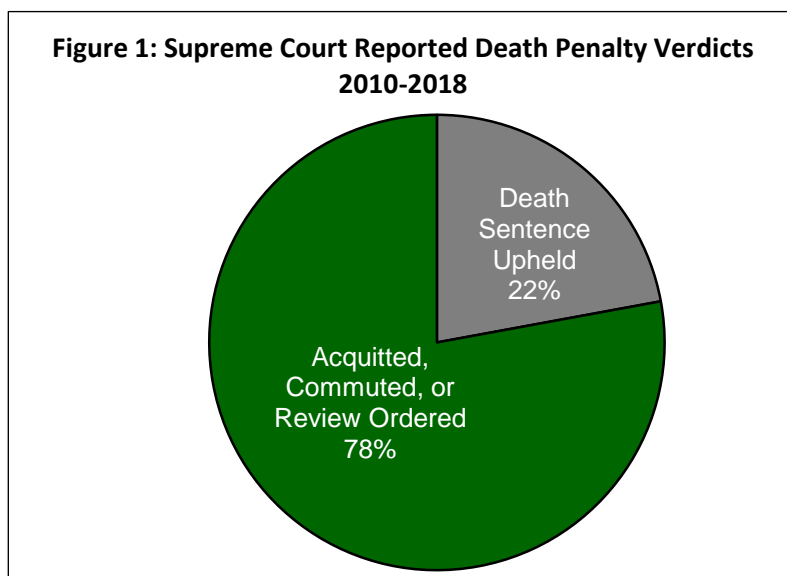
The Supreme Court of Pakistan does not overrule decisions by the lower courts lightly. In a 1973 judgment, Justice Hamoodur Rahman stated “As an ultimate Court, we must give due weight and consideration to the opinions of the courts below, and normally we should not interfere with their findings where we are satisfied that they are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence.”<sup>15</sup> Consequently, the Supreme Court only interferes with a lower ruling where it finds “some serious defect in the process by which the finding has been arrived at.”<sup>16</sup>

It is striking, therefore, that in 78% of the cases reviewed as part of the Study, the Supreme Court has been forced to ‘correct’ errors made by the lower courts, either by acquitting the death row prisoner or by commuting or ordering a review of his death sentence (see Annex 1).

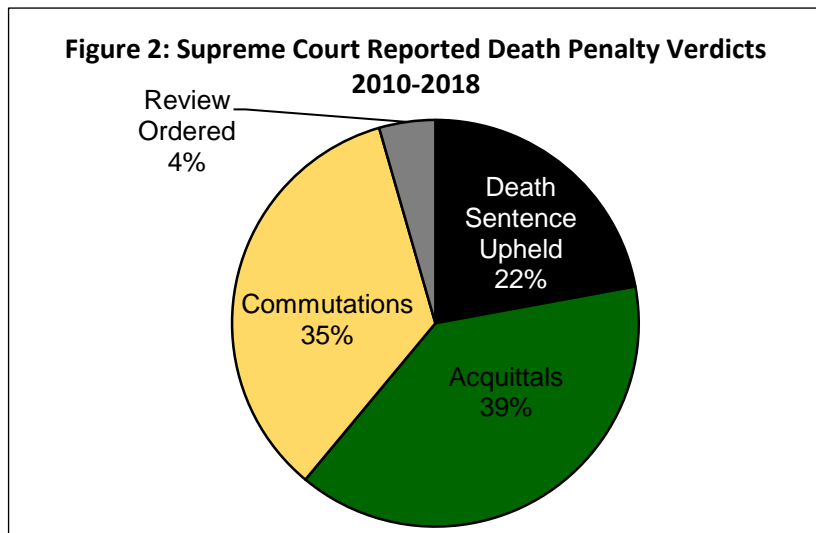
The first part of this Section will summarise the findings from the review of these judgements; the second will explore the reasons behind these findings.

### 1. Supreme Court Jurisprudence: By the Numbers

In the nine years from 2010 to 2018, the Supreme Court upheld death sentences in just 22% of its 310 reported cases. In 78% of cases, the Supreme Court ordered that the accused be acquitted, or that his death sentence be commuted or reviewed (**Figure 1**).<sup>17</sup>

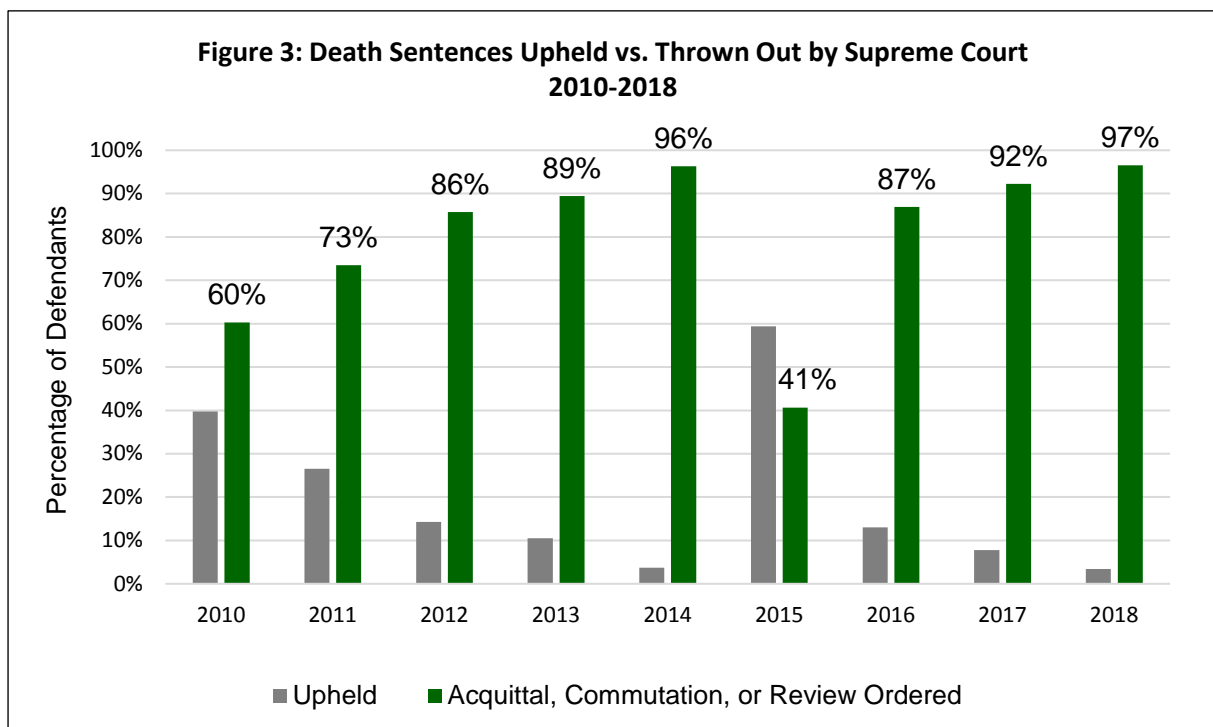


The analysis of the Supreme Court jurisprudence suggests that 78% of death sentences handed down by the trial courts are viewed as unsafe by the Supreme Court. In 39% of cases, the Supreme Court acquits the accused; in 35% of cases, the Supreme Court commutes the death sentence; in 4% of cases the Supreme Court orders a review of the death sentence (**Figure 2**).<sup>18</sup>



Recent official figures put the country’s death row population at 4,688.<sup>19</sup> Based on the results of this study, if all of these individuals’ cases were to reach the Supreme Court, as many as 3,657 individuals (nearly four out of every five prisoners) on death row would be acquitted or have their death sentences commuted or reviewed. If the Supreme Court acquits on average in 39% of cases, then as many as 1,828 prisoners on Pakistan’s death row could be innocent of the crime for which they were convicted and sentenced to death.<sup>20</sup>

In the four years since the lifting of the moratorium on the death penalty in December 2014, the rate at which the Supreme Court upholds death sentences in its jurisprudence has fallen dramatically. In 2015, the Supreme Court upheld 59% of death sentences; in 2016, only 13% were upheld; and by 2018, the Supreme Court upheld just 3% (**Figure 3**). In the same period, over 500 executions were carried out.



## 2. Supreme Court Jurisprudence: Behind the Numbers

Detailed analysis of the Supreme Court's capital jurisprudence revealed systemic procedural flaws in the handling of capital cases by lower courts that rendered 78% of the convictions and death sentences that the Supreme Court reviewed unsafe.

The Supreme Court acquitted the accused in 39% of the cases reviewed. In 30% of those acquittal cases, the acquittal was on the grounds that the prosecution failed to prove its case beyond a reasonable doubt. In 14% of cases, the Supreme Court explicitly commented on the 'grave miscarriage of justice' done to the accused.<sup>21</sup>

A detailed analysis of the Supreme Court reported judgements from 2015 to 2018 reveals that there are serious evidential failings behind the miscarriages of justice at the lower court level that lead the Supreme Court to either acquit the accused or commute or order a review of his/her death sentence upon receiving the case, including:

- A. Reliance on unreliable witness testimony;
- B. Sentencing an accused to death who has not been properly identified;
- C. Application of death sentences despite a lack of evidence;
- D. Reliance on evidence that was planted or manipulated by corrupt police officers;
- E. Arbitrary application of a death sentence for one accused while acquitting co-accused on the same evidence;
- F. Conviction despite prosecution failure to establish "intention, guilty mind or motive" of the accused; and
- G. Reliance by the lower courts on confessions which were involuntary, retracted or obtained using improper procedure.

### **Case study: Executing innocent prisoners**

Systematic flaws in the criminal justice system produce high rates of wrongful convictions and death sentences for innocent people, many of whom spend more than a decade on death row before being offered a chance of exoneration.<sup>22</sup>

The Ghulam brothers, Qadir and Sarwar, were convicted of murder by a trial court in 2002. 14 years later, the brothers were acquitted by the Supreme Court. The Justices found serious discrepancies in the eyewitness testimony and ruled the prosecution had failed to provide adequate evidence to prove its case against the brothers.<sup>23</sup>

When authorities sought out the brothers to release them from detention, they found that they were too late. The brothers had already been executed: hanged a year earlier, while their appeal was still pending.<sup>24</sup> The brothers' state-appointed lawyer had not been informed of their executions until after the belated acquittal.<sup>25</sup> The Human Rights Commission of Pakistan called the execution of the Ghulam brothers "a stark reminder of the criminal neglect of the justice system."<sup>26</sup> Their case demonstrates the systemic flaws that cause innocent individuals to face execution, for whom the Supreme Court appeal comes too late to rectify a grave miscarriage of justice. Shockingly, this was not even the first instance of such a premature execution. In 2006, a man was executed despite the fact that a stay of execution had been issued by the Supreme Court while his appeal was pending.<sup>27</sup> Due to negligence in the registrar's office, the suspension was never transmitted to the jail.<sup>28</sup>

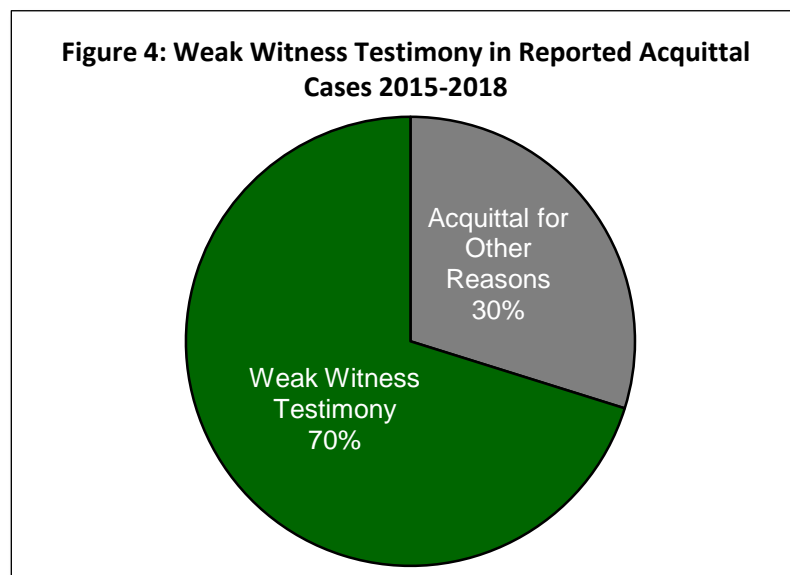
## A. Lower Courts Rely on Unreliable Witness Testimony

“*[T]he conviction of the appellant on the quality and standard of [this] evidence becomes unjustified and unwarranted in law, thus, has certainly caused a miscarriage of justice.*

Justice Dost Muhammad Khan *Shugra Begum v. Qaiser Pervez* (2015 SCMR 1142)

The Supreme Court’s most serious criticisms of proceedings in the lower courts arise from reliance on dubious eye witness testimony, especially where that testimony is not corroborated by independent physical evidence. In 70% of the cases where the Supreme Court acquitted the accused, the reason for the acquittal was that the lower courts wrongly relied on weak witness testimony (**Figure 4**).

The Supreme Court has described its role in capital cases as “sifting the grains from the chaff” or, in the words of Justice Ejaz Afzal Khan, the Supreme Court has a duty to separate “the lies, distortions and half-truths” from reliable evidence in capital trials.<sup>29</sup>



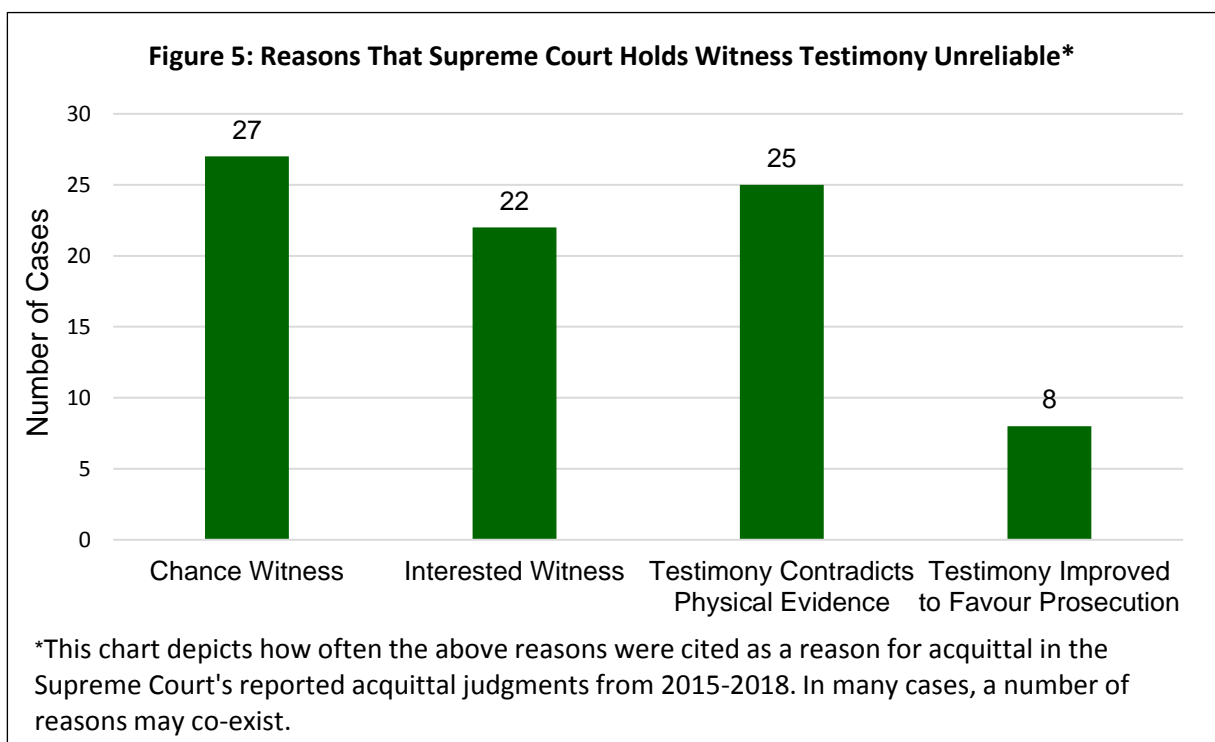
The Supreme Court’s judgments have clearly established that witness testimony must be scrutinized. If a witness is shown to have an interest in the case or cannot prove their reason for being present at the scene of the crime, the Supreme Court demands particularly strong corroborating evidence before upholding a death sentence.<sup>30</sup>

For example, in the case of *Qasir Pervez v. the State*, the trial court relied heavily on witness testimony to convict and sentence the accused to death. The Supreme Court, however, threw out the conviction because “the witnesses were found false while deposing on oath taken to tell the truth. . . . [B]eing false witnesses, they cannot be safely relied upon without strong corroboration, which is absolutely missing in the present case”.<sup>31</sup>

In another judgment, the Supreme Court chided the High Court for placing “reliance on [witness] testimony without judicial care and caution, which has resulted into miscarriage of justice” because the prosecution had “miserably failed to prove the presence of the eye-witnesses on the crime spot at the fateful time”.<sup>32</sup>

Detailed analysis of the Supreme Court’s reasoning in the reported acquittal judgments from 2015 - 2018 indicates that the Supreme Court most often has to acquit the accused because of four frequent issues concerning witness testimony (**Figure 5**). These issues are as follows:

- The witness testimony is not corroborated by, or even directly contradicts, the physical evidence;<sup>33</sup>
- There is no proof that the witness was present at the crime scene at the relevant time and there was no reason for the witness to be there (deemed a ‘chance witness’);<sup>34</sup>
- The witness has altered his or her testimony throughout the course of the investigation and trial to make ‘false improvements’ in favour of the prosecution’s case;<sup>35</sup> or
- The witness testimony was credited by the lower court despite the witness having a serious conflict of interest with the accused or another interest in the case.<sup>36</sup>



In its jurisprudence, the Supreme Court repeatedly stresses that eye witness accounts should be supported by independent corroborating evidence, particularly where witnesses could be subject to personal bias or have improved their account of the crime since their initial statement in a way that favours the prosecution.<sup>37</sup> For example, in *Irfan Ali v. the State*, Justice Dost Muhammad Khan found that to “award capital punishment in a murder crime it is imperative for prosecution to lead unimpeachable evidence of a first degree, which ordinarily must get strong corroboration from other independent evidence if the witnesses are interested or inimical towards the accused.”<sup>38</sup>

The Supreme Court regularly overturns lower court convictions for having relied on witness testimony that was contradicted by physical evidence — 44% of the acquittal judgments raised this issue. In the judgments reviewed, the Supreme Court was rarely satisfied with the lack of corroborating evidence presented in the lower courts. For example, the Supreme Court commonly discredits witnesses testifying that the accused shot the victim from far away when the post-mortem showed burning and other clear signs of shooting from a close range,<sup>39</sup> or witnesses testifying that the accused inflicted injuries which, according to the post-mortem, never occurred.<sup>40</sup> In other cases, lower court decisions are overturned for relying on suspicious and unreliable evidence which appears to be the product of

police corruption.<sup>41</sup> In *Mst. Sughra Begum v. Qaiser Pervez*, the Justices found that the prosecution's witnesses not only had a vested interest in seeing the accused convicted, but that "their testimony [was] not corroborated by a single shred of evidence".<sup>42</sup> The Supreme Court held that "being false witnesses, they cannot be safely relied upon without strong corroboration."<sup>43</sup> While Mr. Qaiser's co-accused had been acquitted at the trial stage, Mr. Qaiser himself served almost 12 years in prison before finally being acquitted by the Supreme Court.<sup>44</sup>

Despite the trends and guidance issued by the Supreme Court, lower courts continue to impose death sentences based on witness testimony that the Supreme Court later finds is not corroborated, inconsistent, potentially biased or simply false. Thus, the Supreme Court itself is forced to review witness testimony and decide issues of credibility and corroboration, taking on the duties of a trial court and leaving the accused to languish on death row for upwards of a decade before receiving meaningful justice.<sup>45</sup>

### Recommendation

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth).

### B. Lower Courts Sentence Accused to Death Who Have Not Been Properly Identified

The death penalty is the most severe punishment that a court can prescribe and executions are irreversible. Thus, in capital cases, proper identification of the accused is paramount. The evidence must prove to the trial judge that the accused standing before him is the one who committed the capital crime before a death sentence can be handed down. In one in six of the judgments where an acquittal was ordered, the Supreme Court found that the trial court had sentenced an accused to death despite his not having been properly identified as the culprit who caused the fatal injury.<sup>46</sup> Lower courts frequently convict and sentence an accused to death on the basis of an identification parade that did not follow the proper procedure or in circumstances where the accused was not shown to be the gunman.

In one out of 11 acquittal cases from 2015 - 2018, the Supreme Court found that the lower courts had sentenced an accused to death by relying on an identification parade that did not follow the proper procedures, meaning the accused spent years languishing on death row despite never even being properly identified as the guilty party.<sup>47</sup> In *Haider Ali v. the State*, the Supreme Court acquitted an accused who had been convicted based on an identification parade which took place more than a year after the alleged murder and was not attended by any eyewitness identified in the First Information Report (FIR), noting that "it was unbelievable that witnesses who had a fleeting look at the assailants would still be able to identify them"<sup>48</sup> after so much time. In another case, the trial court convicted two co-accused based on a joint identification parade which identified both of them,<sup>49</sup> despite the Supreme Court having clearly established since 1981 that joint identification parades are not admissible.<sup>50</sup>

## Recommendations

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth).
2. The processes by which eye witnesses identify suspects must be reviewed to bring these in line with best practice.

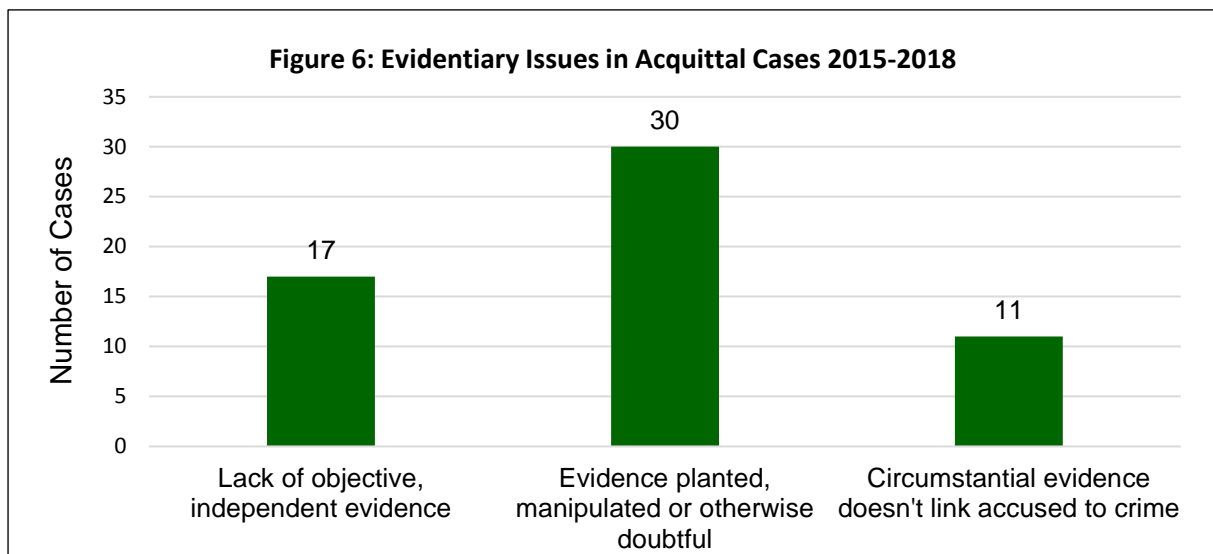
### C. Lower Courts Impose Death Sentences Despite a Lack of Evidence

“  
*It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character. . . . The principle of law, consistently laid down by this Court, is that different pieces of such evidence have to make one chain, an unbroken one where one end of it touches the dead body and the other the neck of the accused. In case of any missing link in the chain, the whole chain is broken and no conviction can be recorded in crimes entailing capital punishment.*

Justice Dost Muhammad Khan  
*Azeem Khan v. Mujahid Khan (2016 SCMR 274)*

”

In a staggering 74% of its reported acquittal judgments from 2015 - 2018, the Supreme Court found that there had been insufficient evidence presented in the case to justify a death sentence.<sup>51</sup> In these cases, the Supreme Court acquitted the accused because of one of the following evidentiary issues: a lack of objective, independent evidence; evidence that was planted, manipulated, or otherwise doubtful; and/or insufficient circumstantial evidence to link the accused to the crime (**Figure 6**).





While Supreme Court jurisprudence allows for the accused to be linked to the crime by circumstantial evidence, the evidentiary threshold is very high. As held in the cases of *Muhammad Aslam v. the State*<sup>52</sup> and *Ch. Barkat Ali v. Major Karam Elahi Zia*,<sup>53</sup> when the prosecution's case is based on circumstantial evidence, the various "pieces of such evidence have to make one chain, an unbroken one where one end of it touches the dead body and the other the neck of the accused. In case of any missing link in the chain, the whole chain is broken and no conviction can be recorded in crimes entailing capital punishment."<sup>54</sup> This principle is consistent with the law in India, where the death penalty can only be applied based on circumstantial evidence in exceptional cases.<sup>55</sup> The Indian Supreme Court consistently commutes death sentences to life imprisonment when the conviction was based solely on circumstantial evidence.<sup>56</sup>

Despite more than 25 years since this precedent was established, lower courts today still hand down death sentences based on 'broken chains' of circumstantial evidence.<sup>57</sup> For example, in *Hashim Qasim v. the State*, a 16 year old accused was sentenced to death based on circumstantial evidence which the Supreme Court found to be "cryptic, infirm in nature and substance, [and] deserv[ing] outright rejection."<sup>58</sup> The Supreme Court held that the circumstantial evidence did not adequately link the accused to the crime and acquitted him—after the juvenile had already spent more than ten years on death row. In another case, Justice Dost Muhammad Khan explicitly criticized the lower courts' reliance on incomplete circumstantial evidence, stating that:

*Both the learned Trial Judge and the learned Division Bench of the High Court in the impugned judgment have not observed, nor have taken care of these guiding and leading principles universally accepted and have at random relied on highly cryptic, infirm and incredible evidence, resulting into miscarriage of justice.*<sup>59</sup>

In 30% of the acquittals reviewed, lower courts had applied a death sentence despite there being insufficient physical evidence to support the conviction.<sup>60</sup> Trial courts commonly sentence an accused to death based on unreliable evidence relating to weapons. Analysis of the Supreme Court's acquittal jurisprudence from 2015 - 2018 revealed that lower courts frequently credit a weapon recovered from the accused as evidence of his guilt despite the fact that there is nothing to prove that the weapon was the one used in the crime.<sup>61</sup> In several cases, the Supreme Court acquitted an accused noting that the recovery of a weapon from his possession was legally inconsequential because no crime empty (i.e. a discharged bullet casing from the scene of the crime) was ever recovered<sup>62</sup> or because the supposed empties were recovered months after the alleged crime.<sup>63</sup>

The frequency with which the Supreme Court must throw out the exact same evidence demonstrates not only that lower courts are not following well-established precedent, but that police are not trained to conduct thorough and reliable investigations. These errors reveal that the trial courts are unaware of both the importance of evidence relating to weapons, and how it should be treated.

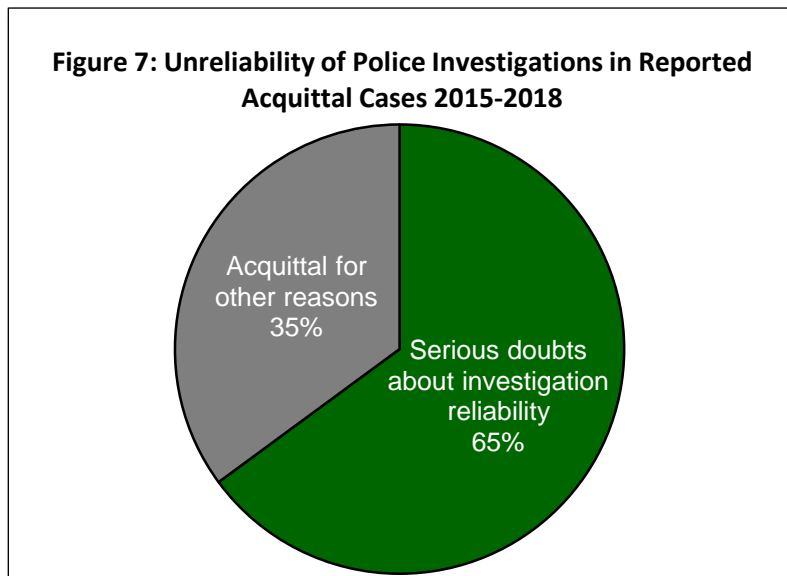
### Recommendations

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth).

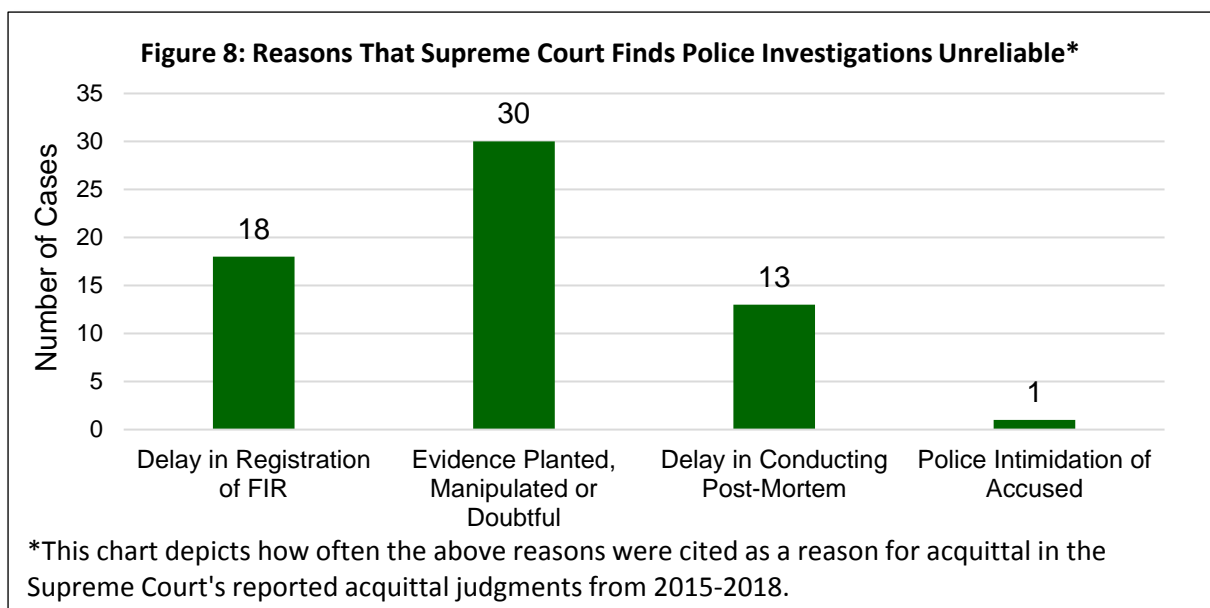
2. The process of evidence collection in all criminal cases must be reviewed and improved in line with best practice, including through the use of modern technology.

#### D. Lower Courts Rely on Evidence That Was Planted or Manipulated by Police

In 65% of acquittal judgments reviewed, the Supreme Court identified some form of “police chicanery”<sup>64</sup> which cast serious doubts on the reliability of the police investigation (**Figure 7**). In these judgments, the Supreme Court explicitly stated its belief that certain evidence had been planted or manipulated by investigating agencies.



In several cases, the Supreme Court flagged that evidence mentioned in the FIR later disappeared or was not produced at trial,<sup>65</sup> or that evidence that had no clear connection to the crime was represented as a crucial piece of evidence by the prosecution and police.<sup>66</sup> Other concerns raised by the Supreme Court include identification parades that fail to follow proper procedure<sup>67</sup> and witnesses who seem to have been “planted” at the scene.<sup>68</sup>



Irregularities which the Supreme Court finds indicative of police misconduct take several forms, such as an unexplained delay in registering the FIR of the crime<sup>69</sup> or in conducting the post-mortem (**Figure 8**).<sup>70</sup> The Supreme Court considers such unexplained delays to be indicators that “the FIR was drawn up after due deliberation and consultation”<sup>71</sup> between police and witnesses, rather than being an honest account of the alleged crime.

In cases where the Supreme Court identified signs of police corruption in the course of the criminal investigation, it overwhelmingly found the evidence insufficient to prove the accused guilty beyond a reasonable doubt and thus acquitted on all charges.

“*Where the circumstances are tinkered and tampered with, or contrived and conjured up they cannot be accepted*”.

Justice Ejaz Afzal Khan  
(2016 SCMR 1144)

“*...it appears that time has been consumed by the complainant party and the local police in procuring and planting eyewitnesses and in cooking up a story for the prosecution.*”

Justice Asif Saeed Khan Khosa  
(2016 SCMR 1763)

The frequent references to suspicious and untrustworthy evidence make clear that the Supreme Court itself recognizes the prevalence of corruption and falsity in police investigations. The Supreme Court has described police investigations and the resulting evidence as being “absolutely doubtful,”<sup>72</sup> and “dishonestly conducted.”<sup>73</sup> For example, in a case involving a night time murder, Justice Dost noted that the testimony of the apparent eye-witnesses was a “fantastic story which appears to be the hand-art of the local police because in a night occurrence of this nature, remaining un-witnessed, the police imprudently indulge in such like tactics to mislead the Supreme Court of law and justice.”<sup>74</sup> In another case in which the victim’s post-mortem was delayed without explanation, current Chief Justice of Pakistan (CJP) Khosa explicitly criticized the behaviour of the police, stating that “it appears that time had been consumed by the complainant party and the local police in procuring and planting eyewitnesses and in cooking up a story for the prosecution.”<sup>75</sup>

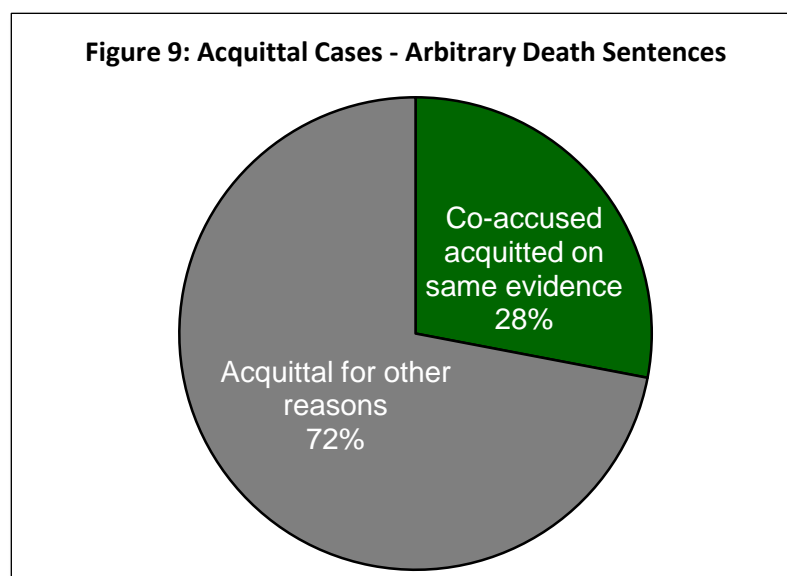
In this context, CJP Khosa has repeatedly warned lower courts to watch for “the trap of being deliberately misled into a false inference” by investigating agencies, since “failure to observe care and caution would be a failure of justice.”<sup>76</sup> CJP Khosa has warned courts that “when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Supreme Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out.”<sup>77</sup> Yet despite the Supreme Court’s acknowledgment of frequent police corruption,<sup>78</sup> no further action is taken to sanction the responsible officers.

## Recommendations

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth).
2. Independent and evidence-based investigations by the police must be encouraged by:
  - Instituting a taskforce to review the independence of the police and the prosecutorial process, with particularly careful examination of the role that the First Information Report plays in the criminal justice system;
  - Increasing police salaries; and
  - Introducing an independent disciplinary process to prevent and identify police corruption.

### E. Lower Courts Arbitrarily Apply Death Sentences While Acquitting Co-accused on the Same Evidence

It is a fundamental principal that the law should not be arbitrary, but the Supreme Court's acquittal jurisprudence demonstrates that trial court decisions are often tainted by arbitrariness.



The Supreme Court held in 28% of its acquittal jurisprudence from 2015 - 2018 that trial courts erred by sentencing an accused to death while acquitting his co-accused on the very same evidence (**Figure 9**).<sup>79</sup> Such practice reveals failures in both lower courts' decision-making and police investigation tactics. The Supreme Court itself has recognised that:

*It is customary . . . to throw a wide net of implication to rope in all those who could possibly pursue the case or do something to save the skin of the one who is innocent or who is actually responsible for commission of the crime. The Court, therefore, is required to exercise much greater care and circumspection while appraising evidence.<sup>80</sup>*

Irrespective of clear directions from the Supreme Court to exercise due care and caution, trial courts often hand down death sentences to an accused based on eyewitness testimony, notwithstanding the fact that the same witness was disbelieved in the cases of a co-accused. This is contrary to established jurisprudence of the Supreme Court.<sup>81</sup>

In *Sardar Bibi v. Munir Ahmed*, for example, an eyewitness gave testimony that five co-accused had together killed the victim by decapitation.<sup>82</sup> Two of the accused were acquitted by the trial court in the face of this testimony while a third was acquitted by the High Court.<sup>83</sup> Inexplicably, the death sentences imposed upon the final two co-accused were confirmed by the High Court.<sup>84</sup> Justice Sardar Tariq Masood wrote that:

*This court had already settled the law on the point that if the eye-witnesses produced by the prosecution are disbelieved to the extent of some accused person attributed effective role, then the said eye-witnesses cannot be relied upon for the purpose of convicting another accused person attributed a similar role, without availability of independent corroboration to the extent of such other person.*<sup>85</sup>

Moreover, in some cases the accused who receives a death sentence while others are acquitted on the same evidence is actually alleged to have played a *lesser* role in the offence than those who were acquitted.<sup>86</sup>

These cases demonstrate the arbitrary nature with which the death penalty is applied in Pakistan's lower courts. While some accused are acquitted, others spend years or even decades languishing on death row on the same evidence. This record of inconsistency suggests that courts may be reacting to pressure to convict at least one of many co-accused, even where the evidentiary burden has clearly not been satisfied.

#### **Case study: Mazhar Farooq**

Mazhar was 19 years old when he was convicted of murder and sentenced to death after a trial riddled with evidentiary irregularities and misconduct by investigating agencies.<sup>87</sup> 24 years later, the Supreme Court acquitted him of all charges.

In its ruling, the Supreme Court expressed alarm that Mazhar had been convicted despite fundamental discrepancies between eye witness testimony and medical evidence in the case, particularly as these inconsistencies had resulted in the acquittal of a co-accused who had been tried on the same evidence.<sup>88</sup>

In addition, the Court found that information in the police report had been falsified by investigating officers in order to implicate Mazhar, and that the gun allegedly recovered from Mazhar did not match the shell casings collected at the scene of the crime.<sup>89</sup>

The Court held that the prosecution had entirely failed to prove its case beyond a reasonable doubt and that Mazhar should never have been convicted.<sup>90</sup>

Mazhar was a teenager when he was first arrested, but emerged from death row a middle-aged man. Denied the opportunity to build a career and contribute to his society and community, Mazhar became a financial burden on his family, which had already sold much of its property to pay for Mazhar's legal fees.<sup>91</sup>

## Recommendations

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth).
2. Independent and evidence-based investigations by the police must be encouraged by instituting a taskforce to review the independence of the police and the prosecutorial process, with particularly careful examination of the role that the First Information Report plays in the criminal justice system.

### F. Lower Courts Impose Death Sentences Despite Prosecutors' Failure to Establish "Intention, Guilty Mind or Motive" of the Accused

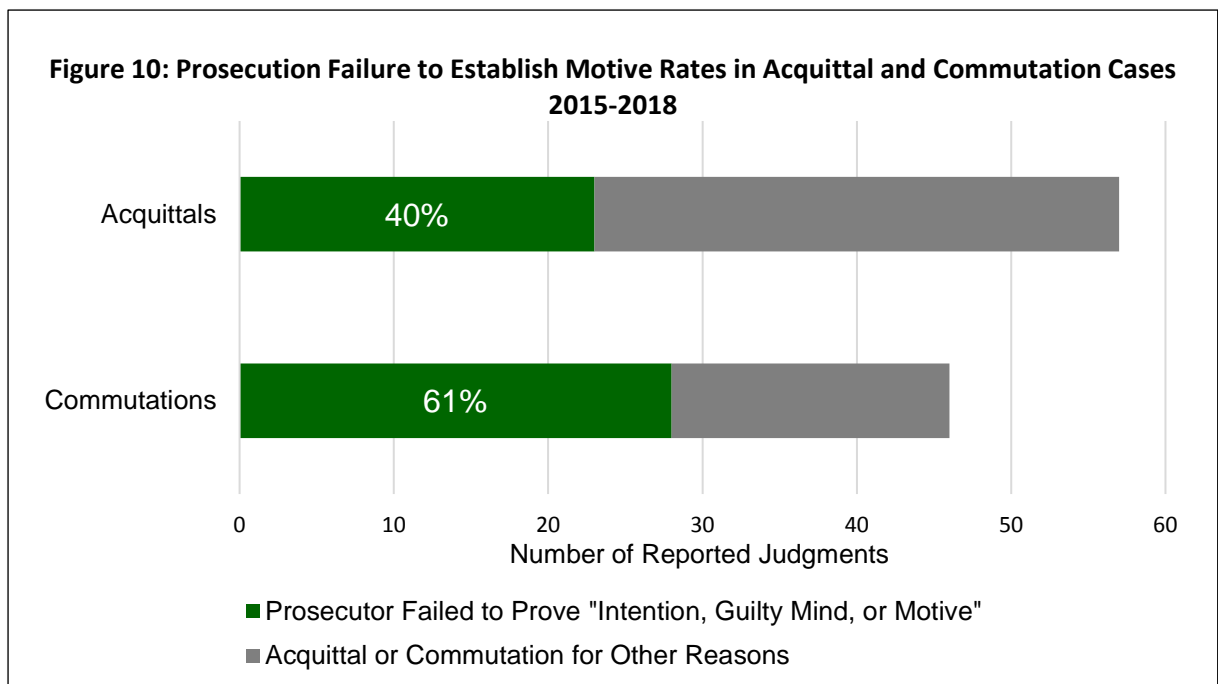
“*The accused's intention, guilty mind or motive to commit the [offence] remains shrouded in mystery and is therefore unproven. In such like cases where the motive is not proved or is not alleged by the prosecution, the Supreme Court for the sake of administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict.*

Justice Ejaz Afzal Khan, *Amjad Shah v. the State* (PLD 2017 SC 152)

The Supreme Court has made clear that if the prosecution alleges a motive for the crime but fails to prove that motive beyond a reasonable doubt, the accused cannot be sentenced to death.<sup>92</sup>

Justice Tariq Parvez has written that “Motive is always very relevant to determine the quantum of sentences that might be awarded to a person against whom charge of murder is proved” and that “[as] motive is so basic and relevant for the commission of the crime, it would definitely have bearing in every case while determining the quantum of sentence.”<sup>93</sup>

Lack of criminal intent remains one of the significant causes of the Supreme Court's high rates of both acquittals and commutations in recent years. The review of the cases from 2015 to 2018 shows that in 40% of acquittals and 61% of commutations, the Supreme Court found the prosecution had failed to establish the basic “*intention, guilty mind or motive*” of the accused (**Figure 10**).<sup>94</sup>



In 13% of commutation cases, the absence of a clear motive on the part of the accused formed the sole reason the Supreme Court rejected the capital sentence.<sup>95</sup> In around half of all the acquittal and commutation cases reviewed, a failure to prove “intention, guilty mind, or motive” was one of the reasons that the Supreme Court gave to overturn the death sentence. This is consistent with practice in other Commonwealth countries retaining the death penalty, where courts have held that capital punishment is only appropriate when the motive for a lethal crime is proven to demonstrate total depravity<sup>96</sup> or to be so heinous as to cause a deep sense of abhorrence and condemnation in society.<sup>97</sup>

### Recommendations

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth)
2. Standards in the trial and High Courts must be improved by providing specific judicial training on the burden of proof in relation to motive and intent.

### G. Lower Courts Rely on Confessions That Are Involuntary, Retracted or Obtained Using Improper Procedure

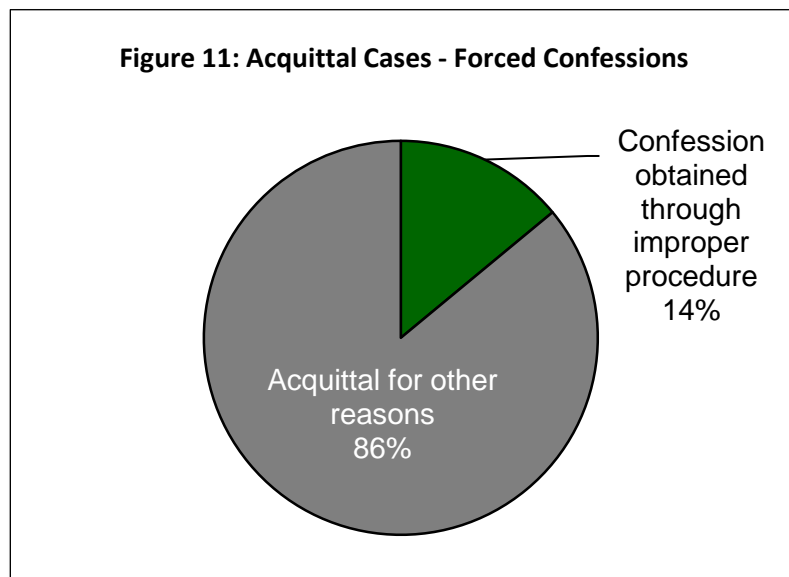
Pakistan’s law of criminal procedure lays out strict rules governing how police can legally obtain a voluntary confession that can be admissible evidence in court.<sup>98</sup> The law provides that confessions must be made before a Magistrate.<sup>99</sup> The Magistrate must inform the accused that he is not bound to confess, and must only record the confession if he or she is satisfied that it is voluntary.<sup>100</sup> Any



confession must be recorded, shown or read to the accused, and signed by both the accused and the Magistrate.<sup>101</sup>

Despite this statutory authority, the Supreme Court routinely finds that convictions from lower courts are based on confessions which have been obtained in contravention of due process.

In 14% of reported cases where the Supreme Court acquitted the accused, the Supreme Court found a confession relied upon by the lower courts was involuntary, retracted or obtained using improper procedure (**Figure 11**).<sup>102</sup>



In *Muhammad Ismail v. the State*, the Supreme Court found a confession “absolutely inadmissible in evidence” because it was obtained without regard to due process of law. While there was sufficient evidence to uphold the conviction, the Supreme Court commuted the death sentence “in the interest of safe administration of justice” in part because both the trial court and High Court “heavily relied upon the so called confession of the appellant, which is not at all a confession under the law.”<sup>103</sup> By the time the Supreme Court corrected the lower courts’ actions by removing the death sentence, the accused had already spent 11 years in a death cell.<sup>104</sup>

In a number of other cases, the Supreme Court suggested that a confession was procured through police malfeasance. In *Dully v. the State*, the Supreme Court found the submitted confession “entirely insufficient to carry conviction” on a capital charge, “more so, when it is [a] badly tainted one and appears to be the job of the investigating officers who normally indulge in such police chicanery.”<sup>105</sup>

Even those confessions which are given in the presence of a Magistrate are sometimes held inadmissible by the Supreme Court because the Magistrate himself failed to comply with statutory procedure.<sup>106</sup> In one such case, the Supreme Court commented that the Magistrate had committed “successive illegalities” that allowed the investigating agency to intimidate the accused in the lead-up to his confession.<sup>107</sup> Such unlawful practices, the Supreme Court found, result in grave miscarriages of justice and may be grounds for acquittal.<sup>108</sup> In this case, the co-accused Mujahid Khan and Arbab Khan had already spent nine years in death cells based on the illegal confession before they were acquitted and freed by the Supreme Court.<sup>109</sup>

The jurisprudence of the Supreme Court makes it clear that statutory procedures regarding admissibility of confessions must be strictly complied with in capital cases. Anything less creates an

unacceptable risk of unsafe convictions. While the Supreme Court repeatedly discards confessions tainted by police malfeasance or Magistrate errors, the jurisprudence shows that such confessions remain common in the lower courts.

### Recommendations

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth)
2. Improve standards in the trial and High Courts by providing specific judicial training on the statutory and case law relating to admissibility of confessions.

## II. Supreme Court – Setting Standards for Capital Sentencing

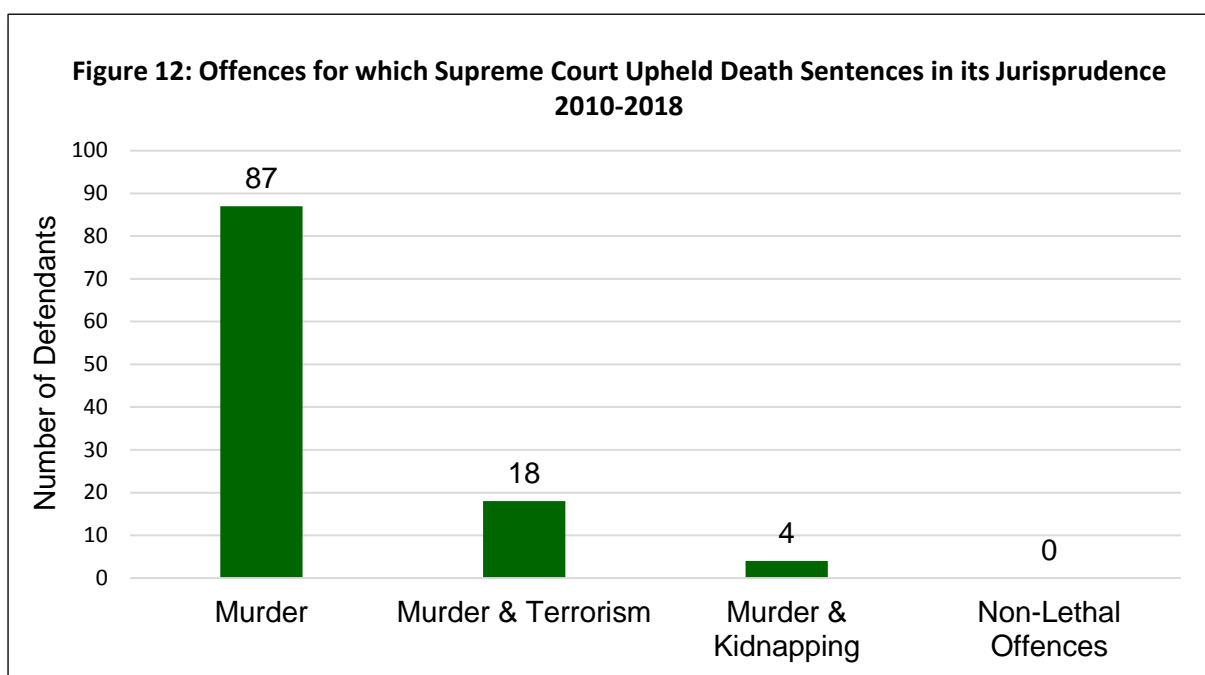
Over the last decade, the Supreme Court has established the principle that the death penalty should only be applied in exceptional circumstances. In its jurisprudence, the Supreme Court upholds death sentences only for offences which cause death and involve exacerbating circumstances. The Supreme Court has adopted a consistent, principled approach when exercising its discretion in relation to capital sentencing — if exacerbating circumstances are not present, the lower court’s death sentence must be thrown out. Between 2010 and 2018, the Supreme Court did not report a single judgment upholding a death sentence for a non-lethal offence.

The Supreme Court jurisprudence has furthermore established a presumption in favour of life imprisonment over death sentences, which has considerably narrowed the scope of the application of the death penalty. However, it appears that the lower courts are not yet following this precedent as they continue to hand down sentences for crimes that are not the “worst of the worst,” such as low-level drug offences.

Finally, the Supreme Court jurisprudence emphasises the importance of mitigating factors in sentencing. As noted above, the Supreme Court commuted the death sentence in 35% of over 300 judgments between 2010 and 2018;<sup>110</sup> in the majority of these cases, consideration of mitigating factors contributed to the decision of the Court to commute the death sentences. A detailed analysis of the Supreme Court’s treatment of mitigating factors in capital cases can be found in Section 4 below.

### 1. The Supreme Court Has Limited the Death Penalty to the Most Serious Crimes

While Pakistan’s statutory law imposes the death penalty for approximately 27 separate criminal offences,<sup>111</sup> the Supreme Court’s jurisprudence applies capital punishment only for offences that cause death—murder; murder and terrorism; and murder, kidnapping and terrorism (**Figure 12**). In the last eight years, the Supreme Court has not advanced any jurisprudence for upholding a death sentence for a non-lethal offence. This demonstrates that, in practice, non-lethal offences rarely if ever justify capital punishment.



Moreover, when sentencing individuals convicted of lethal offences such as murder, the Supreme Court carefully considers the relative severity of the crime committed and increasingly reserves death sentences only for the worst and most exceptionally aggravated offences. In the 2009 judgment of *Muhammad Sharif v. the State*, a three-judge bench consisting of Justices Javed Iqbal, Sayed Zahid Hussain and Muhammad Sair Ali ruled that “the infliction of death penalty” is justified only “when the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner, so as to arouse intense and extreme indignation of the community.”<sup>112</sup>

In the intervening years, the Supreme Court has consistently maintained this standard. In 75% of the judgments in which a death sentence was upheld between 2015 and 2018, the Supreme Court used language such as “brutal”, “horrific”, “heinous”, “shocking” or “terrorist” to describe the offence committed.<sup>113</sup>

“  
*The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. . . Life imprisonment is the rule and death sentence is an exception.*

Justice Sayed Zahid Hussain  
*Muhammad Sharif v. the State* (2009 PLD 709)  
(citing Indian Supreme Court in *Machhi Singh and others v. State of Punjab*)

In determining the severity of the offence, the Supreme Court also considers the nature or number of the victims. Analysis of the jurisprudence illustrates that in 63% of confirmed death sentences, the crime involved more than one victim, while 54% of cases involved the death of a woman, child and/or a police officer. Where the case does not meet the threshold of ‘brutality’ that the Supreme Court deems would merit a death sentence, the Court commutes the death sentence to a life sentence.

This approach to capital sentencing is in line with Pakistan’s obligations under the International Covenant on Civil and Political Rights,<sup>114</sup> which articulates the broad consensus across common law jurisdictions that there should be a presumption in favour of life in discretionary capital cases.<sup>115</sup> It also chimes with the case law of India, the United States and Commonwealth countries that have adopted the ‘worst of the worst’ or ‘rarest of the rare’ standard, which stipulates that the death penalty should be restricted to cases of exceptionally heinous murders.<sup>116</sup> The Supreme Court of India has specified that an offence qualifies as the ‘rarest of the rare’ only if it is committed in such a grotesque manner as to arouse extreme indignation of society, it evinces total depravity of the accused, it is aggravated by its socially abhorrent nature (e.g. bride burning), it is aggravated by its enormity and magnitude of proportion and/or it is aggravated as a result of the circumstances of the victim.<sup>117</sup>

While restricting the death penalty to the most serious crimes, the Supreme Court also warns lower courts to remain impartial, even when adjudicating particularly gruesome murders. In *Azeem Khan v. Mujahid Khan*, a three-judge bench consisting of Asif Saeed Khan Khosa, Mushir Alam, and Dost Muhammad Khan ruled that:

*[M]ere heinous or gruesome nature of crime shall not detract the Supreme Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty.*<sup>118</sup>

The Supreme Court’s jurisprudence since 2010 suggests that the Court deems the death penalty to be appropriate only in the “rarest of the rare” cases of murder, where there is no hope of reforming the offender. The Supreme Court’s decisions in this regard are in line with Pakistan’s international

obligations and the broad consensus among other executing jurisdictions such as India. Yet lower courts continue to apply death sentences for non-lethal<sup>119</sup> and non-aggravated offences.<sup>120</sup> In this context, it should come as little surprise that over 1/3 of all Supreme Court reported capital judgments are commutations.<sup>121</sup>

### Recommendations

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth).
2. Improve standards in the trial and High Courts by providing specific judicial training on Supreme Court precedent on sentencing practises.

## 2. The Supreme Court Has Established a Presumption in Favour of Life Sentences Over the Death Penalty

“*[T]he law has conferred discretion upon the Supreme Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course.*

Justice Sheikh Hakim Ali, *Iftikhar Ahmed Khan v. Asghar Khan* (2009 SCMR 502)

”

In early 2018, then Chief Justice of Pakistan Mian Saqib Nisar publicly stated that one of the principle issues plaguing the justice system is that lower courts ignore the law and guidelines set out by the Supreme Court.<sup>122</sup> According to former Chief Justice Nisar, lower courts issue decisions based on their own discretion rather than following Supreme Court precedent as they are legally obligated to do. The result, he added, is often the conviction and incarceration of innocent people.<sup>123</sup>

In common law jurisdictions like Pakistan, judgments handed down by the apex court are binding precedent on lower courts. Between 2010 and 2018, Pakistani trial courts handed down at least 2,788 death sentences for both lethal and non-lethal capital offences.<sup>124</sup> In the Supreme Court judgments, however, less than one in four death sentences were upheld (see Section I.1 above).<sup>125</sup> The unusually high rate of correction speaks to a fundamental divergence between the rules laid down by Supreme Court authorities and the practice of the lower courts, which frequently fail to observe this binding law. The jurisprudence suggests that the lower courts mistakenly continue to follow obsolete precedent from the 1970s in murder trials.

The 1976 case *Muhammad Sharif v. Muhammad Javed* established the historic rule in capital sentencing, whereby “once conviction is finally upheld the deliberate extinction of life is visited with the normal penalty of death.”<sup>126</sup> However this rule was overturned in 2009 when Justice Sayed Zahid Hussain held in *Muhammad Sharif v. the State* that “there is a choice and discretion left with the Supreme Court to inflict punishment ‘with death or imprisonment for life as *ta’zir* having regard to the

facts and circumstances of the case’.”<sup>127</sup> Justice Hussain stressed that under the Penal Code of Pakistan “a very heavy duty is assigned to the Supreme Courts and the Judges to weigh and analyze the facts and circumstances of the particular case, before exercising *discretion of awarding penalty*.”<sup>128</sup>

In this landmark ruling establishing the presumption in favour of life, Justice Hussain also relied in part on Article 9 of the Constitution of Pakistan, which enshrines the right to life.<sup>129</sup> He stated:

*Art. 9 of the Constitution attaches great value to the ‘life and liberty’ of human being. It is a most precious human right regarded by the Constitution as a Fundamental Right, therefore, as far as possible and whenever permissible (depending upon the circumstances of a case), the Supreme Court may exercise its discretion in favour of lesser punishment, which also will be strictly legal having the statutory backing of [the Penal Code]. Such an approach, is likely to be regarded as liberal, but will advance the rationale and philosophy behind the mandate of Art. 9 of the Constitution.*<sup>130</sup>

The presumption in favour of life is also consistent with practice in other Commonwealth countries, which have held that the accused’s right to life can only be forfeited if the judge is satisfied beyond reasonable doubt that the offence calls for no other punishment but death.<sup>131</sup>

Historically, capital punishment had been treated by the Supreme Court of Pakistan as the ‘de facto’ sentence for murder in part because of Section 367(5) of the Criminal Procedure Code.<sup>132</sup> However, in the 2013 judgment of *Hassan and others v. the State*, current CJP Asif Saeed Khan Khosa explicitly held that there is no ‘normal penalty’ for murder.<sup>133</sup> Justice Khosa commented:

*Upon the strength of the provisions of subsection (5) of section 367, Cr.P.C. it has been maintained before us that the normal sentence for an offence of murder is death and while considering a prayer for reduction of a sentence of death passed against a convict this Court may remain mindful of that statutory stipulation. We have found such a submission to be suffering from multiple misconceptions. We have not been able to find anything in the said provision of law even hinting at the sentence of death being the normal sentence in such a case. Section 302(b), P.P.C. clearly provides for two alternative sentences, i.e. sentence of death or sentence of imprisonment for life for the offence of murder and **it does not state that any one of those sentences is to be treated as the normal sentence** (emphasis added).<sup>134</sup>*

Moreover, the Supreme Court went on to comment that “the general misunderstanding or misconception about the true import of the provisions of subsection (5) of section 367, Cr.P.C. entertained by the legal community, including the courts, in this regard needs to be removed and rectified.”<sup>135</sup> The principle was reiterated in the following year by the Supreme Court in its judgment *Ghulam Mohy-ud-din alias Haji Babu v. the State*.<sup>136</sup>

“*[A] very heavy duty is assigned to the Supreme Courts and the Judges to weigh and analyze the facts and circumstances of the particular case, before exercising discretion of awarding penalty.*

Justice Sayed Zahid Hussain, *Muhammad Sharif v. the State* (2009 PLD 709)

”

The presumption in favour of life, adopted nearly a decade ago by the Supreme Court, is still not being followed by the lower courts. Lower courts continue to apply disproportionately harsh sentences for both lethal and non-lethal offences in violation of the Supreme Court’s binding precedent, causing the Supreme Court to commute more than 1/3 of death sentences in its reported jurisprudence (see

section I.1 above). As former Chief Justice Nisar has himself noted, this failure of the lower courts to follow the law is one of the main issues plaguing Pakistan’s justice system.

### Recommendation

1. The capacity, independence and effectiveness of the judiciary should be assured by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth).
2. Improve standards in the trial and High Courts by providing specific judicial training on Supreme Court precedent on sentencing practices.

### 3. The Supreme Court Does Not Uphold Death Sentences For Drug Offences

While the Supreme Court of Pakistan has clearly established a presumption in favour of life and has limited application of the death penalty to the most serious crimes, the lower courts continue to hand down death sentences for non-lethal and non-violent offences such as drug possession. The Supreme Court’s jurisprudence reveals a troubling trend wherein trial courts impose death sentences for drug offences on an almost strict liability basis — if an accused is apprehended with a sufficient quantity of drugs, a death sentence is imposed.

The Supreme Court consistently acquits the accused where there is insufficient evidence of their possession or knowledge of the drugs. In *Muhammad Janas and another v. State*, two accused were arrested a significant distance away from a vehicle from which narcotics were recovered, and there was no evidence connecting the accused to the vehicle.<sup>137</sup> Nonetheless, the lower courts sentenced them to death.<sup>138</sup> The Supreme Court acquitted them of all charges, noting the complete lack of evidence connecting the accused to the drugs.<sup>139</sup> In *Gul Badshah v. the State*, the Supreme Court acquitted an accused who raised a credible claim that he was unaware of the cavity in his truck from which drugs had been recovered.<sup>140</sup> The Supreme Court’s jurisprudence thus maintains a high evidentiary standard, wherein possession and knowledge of the drugs must be proven with sufficient evidence.

Moreover, the Supreme Court distinguishes drug mules, or ‘simple couriers’ from drug traffickers. Arshad Ahmed was sentenced to death in Rawalpindi in 2005 after being apprehended with a large quantity of heroin in his suitcases at the Islamabad Airport.<sup>141</sup> While the Supreme Court found there was sufficient evidence to maintain the conviction, Justice Sardar Tariq Masood noted that the investigating officer himself had admitted at trial that Mr. Ahmed was a “simple courier” with no criminal record.<sup>142</sup> The Supreme Court also noted that the officer had not investigated the “actual owner” of the drugs. Finding these to be mitigating factors, the Supreme Court commuted Mr. Ahmed’s death sentence.<sup>143</sup>

Mr. Ahmed’s case is not unique. According to data collected by FFR from interviews of 57 prisoners convicted of capital drug offences, 41% of these prisoners are entirely illiterate and the majority are not educated past the age of 9 years old.<sup>144</sup> Nearly two thirds of the individuals interviewed earned



below the minimum wage prior to conviction, and the average value of the narcotics that were seized from their possession was roughly 1,600 times their median income.<sup>145</sup> Clearly, these prisoners were not acting alone and could not have been the ‘actual owner’ of the drugs supposedly found in their possession. Yet despite the Supreme Court’s practice of distinguishing simple couriers from traffickers, trial courts continue to send such couriers to death cells.

### Recommendation

1. The Government of Pakistan should seek to amend the Control of Narcotics Substances Act, 1997 and remove the death penalty for any drug offence.

## 4. The Supreme Court Gives Weight to Mitigating Factors in Capital Cases

“

*It is a fundamental principle of Islamic jurisprudence on criminal law to do justice with mercy, being the attribute of Allah Almighty but on the earth the same has been delegated and bestowed upon the judges, administering justice in criminal cases, therefore, extra degree of care and caution is required to be observed by the Judges while determining the quantum of sentence, depending upon the facts and circumstances of particular cases.*

Justice Dost Muhammad Khan, *Ghulam Mohy-ud-din alias Haji Babu v. the State* (2014 SCMR 1034)

”

The Supreme Court has firmly established the legal rule that mitigating factors including the nature of the offence and personal circumstances of the offender must be fully considered before a death sentence can be applied. As early as the 1970s, the Supreme Court declared that in capital cases, "there may be a host of extenuating and mitigating circumstances such as extreme youth, sudden provocation, influence of an elder, question of family honour etc. justifying the award of the lesser penalty of life imprisonment."<sup>146</sup> The Supreme Court commuted the death sentence in 35% of over 300 judgments between 2010 and 2018; consideration of mitigating factors played a very large role in the Supreme Court’s decision to commute these sentences.

The Supreme Court’s approach to mitigation has advanced in recent years. In *Muhammad Sharif v. the State* in 2009,<sup>147</sup> the Supreme Court established that in every capital case, Pakistani courts have a duty to consider the circumstances of the offender along with the nature of the crime. The Supreme Court confirmed the position adopted by the Indian Supreme Court, whereby:

*A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option [to award a death sentence] is exercised.<sup>148</sup>*

In 2014, a three judge bench comprising of Justices Asif Saeed Khan Khosa, Gulzar Ahmed and Dost Muhammad Khan ruled in *Ghulam Mohy-ud-din alias Haji Babu v. the State* that a “single mitigating instance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment.”<sup>149</sup> This is in line with legal practise in India.<sup>150</sup>

This jurisprudence also aligns with international principles governing capital sentencing, including that there can be no exhaustive list of mitigating factors.<sup>151</sup> Rather, the Supreme Court maintains that Pakistani courts must be open to considering any potential extenuating circumstances depending on

the case. In *Ghulam Mohy-ud-din alias Haji Babu v. the State*, the Supreme Court confirmed that when hearing mitigation:

*No clear guideline . . . can be laid down because facts and circumstances of one case differ from the other, however, it becomes the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case.*<sup>152</sup>

Despite the clear guidance set down by the Supreme Court, lower courts continue to ignore mitigating evidence. This is one of the drivers of the Supreme Court’s 35% commutation rate in its reported judgments.<sup>153</sup>

Typical forms of mitigating evidence relevant to capital sentencing in Pakistan as identified through a review of the Supreme Court’s jurisprudence from 2015 - 2018 include:

- A. Type and gravity of the offence;<sup>154</sup>
- B. Lesser participation;<sup>155</sup>
- C. Lack of premeditation;<sup>156</sup>
- D. Provocation;<sup>157</sup>
- E. Social and familial circumstances;<sup>158</sup>
- F. Partial compromise with the victim’s family;<sup>159</sup>
- G. Age of the offender;<sup>160</sup>
- H. Acting under the influence of an elder;<sup>161</sup>
- I. Mental state of the accused;<sup>162</sup>
- J. Capacity for reform; and<sup>163</sup>
- K. Time spent on death row.<sup>164</sup>

“*If the Judge entertains some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows. So it is better to respect the human life, as far as possible, rather to put it at end, by assessing the evidence, facts, and circumstances of a particular murder case under which it was committed.*

Judge Dost Muhammad Khan, *Ghulam Mohy-ud-din alias Haji Babu v. the State* (2014 SCMR 1034)

”

Each of these forms of mitigation is considered in turn in the sections below.

### **A. Type and Gravity of the Offence**

The Supreme Court in its capital jurisprudence considers whether an offence is sufficiently “brutal, grotesque, diabolical, revolting, or dastardly” to meet the threshold to attract a death sentence.<sup>165</sup> Conversely, the absence of “cruel or unusual behaviour” exhibited by the offender is treated by the Supreme Court as mitigating evidence in favour of life imprisonment.<sup>166</sup>

Evidence that the offender exercised restraint during the commission of an offence is frequently regarded as a mitigating circumstance. In several cases, inflicting a single stab wound<sup>167</sup> or gun shot<sup>168</sup> on the victim rather than multiple blows or shots was interpreted as restraint warranting a lesser sentence, especially where the offender was provoked in some way<sup>169</sup> or was in the midst of a chaotic shootout.<sup>170</sup>

In the landmark 2013 case *Hassan and others v. the State and others*, CJP Asif Saeed Khan Khosa wrote for a three-judge bench also consisting of Justices Anwar Zaheer Jamali and Amir Hani Muslim that:

*Despite having an ample opportunity to cause more injuries to the complainant party by keeping on firing at it, both appellants . . . had fired from their firearms only once causing*

*one injury each to their victims. When incessant firing was taking place from both sides . . . the said appellants could have fired more shots causing injuries to more persons of the opposite party.*<sup>171</sup>

As discussed earlier, this jurisprudence is completely consistent with international law and domestic practise in other Commonwealth countries maintaining the death penalty, which reserve capital punishment for the ‘worst of the worst’ or ‘rarest of the rare’ offences.<sup>172</sup>

### **B. Lesser Participation**

Under the Supreme Court’s capital jurisprudence, offenders found to be accessories to a murder lack the moral culpability needed to justify a death sentence. For instance, in *Sabeeha v. Ibrar and others*, a case involving multiple shooters “firing indiscriminately”, the Supreme Court held that as “it was not possible to identify as to whose fire hit whom and in such circumstances, award of maximum sentence (i.e. death) would not be in consonance with safe administration of justice.”<sup>173</sup>

Thus, where the prosecution and police report fail to attribute any lethal injury to the accused, the Supreme Court might sentence the accused to life imprisonment rather than death.<sup>174</sup>

### **C. Lack of Premeditation**

In weighing culpability for capital murder, the Supreme Court considers whether the accused committed the crime after previous planning or preparation. The absence of such premeditation is treated as a strong mitigating factor as it indicates that the crime does not fall into the category of ‘the worst of the worst’.<sup>175</sup> For instance, in *Muhammad Sharif v. the State*, Justice Sayed Zahid Hussain, writing for a bench of three judges, declined to uphold a death sentence in part because “there was no apparent planning, premeditation or intention to kill the deceased; there being no preparation by the appellant in this regard nor he had any crime weapon with him.”<sup>176</sup> Courts in other Commonwealth countries have similarly held that a lack of premeditation precludes imposition of the death penalty, even when it is the only mitigating factor.<sup>177</sup>

Further, the Supreme Court regards the fact that a murder happened on the spur of the moment as mitigating the culpability of the accused. In *Hassan and others v. the State*, where the victim and offender met “by way of a chance encounter”, CJP Asif Saeed Khan Khosa wrote that “[t]his aspect of the case, in its peculiar background, may call for withholding the extreme sentence of death.”<sup>178</sup> Justice Khosa went on to say, “[i]n a case lacking malice aforethought on the part of the accused party and in the place of an occurrence developing at the spur of the moment, this Court, depending on the circumstances of the case, generally looks at the matter of sentence with some degree of empathy and consideration.”<sup>179</sup>

### **D. Provocation**

The Supreme Court treats provocation as a mitigating circumstance that weighs against a death sentence in murder cases. In the 2002 judgment of *Muhammad Saleem v. the State*, the Supreme Court posited, “where the accused is able to demonstrate that he was deprived of his capability of self-control or that he was swayed away by circumstances immediately preceding the act of murder or there was an immediate cause leading to serious provocation, Court may be justified in mitigation of sentence.”<sup>180</sup> For example, in *Abdul Haq v. the State*, the Supreme Court accepted that the offender had acted out of provocation and was eligible for a reduction in sentence where he had killed the victim after the victim swore that “he would commit *Zina* with [the offender’s] wife and with the wives of other members of his tribe.”<sup>181</sup>

## **E. Social and Familial Circumstances**

Because there is no finite list of potential mitigating factors relevant to sentencing in capital cases, the Supreme Court recognises influences arising from an offender's social and familial circumstances as potential grounds for mitigation. In the Supreme Court's own words, "the action of a man is to be judged in the background of the society to which he belongs as he is creature of his environment".<sup>182</sup>

In particular, where the Supreme Court adjudicates crimes committed in rural areas, it adopts a more lenient approach to offenders motivated by community or familial enmities.<sup>183</sup> For this reason, the Supreme Court accepts the fact that a crime was motivated by vindication of the offender's family reputation as an extenuating circumstance.<sup>184</sup> In *Muhammad Ismail v. the State*, the Supreme Court commuted a death sentence on the basis that "[s]ome detestable affairs in the family of the deceased were prevailing, rendering the appellant unable to bear the stigma/blot on the escutcheon (family honour)."<sup>185</sup>

In many ways, such extenuating circumstances closely resemble provocation. For instance, in *Muhammad Afzal v. the State*, the Supreme Court found that the offender was "deeply charged by emotion" by an insult to his family's honour "and lost his self-restraint and control."<sup>186</sup>

While the Supreme Court is reluctant to excuse 'honour killings' of any kind, it is willing to accept that the extreme cultural and economic pressures related to kinship and reputation – especially in rural communities – can represent extenuating circumstances in some cases.

## **F. Partial Compromise with the Victim's Family**

The Supreme Court's jurisprudence regards a partial compromise agreement with a murder victim's family as mitigation.<sup>187</sup> Because a full compromise agreement reached with all relevant members of the victim's family operates as an acquittal, an agreement with some members of the victim's family can weigh against a death sentence.<sup>188</sup>

## **G. Age of the Offender**

Capital punishment for children under the age of 18 is expressly prohibited by statute.<sup>189</sup> The Supreme Court's jurisprudence also finds age to be a mitigating factor for young adult offenders aged 18 to 25 years.<sup>190</sup> The Supreme Court held in *Amjad Shah v. the State* that "[y]outhful tendency toward excitement and impulsiveness" should be "treated by the law as a mitigating circumstance" weighing against a death sentence.<sup>191</sup> The US Supreme Court has recognized the same principle, holding that the ability to control behaviour continues to mature through late adolescence and young offenders are more capable of change and reform than older adults.<sup>192</sup>

Similarly, while adjudicating the case of an elderly and infirm prisoner, the Supreme Court is likely to consider the accused's age and health alongside other mitigating factors, though it is unlikely to be a singular ground for commutation.<sup>193</sup>

## **H. Acting Under the Influence of an Elder**

According to the jurisprudence, a young offender found to have committed a capital crime under the influence or at the direction of a family or community elder may be less culpable and is entitled to leniency in sentencing. In *Asad Mehmood v. Akhlaq Ahmed*, the Supreme Court stated, "The doctrine of influence of elders can be considered a relevant factor and can constitute mitigating circumstances looking to the tender age of the accused."<sup>194</sup>

For instance, in *Muhammad Imran alias Asif v. the State*, the Supreme Court commuted a death sentence where the offender was 21 years old and was found to have acted at the direction of his father, who was a co-accused.<sup>195</sup> The jurisprudence demonstrates that such influence is likely to weigh against a death sentence where the offender is (1) a young adult; (2) susceptible to the influence of an elder—usually a family member; and (3) acts in concert with others.<sup>196</sup>

### I. Mental State of the Accused

The Supreme Court’s jurisprudence regarding the execution of mentally ill prisoners is rapidly developing and becoming more consistent with international law. In 2016, Mst. Safia Bano brought a case before the Supreme Court on behalf of her husband Imdad Ali, who had been convicted for murder and sentenced to death.<sup>197</sup> Mst. Bano claimed that Mr. Ali was suffering from paranoid schizophrenia and thus should not be executed.<sup>198</sup> In 2016 the Supreme Court ruled that “schizophrenia is not a permanent mental disorder, rather imbalance, increasing or decreasing, depending the level of stress . . . . It is, therefore, a recoverable disease, which, in all the cases, does not fall within the definition of “mental disorder” as defined in the Mental Health Ordinance, 2001.”<sup>199</sup> Thus the Supreme Court held that Imdad Ali’s execution could go ahead.

However, the Government of Punjab itself took the unusual step of filing a review of Imdad’s case. The Supreme Court accepted the petition, and ordered that a medical board be convened to review Mr. Ali’s case.<sup>200</sup> On 23 October 2018, the Supreme Court ordered that a new medical board be convened to carefully review Mr. Ali’s case as well as that of a schizophrenic woman named Kaneez Bibi.<sup>201</sup> Justice Manzoor Ahmad Malik noted that “this is a delicate matter and affects the future since the State has to ensure that every convict awarded capital punishment should not be suffering from any physical or mental health, rather he should be normal.”<sup>202</sup>

Customary international law prohibits the execution of prisoners who are “insane,”<sup>203</sup> and the UN Commission on Human Rights has adopted several resolutions urging all states not to execute any person “suffering from any form of mental disorder.”<sup>204</sup> It appears the Supreme Court may be bringing Pakistan in line with many other jurisdictions worldwide and international law by preventing the execution of mentally ill prisoners.

### J. Capacity for Reform

Where the Supreme Court is satisfied that an offender is unlikely to resort to violence again and has a clear capacity for reform, this should be accepted as mitigation rendering a death sentence disproportionate.<sup>205</sup> For example, in *Tariq Mehmood v. the State*, the Supreme Court recognised the fact that the offender had no previous criminal record as mitigation and commuted his death sentence to life imprisonment.<sup>206</sup> The Supreme Court of India has also recognized that in order to apply the death penalty, “there must be clear evidence that the offender is not fit for any kind of scheme for reform or rehabilitation.”<sup>207</sup>

An offender’s capacity for reform is a typical reason for granting clemency and commuting the death sentence in other jurisdictions. Given that Pakistan has no meaningful system for granting clemency,<sup>208</sup> it is imperative that capacity for reform be considered a mitigating factor by courts.

### K. Time Spent on Death Row

“*When taste of regained life has been relished, when expectancy of life has returned, when the liberated bird has begun to sing, would it be advisable to take it to gallows?*”



The Supreme Court's jurisprudence over the last decade has established the principle that prisoners who spend a period on death row that is "equal to or more than a term of imprisonment for life [are] reasonably entitled to an 'expectation of life.'"<sup>209</sup>

In *Hassan and others v. the State*, Justices Asif Saeed Khan Khosa, Anwar Zaheer Jamali and Amir Hani Muslim considered the case of two co-accused who had spent more than 25 years in custody, 22 of which was in death cells. CJP Khosa wrote:

*Both of them [have] already spent in custody a period more than a full term of imprisonment for life and if their sentence of death were upheld by the Supreme Court then they would be punished with death after spending a period in custody which was more than a full term of imprisonment for life and such a bizarre situation might run contrary to the letter and spirit of S 302(b) PPC which provided for a sentence of death or a sentence of imprisonment for life . . . . Accused and co-accused had been vegetating and rotting in death cells awaiting their execution for so long that . . . . It would be unjust to impose double sentence on the petitioner...it will be against the principle of natural justice that he is hanged by the neck.*<sup>210</sup>

In 2014, a three-judge bench comprised of Justices Asif Saeed Khan, Dost Mohammad Khan and Gulzar Ahmed stressed further that that subjecting prisoners to prolonged incarceration while awaiting execution can amount to psychological torture.<sup>211</sup> The Supreme Court held that:

*The two appellants have . . . spent almost 16 years in death cells . . . in highly restless and painful condition and mental torture because the sword of death was hanging over their heads day and night during such a long period. On this account, it is highly desirable and legally deemed appropriate to reduce their sentence from death to life imprisonment.*<sup>212</sup>

The Supreme Court has repeatedly recognized that a lengthy period of imprisonment in a death cell while "the sword of death" hangs over one's head is a mitigating factor that may prevent application of a death sentence, which is consistent with practice in other executing countries.<sup>213</sup> However, time on death row may sometimes not by itself amount to sufficient mitigation to warrant commutation of sentence. In 2013 the Supreme Court held that time spent on death row may not automatically result in commutation of a death sentence.<sup>214</sup> In 2016, the Supreme Court upheld a death sentence even though the accused had spent more than 17 years on death row, citing the 2013 judgment.<sup>215</sup>

In practice, prisoners are still routinely executed after decades of incarceration. Evidence gathered by Reprieve shows that about 84% of prisoners are executed after spending more than a decade on death row.<sup>216</sup> Since the resumption of executions in late 2014, at least thirteen prisoners have been executed after serving more than two decades on death row<sup>217</sup> – essentially being executed after already serving a life sentence.

## Recommendations

1. The capacity, independence and effectiveness of the judiciary should be assured by:

- Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth).
2. Standards in the trial and High Courts should be improved by providing specific judicial training on Supreme Court precedent on sentencing practices, including specific training on mitigating factors which must be considered before applying a death sentence.
  3. Bifurcated trials should be introduced for all capital charges, with a guilt phase to determine if the accused committed the crime and a separate sentencing hearing to determine the appropriate sentence after considering mitigation.

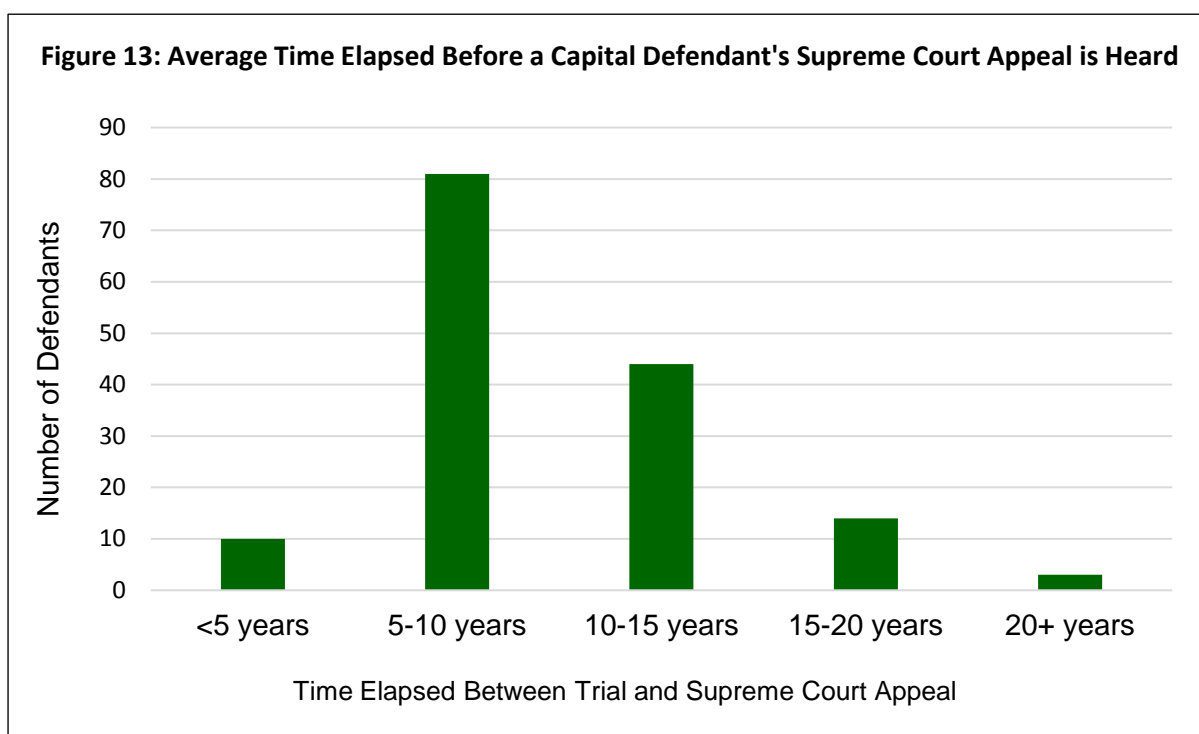


### III. Costs of a Broken System

There are over 40,000 cases currently pending before the Supreme Court.<sup>218</sup> Systematic flaws in the reasoning of the lower courts see the Supreme Court rectifying the same issues in case after case, often explicitly commenting that a miscarriage of justice has occurred.<sup>219</sup> Moreover, analysis of the jurisprudence has demonstrated that failures in the lower courts mean that the Supreme Court must often act as a court of first instance by weighing the evidence and assessing witness credibility. This only adds to the Supreme Court’s colossal backlog – and lengthy wait times across the judicial system.

As a result, prisoners sentenced to death in Pakistan spend an average of nearly ten years with the ‘sword of death hanging over their heads’ before their case is heard by the Supreme Court (**Figure 13**).<sup>220</sup> One in 10 prisoners must wait more than 15 years before their final appeal.<sup>221</sup> Thus each death sentence unlawfully handed down by the trial court imposes significant costs on taxpayers to imprison the accused.

The economic and social cost of wrongfully imprisoning hundreds – if not thousands – of people on death row for decades, many of whom are family breadwinners and as many as two in five of whom are potentially innocent (see section I.1 above), is unquantifiable.



The long wait times for prisoners who are eventually acquitted or have their sentences commuted are particularly unjust when one considers the conditions on death row in Pakistan, which have been described as “life threatening.”<sup>222</sup> Prisons are frequently unsanitary and overcrowded, with penitentiaries housing an average of nearly three times their intended capacity<sup>223</sup> and as many as eight prisoners sharing a single 8 by 10 foot cell.<sup>224</sup> Malnutrition and chronic health problems are rampant among prisoners, who lack access to fresh water, nutritious food and medical care.<sup>225</sup> The Supreme Court recently took up a *suo motu* case on overcrowding in Pakistani prisons, finding that 98 prisons are holding 21,807 prisoners more than their sanctioned capacity, and ordering the provinces to come up with a comprehensive reply on the Federal Ombudsman’s recommendations.<sup>226</sup> Other courts, including the Inter-American Court of Human Rights, have held that unjustified pre-trial and post-trial

delays causing prisoners to spend more time in appalling prison conditions are themselves mitigating factors which are grounds for commuting a prisoner's death penalty to imprisonment.<sup>227</sup>

**Case Study: Mazhar Hussain**

Mazhar was accused of murder in 1997 and sentenced to death in 2004.<sup>228</sup> After spending 13 years on death row awaiting his final appeal, Mazhar succumbed to heart failure.<sup>229</sup> Two years later, the Supreme Court acquitted him of all charges.<sup>230</sup>

The Supreme Court found glaring errors, including obvious omissions in the prosecution's case and serious discrepancies between witness accounts and medical evidence which made it clear that the witnesses were lying.<sup>231</sup>

Mazhar's case provides yet another unsettling example of a grossly inappropriate death sentence, a life wasted on death row and justice that came too late.

## IV. Conclusion and Recommendations

The study conducted by FFR and Reprieve has revealed systemic miscarriages of justice occurring in the trial and appellate courts, resulting in unsafe convictions. These unsafe convictions lead to innocent people spending over a decade on death row before finally being released by the Supreme Court or, worse still, to innocent people being executed and later acquitted of all charges.

Lower courts hand down capital convictions despite the prosecution's failure to prove the case against the accused. The trial and High Courts credit unreliable and inconsistent witness testimony, apply death sentences to accused who have not been properly identified, impose death sentences despite a lack of objective evidence, rely on evidence manipulated by police, sentence accused to death while acquitting their co-accused on the same evidence, impose death sentences despite the prosecution's failure to prove motive or intent, and rely on confessions that do not meet statutory requirements. Such a broken system cannot be trusted to impose the ultimate and irreversible penalty of death.

The Supreme Court has made great effort to establish modern standards of capital sentencing, bringing Pakistani law in line with international legal requirements and practice in other executing states like India. The Supreme Court has limited the death penalty to the most serious crimes, established a presumption in favour of life sentences over the death penalty, and firmly established that the circumstances of the accused and the offence must be considered as factors mitigating against a death sentence. Yet the lower courts continue to hand down death sentences for crimes such as low-level drug possession, indicating a failure to follow the Supreme Court's jurisprudence.

In order to address these systemic issues, the following reforms are needed:

### High-Level Recommendations

- Adopt an immediate moratorium on executions pending a full review of the capital system;
- Establish a taskforce to examine the procedures in capital practice in the trial and High Courts to ensure fair and efficient administration of justice;
- Establish an accessible database of capital cases, divided by province and procedural posture;
- Ensure the right to effective counsel throughout the process in capital cases, including by training state-appointed lawyers in capital trials.
- Establish a mandatory right of appeal to the Supreme Court when a death sentence is confirmed by the High Court;
- Establish an administrative post-appeal review commission for capital cases where there is a serious issue of miscarriage of justice;
- Enact a law of compensation for wrongful convictions and set up a framework which allows individuals to access meaningful redress; and
- Remove the death penalty for non-lethal offences which do not meet the 'worst of the worst' standard, for example drug offences.

## Detailed Recommendations

- Assure the capacity, independence and effectiveness of the judiciary by:
  - Requiring judges to complete certification before hearing capital cases, dependent on expertise, training and regular qualitative assessment of judicial decision-making;
  - Connecting judicial promotion to expertise, training and regular qualitative assessment of judicial decision-making;
  - Increasing salaries to attract highly-qualified legal practitioners to the bench; and
  - Increasing the number of judges to reduce time-pressure on the courts (particularly in areas where the number of judges has not increased in line with population growth)
- Improve standards in the trial and High Courts by providing specific judicial training on:
  - The burden of proof in relation to motive and intent;
  - The statutory and case law relating to admissibility of confessions; and
  - Supreme Court precedent on sentencing practices, including specific training on mitigating factors which must be considered before applying a death sentence.
- Ensure that capital convictions are handed down only on the strongest, most reliable evidence by:
  - Reviewing the processes by which eye witnesses identify suspects to bring these in line with best practice; and
  - Reviewing the process of evidence collection in all criminal cases and improving these practices in line with best practice, including through the use of modern technology.
- Ensure that the death penalty is reserved for the most serious crimes as required under international law, in line with the Supreme Court of Pakistan's practice, by:
  - Introducing bifurcated trials for all capital charges, with a guilt phase to determine if the accused committed the crime and a separate sentencing hearing to determine the appropriate sentence after considering mitigation; and
  - Amending the Control of Narcotics Substances Act, 1997 to remove the death penalty for drug offences.
- Encourage independent, evidence-based investigations by the police by:
  - Instituting a taskforce to review the independence of the police and the prosecutorial process, with particularly careful examination of the role that the First Information Report plays in the criminal justice system;
  - Increasing police salaries; and
  - Introducing an independent disciplinary process to prevent and identify police corruption.

## ANNEX 1: Quantitative Findings

Researchers at FFR and Reprieve analysed the Supreme Court’s capital jurisprudence from 2010 - 2018. 310 such reported cases were analysed. Because many cases involve multiple accused, the 310 reported judgments concerned the cases of 493 accused. The following chart summarizes the quantitative findings of the study, with each data point representing one accused.

	Death Sentence Upheld	Death Sentence Commuted	Accused Acquitted	Remand, Retrial, or Leave to Appeal Granted	Total # capital defendants
2010	33	17	33	0	83
2011	35	47	35	15	132
2012	5	7	20	3	35
2013	2	16	0	1	19
2014	1	19	7	0	27
2015	19	3	10	0	32
2016	6	15	25	0	46
2017	7	35	46	2	90
2018	1	11	16	1	29
2015-2018	33	64	97	3	197
<b>TOTAL:</b>	<b>109</b>	<b>170</b>	<b>192</b>	<b>22</b>	<b>493</b>

## ANNEX 2: Annual Death Sentences Awarded

The below data was shared by the Human Rights Commission of Pakistan, an independent human rights organisation in Pakistan which closely tracks death sentences and executions.

	No. of cases	No. of accused	Sessions court	Anti-terrorism court	Military court	Others/No info
2010	232	348	227	118	3	-
2011	210	285	196	71	17	1
2012	169	238	170	63	4	1
2013	172	229	159	62	8	-
2014	138	230	147	64	8	11
2015	295	423	265	117	27	14
2016	322	436	221	48	112	55
2017	197	253	215	34	1	3
2018	194	346	149	34	156	37
<b>TOTAL:</b>		<b>2,788</b>				

The data collated by the Human Rights Commission of Pakistan is subject to the limitations of official reports, press accounts and sample surveys conducted by NGOs and may not always represent the full or exact picture. These figures should be taken as a reflection of the trends over the years.

## References

- 
- <sup>1</sup> Justice Project Pakistan, 'Counting the Condemned: Data Analysis of Pakistan's Use of the Death Penalty', 4 Oct. 2018, available at: <https://www.jpp.org.pk/report/counting-the-condemned/>.
- <sup>2</sup> See Cornell Center on the Death Penalty Worldwide, 'Death Penalty Database: Pakistan', available at: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Pakistan#f5-2> (citing Amnesty International, Death Sentences and Executions Annual Reports, 2013–2017).
- <sup>3</sup> *Id.*
- <sup>4</sup> United States Department of State Bureau of Democracy, Human Rights and Labor, 'Country Report on Human Rights Practices for 2016 – Pakistan', pp.7-8, available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265546>; United States Department of State Bureau of Democracy, Human Rights and Labor, 'Country Report on Human Rights Practices for 2015 – Pakistan', pp.7-9, available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dliid=252973>.
- <sup>5</sup> Justice Project Pakistan, 'Counting the Condemned: Data Analysis of Pakistan's Use of the Death Penalty', 4 Oct. 2018, available at: <https://www.jpp.org.pk/report/counting-the-condemned/>.
- <sup>6</sup> This ranking excludes China, which is believed to have carried out thousands of executions but releases no data from which such claims can be substantiated. See Amnesty International, 'Death Sentences and Executions 2017,' p.39, 2018, available at: <https://www.amnesty.org.au/wp-content/uploads/2018/04/amnesty-report-death-penalty-2018.pdf>.
- <sup>7</sup> According to the Human Rights Commission of Pakistan (HRCP), 506 people were executed between December 2014 and December 2018. See HRCP, 'Death Penalty' database, available at: <http://hrcpmonitor.org/search/?id=17> (report generated on 18 Dec. 2018).
- <sup>8</sup> See Section I.1, *infra*.
- <sup>9</sup> See Section I, *infra*.
- <sup>10</sup> See Section II.4, *infra*.
- <sup>11</sup> See Sections II.1-3., *infra*.
- <sup>12</sup> See Section I.2, 'Case Study: Executing innocent prisoners', *infra*.
- <sup>13</sup> See Section III, 'Case Study: Mazhar Hussein', *infra*.
- <sup>14</sup> See Section III, *infra*.
- <sup>15</sup> *Noora & another v. the State* (PLD 1973 SC 469).
- <sup>16</sup> *Id.*
- <sup>17</sup> In the 310 reported cases, the Supreme Court heard the cases of 493 defendants. Of those 493 defendants, only 109 had their death sentence upheld by the Supreme Court – 22%. See Annex 1 for summarized results of the study's quantitative analysis.
- <sup>18</sup> In the 310 reported cases, the Supreme Court heard the cases of 493 defendants. Of those 493 defendants, 192 were acquitted of all charges – 39%. 170 defendants had their death sentence commuted to imprisonment for life or a term of years – 35%. Another 22 defendants were granted either a remand, retrial, or leave to appeal – 4%. This totals to 78% of cases in which the death sentence handed down by the trial court was considered unsafe by the Supreme Court. See Annex 1 for summarized results of the study's quantitative analysis.
- <sup>19</sup> Recent official numbers place Pakistan's death row population at 4,688. This number is itself a radical departure from previous government figures which put Pakistan's death row at 8,400. See Justice Project Pakistan, 'Counting the Condemned: Data Analysis of Pakistan's Use of the Death Penalty', 4 Oct. 2018, available at: <https://www.jpp.org.pk/report/counting-the-condemned/> (citing figures by the federal ombudsperson submitted before the Supreme Court). The inconsistent figures demonstrate the need for publically-accessible, accurate data about Pakistan's death row and executions.
- <sup>20</sup> The Supreme Court's acquittal rate may be seen as indicative of the overall rate of unsafe convictions handed down by the lower courts. If there are 4,688 people on death row and 39% of accused are acquitted by the Supreme Court, then up to 1,828 people languishing for years on death row should never have been there in the first place.
- <sup>21</sup> Researchers analysed 57 reported Supreme Court judgments from 2015 - 2018 in which the Supreme Court acquitted the accused of all charges. Researchers tracked several indicators, including whether the Court's judgment explicitly noted that a 'grave miscarriage of justice' was committed against the accused. The detailed analysis found that the Supreme Court commented on lower courts committing a 'grave miscarriage of justice' in 14% of such cases.

- 
- <sup>22</sup> See, e.g., *Hassan & others v. the State & others* (PLD 2013 SC 793).
- <sup>23</sup> Supreme Court of Pakistan, Crim. App. Nos. 249 & 250 of 2010, para.9 (6 Oct. 2016).
- <sup>24</sup> Rafia Zakaria, 'Acquittal After Execution' Dawn, 7 Dec. 2016, available at: <https://www.dawn.com/news/1300922>.
- <sup>25</sup> Hasnaat Malik, 'Wrongful Hangings Expose Flaws in Justice System', Express Tribune, 23 Oct. 2016, available at: <https://tribune.com.pk/story/1207101/criminal-negligence-wrongful-hangings-expose-flaws-justice-system/>; Irfanul Haq, 'Acquittal Verdict: Executed Brothers' Kin in Distress', Dawn, 23 Oct. 2016, available at: <https://www.dawn.com/news/1291711>.
- <sup>26</sup> HRCP, 'State of Human Rights in 2016', p.66, available at: <http://hrcp-web.org/hrcpweb/wp-content/uploads/2017/05/State-of-Human-Rights-in-2016.pdf>.
- <sup>27</sup> International Federation for Human Rights (FIDH) & HRCP, 'Slow March to the Gallows: Death Penalty in Pakistan', p.18, Jan. 2007 (citing a report in The Daily Times on 30 May 2006), available at: <https://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf>.
- <sup>28</sup> *Id.*
- <sup>29</sup> *Muhammad Zaman v. the State* (2014 SCMR 749).
- <sup>30</sup> See, e.g., *Mazhar Hussain v. the State* (2011 SCMR 455); *Mst. Sughra Begum v. the State* (2015 SCMR 1142); *Irfan Ali v. the State* (2015 SCMR 840).
- <sup>31</sup> *Qaiser Pervez & another v. the State* (2015 SCMR 1142), para.26.
- <sup>32</sup> *Pathan v. the State* (2015 SCMR 315), para.10.
- <sup>33</sup> See, e.g., *Mazhar Hussain v. the State* (2011 SCMR 455); *Pathan v. the State* (2015 SCMR 315).
- <sup>34</sup> See, e.g., *Mst. Sughra Begum v. the State* (2015 SCMR 1142).
- <sup>35</sup> See, e.g., *Muhammad Ali v. the State* (2015 SCMR 137).
- <sup>36</sup> See, e.g., *Irfan Ali v. the State* (2015 SCMR 840); *Qaiser Pervez & another v. the State* (2015 SCMR 1142).
- <sup>37</sup> See, e.g., *Muhammad Afzal v. the State* (2017 SCMR 1645).
- <sup>38</sup> *Irfan Ali v. the State* (2015 SCMR 840).
- <sup>39</sup> See, e.g., *Zahir Yousaf & another v. the State* (2017 SCMR 2002); *Haleem & others v. the State* (2017 SCMR 709).
- <sup>40</sup> See, e.g., *Abdul Jabbar alias Jabbari v. the State* (2017 SCMR 1155).
- <sup>41</sup> See Section I.D.
- <sup>42</sup> *Qaiser Pervez & another v. the State* (2015 SCMR 1142), para.26.
- <sup>43</sup> *Id.*
- <sup>44</sup> Mr. Qaiser was arrested in April 2003 and acquitted by the Supreme Court in April 2015. See *Qaiser Pervez & another v. the State* (2015 SCMR 1142).
- <sup>45</sup> For each Supreme Court case reviewed, researchers recorded the date of the original trial where available and the Supreme Court decision date, and calculated the time elapsed between these dates. This data was available for 152 judgments, and the average time elapsed was 9.81 years.
- <sup>46</sup> Of the 57 analysed reported acquittal judgments from 2015 - 2018, there were 10 cases in which the Supreme Court found that the ID parade did not follow proper procedure, the accused was a mere accessory to the crime and/or no specific role was ascribed to the accused.
- <sup>47</sup> See, e.g., *Haider Ali v. the State* (2016 SCMR 1554); *Javed Khan alias Bacha v. the State* (2017 SCMR 524); *Ghulfam v. the State* (2017 SCMR 1189); *Azhar Mehmood & others v. the State* (2017 SCMR 135).
- <sup>48</sup> *Haider Ali v. the State* (2016 SCMR 1554).
- <sup>49</sup> *Ghulfam v. the State* (2017 SCMR 1189).
- <sup>50</sup> See, e.g., *Lal Pasand v. the State* (PLD 1981 SC 142); *Ziaullah alias Jaji v. the State* (2008 SCMR 1210); *Bacha Zeb v. the State* (2010 SCMR 1189); *Shafqat Mehmood & others v. the State* (2011 SCMR 537).
- <sup>51</sup> Of the 57 analysed reported acquittal judgments from 2015 - 2018, the Supreme Court stated there was insufficient independent evidence (namely a lack of medical evidence or inadmissible weapon recovery) in 17 cases; stated that evidence was planted, manipulated, or otherwise doubtful in 30 cases; and found that the verdict was based on inadequate circumstantial evidence in 11 cases. In many cases, more than one of these issues were raised. In total, there were 42 cases in which one or more of these issues were raised, amounting to 74% of the acquittal cases.
- <sup>52</sup> *Muhammad Aslam v. the State* (PLD 1992 SC 254).
- <sup>53</sup> *Ch. Barkat Ali v. Major Karam Elahi Zia* (1992 SCMR 1047).
- <sup>54</sup> *Azeem Khan v. Mujahid Khan* (2016 SCMR 274), para.31.
- <sup>55</sup> See, e.g., *Rajendra Pralhadrao Wasnik v. State of Maharashtra R.P.* (Crl.) Nos. 306-307 of 2013 in Crl. Appeal Nos.145-146 of 2011 (India).
- <sup>56</sup> See, e.g., *Kalu Khan v. State of Rajasthan*, 16 SCC 492 (Supreme Court of India 2015).



- 
- <sup>57</sup> See, e.g., *Imran alias Dully v. the State & others* (2015 SCMR 155); *Nasir Javaid v. the State* (2016 SCMR 1144); *Muhammad Ashraf v. the State* (2016 SCMR 1617); *Faisal Mehmood v. the State* (2016 SCMR 2138); *Azeem Khan v. Mujahid Khan* (2016 SCMR 274); *Hashim Qasim v. the State* (2017 SCMR 986); *Ghulfam v. the State* (2017 SCMR 1189).
- <sup>58</sup> *Hashim Qasim v. the State* (2017 SCMR 986).
- <sup>59</sup> *Azeem Khan v. Mujahid Khan* (2016 SCMR 274), para.33.
- <sup>60</sup> In 17 of the 57 reviewed acquittal judgments from 2015 - 2018, the Supreme Court commented on either a lack of medical evidence or an inadmissible weapon recovery. See, e.g., *Irfan Ali v. the State* (2015 SCMR 840); *Haider Ali v. the State* (2016 SCMR 1554); *Shahbaz v. the State* (2016 SCMR 1763); *Muhammad Ismail v. the State* (2017 SCMR 898); *Nasrullah alias Nasro v. the State* (2017 SCMR 724); *Khuda-E-Dad alias Pehlwan v. the State* (2017 SCMR 701).
- <sup>61</sup> See, e.g., *Zahir Yousuf v. the State* (2017 SCMR 2002); *Abdul Jabbar alias Jabbari v. the State* (2017 SCMR 1155); *Muhammad Azhar alias Ajja v. the State* (2016 SCMR 1928); *Sardar Bib & another v. Munir Ahmed & others* (2017 SCMR 344); *Ghulfam v. the State* (2017 SCMR 1189).
- <sup>62</sup> See, e.g., *Zahir Yousuf v. the State* (2017 SCMR 2002) (finding that recovery of weapon from the accused was legally inconsequential because no crime empty was recovered and the forensic report simply stated that the weapon was in working order); *Abdul Jabbar alias Jabbari v. the State* (2017 SCMR 1155) (finding the same).
- <sup>63</sup> *Haleem & others v. the State* (2017 SCMR 709).
- <sup>64</sup> See, e.g., *Imran alias Dully v. the State & others* (2015 SCMR 155); *Irfan Ali v. the State* (2015 SCMR 840); *Mst. Sughra Begum v. Qaiser Pervez & another* (2015 SCMR 1142); *Nasir Javaid v. the State* (2016 SCMR 1144); *Muhammad Ashraf v. the State* (2016 SCMR 1617); *Javed Iqbal & others v. the State* (2016 SCMR 787).
- <sup>65</sup> See, e.g., *Mehboob Bibi v. the State* (2017 SCMR 1835).
- <sup>66</sup> Such evidence is usually deemed to be 'circumstantial' and in need of independent corroboration. See, e.g., *Asad Khan v. the State* (PLD 2017 SC 681); *Mehboob Bibi v. the State* (2017 SCMR 1835).
- <sup>67</sup> See, e.g., *Javed Khan alias Bacha v. the State* (2017 SCMR 524); *Ghulfam v. the State* (2017 SCMR 1189).
- <sup>68</sup> See, e.g., *Faisal Mehmood v. the State* (2016 SCMR 2138).
- <sup>69</sup> See, e.g., *Haider Ali v. the State* (2016 SCMR 1554).
- <sup>70</sup> See, e.g., *Faisal Mehmood v. the State* (2016 SCMR 2138).
- <sup>71</sup> *Haleem & others v. the State* (2017 SCMR 709).
- <sup>72</sup> *Mst. Sughra Begum v. Qaiser Pervez & another* (2015 SCMR 1142).
- <sup>73</sup> *Id.*
- <sup>74</sup> *Muhammad Asif v. the State* (2017 SCMR 486).
- <sup>75</sup> *Shahbaz v. the State* (2016 SCMR 1763).
- <sup>76</sup> *Hashim Qasim v. the State* (2017 SCMR 986).
- <sup>77</sup> *Azeem Khan v. Mujahid Khan* (2016 SCMR 274).
- <sup>78</sup> See, e.g., *Mst. Sughra Begum v. Qaiser Pervez & another* (2015 SCMR 1142) ("[the] entire investigation . . . appears to have been dishonestly conducted"); *Muhammad Asif v. the State* (2017 SCMR 486) ("no prudent mind would believe such fantastic story which appears to be the hand-Art of the local police because in a night occurrence of this nature, remaining un-witnessed, the police imprudently indulges in such like tactics to mislead the court of law and justice"); *Shahbaz v. the State* (2016 SCMR 1763) ("post-mortem examination of the [victim] was noticeably delayed . . . It appears that time had been consumed by the complainant party and the local police in procuring and planting eyewitnesses and in cooking up a story for the prosecution").
- <sup>79</sup> Of the 57 analysed reported acquittal judgments from 2015 - 2018, the Supreme Court held in 16 cases that the accused should be acquitted because his co-accused had been acquitted on the basis of the same evidence.
- <sup>80</sup> *Muhammad Zaman v. the State* (2014 SCMR 749).
- <sup>81</sup> See, e.g., *Ghulam Sikandar v. Mamaraz Khan* (PLD 1985 SC 11); *Sarfraz alias Sappi v. the State* (2000 SCMR 1758); *Iftikhar Hussain & others v. the State* (2004 SCMR 1185).
- <sup>82</sup> *Sardar Bibi & another v. Munir Ahmed & others* (2017 SCMR 344).
- <sup>83</sup> *Id.* at para.2.
- <sup>84</sup> *Id.*
- <sup>85</sup> *Id.*
- <sup>86</sup> See, e.g., *Irfan Ali v. the State* (2015 SCMR 840).
- <sup>87</sup> Nasir Iqbal, 'Death-row Convict Found Not Guilty – After 24 years', Dawn, 25 Nov. 2016, available at: <https://www.dawn.com/news/1298706>.

- 
- <sup>88</sup> Hasnaat Malik, 'Supreme Court Acquits Death Row Prisoner Jailed for 20 Years', Express Tribune, 26 Nov. 2016, available at: <https://tribune.com.pk/story/1245035/supreme-court-acquits-death-row-prisoner-jailed-20-years/>.
- <sup>89</sup> Nasir Iqbal, 'Death-row Convict Found Not Guilty – After 24 years', Dawn, 25 Nov. 2016, available at: <https://www.dawn.com/news/1298706>.
- <sup>90</sup> Hasnaat Malik, 'Supreme Court Acquits Death Row Prisoner Jailed for 20 Years', Express Tribune, 26 Nov. 2016, available at: <https://tribune.com.pk/story/1245035/supreme-court-acquits-death-row-prisoner-jailed-20-years/>.
- <sup>91</sup> Geo News, 'Who is Mazhar Farooq?', 25 Nov. 26, available at: <https://www.geo.tv/latest/121633-Who-is-Mazhar-Farooq>.
- <sup>92</sup> See, e.g., *Muhammad Ismail v. the State* (2017 SCMR 713) (stating that “once the prosecution sets up a particular motive but fails to prove the same, then, ordinarily capital sentence of death is not awarded, which is a consistent view of the Supreme Courts since long.”).
- <sup>93</sup> *Iftikhar Mehmood & another v. Qaiser Iftikhar* (2011 SCMR 1165).
- <sup>94</sup> In 23 of 57 analysed reported acquittals from 2015 - 2018, the Supreme Court cited the prosecution’s failure to prove motive as among the reasons for acquittal. In 28 of 46 analysed reported commutations from 2015 - 2018, the Supreme Court cited the prosecution’s failure to prove a motive as among the reasons for commuting the death sentence.
- <sup>95</sup> See e.g., *Saeed Ahmed v. the State* (2015 SCMR 710); *Muhammad Asif v. Mukhtar Akhtar & others* (2016 SCMR 2035); *Ghulam Muhammad & another v. the State* (2017 SCMR 2048); *Ghulam Sabir v. the State* (2017 SCMR 807).
- <sup>96</sup> *Macchi Singh v. State of Punjab*, 3 SCC 413 (India 1983).
- <sup>97</sup> See *Republic v. White*, Criminal Case No. 74 of 2008 (Malawi).
- <sup>98</sup> Code of Criminal Procedure (Cr.P.C.), 1898 as amended by Act II of 1997, sections 164, 364, 533.
- <sup>99</sup> Cr.P.C. sec.164.
- <sup>100</sup> Cr.P.C. sec.164(3).
- <sup>101</sup> Cr.P.C. sections 364(1)-(2).
- <sup>102</sup> Of the 57 analysed reported acquittal judgments from 2015 - 2018, the Supreme Court found in 8 cases that the trial court had relied on a confession that was not voluntary or obtained under duress, extrajudicial, and/or retracted.
- <sup>103</sup> *Muhammad Ismail v. the State* (2017 SCMR 713), paras.7, 11, 12. At paragraph 12, the Supreme Court states that under Cr.P.C. sec.265-F:
- If the Trial Court does not convict [the accused] on his plea of guilt, it shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution. This discretion is to be exercised with extra care and caution, and ordinarily on such admission, awarding capital sentence of death shall be avoided and to prove the guilt of an accused, evidence of the complainant or the prosecution has to be recorded, in the interest of safe administration of justice.*
- <sup>104</sup> Muhammad Ismail was sentenced to death by the trial court on 6 September 2005 and his sentence was commuted to life by the Supreme Court on 30 January 2017. See *Muhammad Ismail v. the State* (2017 SCMR 713).
- <sup>105</sup> *Imran alias Dully v. the State & others* (2015 SCMR 155), para.4.
- <sup>106</sup> See, e.g., *Hashim Qasim v. the State* (2017 SCMR 986); *Azeem Kham & another v. Mujahid Khan & others* (2016 SCMR 274).
- <sup>107</sup> *Azeem Kham & another v. Mujahid Khan & others* (2016 SCMR 274).
- <sup>108</sup> *Id.*
- <sup>109</sup> The co-accused Mujahid Khan and Arbab Khan were arrested on 17 August 2006 and acquitted by the Supreme Court on 15 October 2016. See *id.*
- <sup>110</sup> See Section I.1, *supra*.
- <sup>111</sup> The 27 death-eligible offences are listed along with the statutory origin:
1. Murder – Pakistan Penal Code 1860 (PPC) sections 301, 302;
  2. Robbery resulting in death – PPC sec.396;
  3. Terrorism – Anti-Terrorism Act 1997 sec.7;
  4. Kidnapping or abduction of a minor – PPC sec.364-A;
  5. Kidnapping or ransom for extortion – PPC sec.365-A;
  6. Abduction to subject someone to unnatural lust – Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Hudood Ordinance) sec.12;

7. Blasphemy – PPC sec.295-C;
8. Adultery – Hudood Ordinance sections 10(4), 5 & 6;
9. Stripping a woman’s clothes – PPC sec.354-A;
10. Rape – PPC sections 375 & 376;
11. Gang rape – PPC sec.376 (2);
12. Harabaha with murder -- Offences Against Property (Enforcement of Hudood) Ordinance 1979 sections 15 & 17;
13. Sexual abuse – PPC sections 377B & 376(1A);
14. Unnatural offences – PPC sections 377 & 376(1A);
15. Mutiny and insubordination – Pakistan Army Act 1952 sec.31;
16. Abetment of mutiny – PPC sec.132;
17. Disclosure of parole, watchword, or countersign – Pakistan Army Act 1952 sec.26;
18. Giving or fabricating false evidence with intent to procure conviction of a capital offence – PPC sec.194;
19. High treason – High Treason Act 1973 sec.2;
20. Offences against the state – PPC sec.121;
21. Offences in relation to the enemy – Pakistan Army Act 1952 sec.24;
22. Arms trading – Pakistan Arms (Amendment) Ordinance 1996 sec.13-A;
23. Drug smuggling, transport, possession, and other narcotics offences – Control of Narcotics Substances Act 1997 sec.9;
24. Importing and exporting dangerous drugs into and from Pakistan – Dangerous Drugs Act 1930 sections 13 & 14;
25. Inter-provincially importing and exporting drugs, or manufacturing drugs – Dangerous Drugs Act 1930 sec.13;
26. Hijacking and harbouring hijacking – PPC sec.402-B;
27. Sabotage of the railway system – Railways (Amendment) Act 1995 sec.127.

HRCP, ‘Death Penalty Offences’, available at: <http://hrcp-web.org/hrpweb/death-penalty-offences/>.

<sup>112</sup> *Muhammad Sharif v. the State* (2009 PLD 709) (confirming *Iftikhar Ahmed Khan v. Asghar Khan & another* (2009 SCMR 502)).

<sup>113</sup> Of the 24 analysed reported Supreme Court judgments upholding the death penalty from 2015 - 2018, the Supreme Court explicitly noted in 18 cases that the murder was brutal, horrific, heinous, cruel, terrorist, or shocking.

<sup>114</sup> Article 6(1) of the International Covenant on Civil and Political Rights enshrines the right to life. Article 6(2) recognises that the death penalty may be imposed as a criminal sanction only for “the most serious crimes”. International Covenant on Civil and Political Rights, GA res. 2200A (XXI) of 16 Dec. 1966, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. Pakistan ratified the ICCPR in 2010. Office of the United Nations High Commissioner for Human Rights, ‘Ratification Status for Pakistan’, available at: [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=EN).

<sup>115</sup> See, e.g., *Mithu v. State of Punjab*, 2 SCR 690 at 708 (Supreme Court of India 1983); *S v. Makwanyane*, ZACC 3 at para.46 (Constitutional Court of South Africa 1995) (considering the position before the abolition of the death penalty in South Africa); *Spence & Hughes v. the Queen*, Crim. App. No.20 of 1998 at para.44 (Eastern Caribbean Court of Appeal). Privy Council authorities on this include, *inter alia*, *R v. Reyes*, 2 LRC 688 (Belize 2003); *Trimmingham v. the Queen*, UKPC 25 (2009).

<sup>116</sup> International Commission Against the Death Penalty, ‘The Death Penalty and the ‘Most Serious Crimes’: A Country-by-Country Overview of the Death Penalty in Law and Practise in Retentionist States’, Jan. 2013, available at: [http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes\\_final\\_6Feb2013.pdf](http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf). For U.S. jurisprudence on the ‘worst of the worst’ standard, see, e.g., *Roper v. Simmons*, 543 U. S. 551 at 568 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution’” (quoting *Atkins v. Virginia*, 536 U. S. 304 at 319 (2002))).

<sup>117</sup> *Macchi Singh v. State of Punjab*, 3 SCC 413 (Supreme Court of India 1983).

<sup>118</sup> *Azeem Khan v. Mujahid Khan* (2016 SCMR 274), para.32.

<sup>119</sup> See, e.g., *Mehboob Bibi v. the State* (2017 SCMR 1835) (accused sentenced to death by trial court and confirmed by High Court for kidnapping); *Gul Badshah v. the State* (2012 SCMR 567) (accused sentenced to death by trial court and confirmed by High Court for drug offence); *Shaukat Ali @ Billa v. the State* (2015 SCMR 308) (accused sentenced to death by trial court and confirmed by High Court for drug offence).

<sup>120</sup> See, e.g., *Mazhar Abbas alias Baddi v. the State* (2017 SCMR 1884) (death sentence commuted to life in part because murder was caused by a single dagger blow); *Sardar Muhammad & another v. Athar Zahoor & others*

---

(2017 SCMR 1668) (death sentence commuted to life in part because murder was by a single shot and might have been a “sudden affair”).

<sup>121</sup> See Section I.1 and Annex 1.

<sup>122</sup> Malik Asad, ‘Over 1.8 Million Cases Pending in Pakistan’s Courts’, Dawn, 21 Jan. 2018, available at: <https://www.dawn.com/news/1384319>.

<sup>123</sup> Tahir Siddiqui, ‘CJP Looks to Parliament for Reforms in Laws’, Dawn, 14 Jan. 2018, available at: <https://www.dawn.com/news/1382772>.

<sup>124</sup> According to HRCP, 2,788 people were sentenced to death between 1 Jan. 2010 and 31 Dec. 2018. See HRCP, ‘Death Penalty’ database, available at: <http://hrcpmonitor.org/search/?id=17> (report generated on 28 Jan. 2019).

<sup>125</sup> In the 310 reported cases, the Supreme Court heard the cases of 493 defendants. Of those 493 defendants, only 109 had their death sentence upheld by the Supreme Court – 22%. See Annex 1 for summarized results of the study’s quantitative analysis.

<sup>126</sup> *Muhammad Sharif v. Muhammad Javed* (PLD 1976 SC 452).

<sup>127</sup> *Muhammad Sharif v. the State* (2009 PLD 709), para.18 (citing Pakistan Penal Code 186 sec.302 – Punishment of *qatl-i-amd*). The section reads:

*Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter be:*

*(a) punished with death as qisas;*

*(b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or*

*(c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable.*

Pakistan Penal Code (Act XLV of 1860) sec.302, available at <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46816797.pdf>.

<sup>128</sup> *Muhammad Sharif v. the State* (2009 PLD 709), para.18 (emphasis added).

<sup>129</sup> “No person shall be deprived of life and liberty except in accordance with the law.” Constitution of the Islamic Republic of Pakistan, art.9: Security of Person, available at: [http://www.na.gov.pk/uploads/documents/1333523681\\_951.pdf](http://www.na.gov.pk/uploads/documents/1333523681_951.pdf).

<sup>130</sup> *Muhammad Sharif v. the State* (2009 PLD 709), para.22.

<sup>131</sup> See, e.g., *Trimmingham v. the Queen*, UKPC 25 (2009).

<sup>132</sup> “If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, and Court shall in its judgment state the reason why sentence of death was not passed.” Code of Criminal Procedure, 1898 as amended by Act 2 of 1997 [Pakistan], sec.367(5), available at: <https://www.oecd.org/site/adboecdanti-corruptioninitiative/39849781.pdf>.

<sup>133</sup> *Hassan & others v. the State & others* (PLD 2013 SC 793), para.23.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Ghulam Mohy-ud-din alias Haji Babu v. the State* (2014 SCMR 1034).

<sup>137</sup> *Muhammad Janas & another v. the State* (2010 SCMR 1016).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Gul Badshah v. the State* (2012 SCMR 567).

<sup>141</sup> *Arshad Ahmed v. the State*, Supreme Court of Pakistan, Crim. App. No. 124-L of 2012 (31 May 2017). Note this judgment is not reported and thus falls outside the data set and is not included in the summary statistics presented throughout the report.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> FFR, ‘Optimizing Pakistan’s Drug Law: Making the Control of Narcotic Substances Act (1997) Stronger, Fairer and More Effective’, 2018, p.14.

<sup>145</sup> *Id.*

<sup>146</sup> *Muhammad Sharif v. Muhammad Javed alias Jeda Tedi* (PLD 1976 SC 452).

<sup>147</sup> *Muhammad Sharif v. the State* (2009 PLD 709).

<sup>148</sup> *Id.* at para.19, which quotes from Indian Supreme Court case *Machhi Singh & others v. State of Punjab* (AIR 1983 SC 957) at 1:1.

- <sup>149</sup> *Ghulam Mohy-ud-din alias Haji Babu v. the State* (2014 SCMR 1034), para.21.
- <sup>150</sup> See *Manohar Lal alias Mannu & another v. the State*, 2 SCC 92 (Supreme Court of India 2000).
- <sup>151</sup> For example, the Supreme Court of the United States ruled in 1978 that the U.S. Constitution “require[s] that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.” *Lockett v. Ohio*, 438 U.S. 586 (1978).
- <sup>152</sup> *Ghulam Mohy-ud-din alias Haji Babu v. the State* (2014 SCMR 1034), para.21.
- <sup>153</sup> In the 310 reported cases, the Supreme Court heard the cases of 493 defendants. Of those 493 defendants, 170 had their death sentence commuted by the Supreme Court – 35%. See Annex 1 for summarized results of the study’s quantitative analysis.
- <sup>154</sup> See, e.g., *Muhammad Asif v. Mukhtar Akhtar & others* (2016 SCMR 2035); *Mazhar Abbas alias Baddi v. the State* (2017 SCMR 1884); *Zafar Iqbal v. the State* (2017 SCMR 1721); *Sardar Muhammad & another v. Athar Zahoor & others* (2017 SCMR 1668); *Muhammad Anwar v. the State* (2017 SCMR 630); *Hassan & others v. the State & others* (PLD 2013 SC 793).
- <sup>155</sup> See, e.g., *Sabeeha v. Ibrar & others* (2012 SCMR 74); *Abdul Rehman & others v. the State* (2010 SCMR 1758); *Muhammad Akram Rahi & others v. the State* (2011 SCMR 877); *Khalid & others v. the State* (2012 SCMR 327); *Muhammad Imran @ Asif v. the State* (2013 SCMR 782).
- <sup>156</sup> See, e.g., *Muhammad Sharif v. the State* (2009 PLD 709); *Hassan & others v. the State & others* (PLD 2013 SC 793)
- <sup>157</sup> See, e.g., *Muhammad Saleem v. the State* (2002 SCMR 436); *Abdul Haq v. the State* (PLD 1996 SC 1); *Farman Ali v. the State* (1992 SCMR 2055); *Zafar Iqbal v. the State* (2017 SCMR 1721); *Subedar (Retd.) Abdul Majeed & others v. Mulazim Hussain Shah & another* (2010 SCMR 641).
- <sup>158</sup> See, e.g., *Muhammad Sharif v. the State* (2009 PLD 709); *Muhammad Ismail v. the State* (2017 SCMR 713); *Muhammad Saleem v. the State* (2002 436) (citing *Muhammad Afzal v. the State* (1987 SCMR 1864)).
- <sup>159</sup> See, e.g., *Muhammad Amin v. the State* (2016 SCMR 116); *Rafaqat Ali & others v. the State* (2016 SCMR 1766); *Tariq Mehmood v. the State* (2011 SCMR 1880).
- <sup>160</sup> *Amjad Shah v. the State* (PLD 2017 SC 152); *Muhammad Hanif v. Muhammad Zubair* (2010 SCMR 182); *Aleeq Shah v. the State* (2010 SCMR 1590).
- <sup>161</sup> *Muhammad Imran alias Asif v. the State* (2013 SCMR 782).
- <sup>162</sup> See notes 197 to 204 and accompanying text.
- <sup>163</sup> See, e.g., *Tariq Mehmood v. the State* (2011 SCMR 1880); *Zeeshan @ Shani v. the State* (2012 SCMR 428).
- <sup>164</sup> See, e.g., *Hassan & others v. the State & others* (PLD 2013 SC 793); *Ghulam Mohy-ud-Din v. the State* (2014 SCMR 1034);
- <sup>165</sup> *Muhammad Sharif v. the State* (2009 PLD 709) (confirming *Iftikhar Ahmed Khan v. Asghar Khan & another* (2009 SCMR 502)).
- <sup>166</sup> *Muhammad Asif v. Mukhtar Akhtar & others* (2016 SCMR 2035).
- <sup>167</sup> See, e.g., *Mazhar Abbas alias Baddi v. the State* (2017 SCMR 1884).
- <sup>168</sup> See, e.g., *Zafar Iqbal v. the State* (2017 SCMR 1721); *Sardar Muhammad & another v. Athar Zahoor & others* (2017 SCMR 1668); *Muhammad Anwar v. the State* (2017 SCMR 630).
- <sup>169</sup> *Zafar Iqbal v. the State* (2017 SCMR 1721).
- <sup>170</sup> *Hassan & others v. the State & others* (PLD 2013 SC 793).
- <sup>171</sup> *Id.* at para.12.
- <sup>172</sup> See Section II.1.
- <sup>173</sup> *Sabeeha v. Ibrar & others* (2012 SCMR 74).
- <sup>174</sup> See e.g., *Abdul Rehman & others v. the State* (2010 SCMR 1758); *Muhammad Akram Rahi & others v. the State* (2011 SCMR 877); *Khalid & others v. the State* (2012 SCMR 327); *Muhammad Imran @ Asif v. the State* (2013 SCMR 782).
- <sup>175</sup> *Muhammad Sharif v. the State* (2009 PLD 709), para.19. Note that this case, being from 2009, falls outside the data set from which statistics and summary trends were drawn.
- <sup>176</sup> *Id.* at para.20.
- <sup>177</sup> See, e.g., *Masono v. State*, 1 BLR 46 (Botswana 2000), wherein the apex court of Botswana held that a non-premeditated crime, even if callous and cruel, did not justify capital punishment. See also *PP v. Garing and Imba*, 2015 SGHC 107 (Singapore), wherein the apex court of Singapore held that an accused who played a lesser role in an offence with no premeditation could not be sentenced to death.



- 
- <sup>178</sup> *Hassan & others v. the State & others* (PLD 2013 SC 793), para.12.
- <sup>179</sup> *Id.*
- <sup>180</sup> *Muhammad Saleem v. the State* (2002 SCMR 436), para.11.
- <sup>181</sup> *Abdul Haq v. the State* (PLD 1996 SC 1).
- <sup>182</sup> *Muhammad Sharif v. the State* (2009 PLD 709).
- <sup>183</sup> *See, e.g., Muhammad Ismail v. the State* (2017 SCMR 713), para.9 (“The rustic and conservative mind, a distinct feature of our rural society, is always susceptible to drive away a person to a point, retrieval wherefrom, becomes impossible.”)
- <sup>184</sup> *Muhammad Saleem v. the State* (2002 SCMR 436) (quoting *Muhammad Afzal v. the State* (1987 SCMR 1864)).
- <sup>185</sup> *Muhammad Ismail v. the State* (2017 SCMR 713), para.9.
- <sup>186</sup> *Muhammad Saleem v. the State* (2002 SCMR 436) (quoting *Muhammad Afzal v. the State* (1987 SCMR 1864)).
- <sup>187</sup> *See, e.g., Muhammad Amin v. the State* (2016 SCMR 116); *Rafaqat Ali & others v. the State* (2016 SCMR 1766).
- <sup>188</sup> *Tariq Mehmood v. the State* (2011 SCMR 1880).
- <sup>189</sup> Pakistan Juvenile Justice System Act 2018, sec.16; PPC sec.306(a).
- <sup>190</sup> *Amjad Shah v. the State* (PLD 2017 SC 152).
- <sup>191</sup> *Id.* at para.9. *See also Muhammad Hanif v. Muhammad Zubair* (2010 SCMR 182).
- <sup>192</sup> *Graham v. Florida*, 560 U.S. 48 (USA 2010).
- <sup>193</sup> *See Aleeq Shah v. the State* (2010 SCMR 1590).
- <sup>194</sup> *Cf. Asad Mehmood v. Akhlaq Ahmed & another* (2010 SCMR 868) (upholding a death sentence because, in this case, the nature of the crime was out of proportion to the influence of the elders).
- <sup>195</sup> *Muhammad Imran alias Asif v. the State* (2013 SCMR 782).
- <sup>196</sup> *See e.g. Muhammad Javed & another v. the State & others* (2011 SCMR 1462).
- <sup>197</sup> *Mst. Safia Bano v. Home Dept, Govt of Punjab & others* (PLD 2017 SC 18).
- <sup>198</sup> *Id.*
- <sup>199</sup> *Id.*
- <sup>200</sup> Dawn, ‘SC Orders Medical Examination of Mentally Ill Death-Row Inmate’, 24 Oct. 2018, available at: <https://www.dawn.com/news/1441006>.
- <sup>201</sup> *Id.*
- <sup>202</sup> *Id.*
- <sup>203</sup> *See, e.g.,* U.N. ECOSOC, ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, para.3, E.S.C. Res. 1984/50, U.N. Doc. E/1984/92, 1984 (stating that the death penalty shall not be carried out on persons who have become insane); William A. Schabas, ‘International Norms on Execution of the Insane and the Mentally Retarded’, 4 Criminal Law Forum 95, 113 (1993) (finding “no empirical evidence that any state actually executes the insane, even though many have no legislative provisions to this effect”).
- <sup>204</sup> *See, e.g.,* Office of the UN High Commissioner for Human Rights, ‘The Question of the Death Penalty’, E/CN.4/RES/2003/67, 25 Apr. 2003.
- <sup>205</sup> This principle is in line with law in executing states in the Caribbean and Africa. Edward Fitzgerald QC & Keir Starner QC, ‘A Guide to Sentencing in Capital Cases’, para.56, The Death Penalty Project (2007), available at: [https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/A\\_Guide\\_to\\_Sentencing\\_in\\_Capital\\_Cases.pdf](https://www.deathpenaltyproject.org/wp-content/uploads/2018/02/A_Guide_to_Sentencing_in_Capital_Cases.pdf).
- <sup>206</sup> *Tariq Mehmood v. the State* (2011 SCMR 1880). *See also Zeeshan @ Shani v. the State* (2012 SCMR 428).
- <sup>207</sup> *Santosh Bariyar v State of Maharashtra*, 6 SCC 498 (Supreme Court of India 2009). Note however that the Supreme Court of India has applied this principle inconsistently in recent years.
- <sup>208</sup> *See* Keerthana Annamaneni et al, ‘No Mercy: A Report on Clemency for Death Row Prisoners in Pakistan’, Justice Project Pakistan, 11 April 2018, available at: [http://www.jpp.org.pk/wp-content/uploads/2018/04/No-Mercy\\_Final-Report1.pdf](http://www.jpp.org.pk/wp-content/uploads/2018/04/No-Mercy_Final-Report1.pdf).
- <sup>209</sup> *Hassan & others v. the State & others* (PLD 2013 SC 793), paras.16, 20.
- <sup>210</sup> *Id.* at para.9.
- <sup>211</sup> *Ghulam Mohy-ud-Din v. the State* (2014 SCMR 1034). International jurisprudence supports the principle that prolonged periods on death row awaiting execution amount to cruel, inhuman, or degrading punishment in contravention of prisoners’ human rights. *See, e.g., Pratt & Morgan v. Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc); *Soering v. United Kingdom*, 11 Eur. Hum. Rts. Rep. 439 (European Court of Human Rights 1989). For further information, see Cornell Center on the Death Penalty

---

World Wide, 'Death Row Phenomenon', Feb. 2012, available at: <http://www.deathpenaltyworldwide.org/death-row-phenomenon.cfm>.

<sup>212</sup> *Ghulam Mohy-ud-Din v. the State* (2014 SCMR 1034).

<sup>213</sup> In Uganda, the apex court held in 2009 that any prisoner spending more than three years on death row after their death sentence was confirmed by the highest appellate court should have their sentence commuted to life imprisonment. *Attorney General v. Susan Kigula & 417 Others*, Const. App. No.03 of 2006, (Uganda 2009). The Inter-American Court of Human Rights has held that unjustified pre-trial and post-trial delays causing prisoners to spend time in appalling prison conditions are mitigating factors which are grounds for commuting a prisoner's death penalty to imprisonment. *Hilaire and Ors. V. Trinidad and Tobago*, IACHR Series C No. 9, IHRL 1477.

<sup>214</sup> *Dilawar Hussain v. the State* (2013 SCMR 1582).

<sup>215</sup> *Muhammad Mansha v. the State* (2016 SCMR 958).

<sup>216</sup> Reprieve has closely monitored public reporting of executions in Pakistan since the lifting of the moratorium in December 2014. For each publically reported execution, Reprieve tracks the date on which the prisoner was sentenced to death (when available) and the date of the execution, among other factors. By calculating the time elapsed between these two dates, Reprieve can determine how long each executed prisoner spent on death row before his execution. Because the data is reliant on public reporting, it provides a picture of general trends but does not include every single execution.

<sup>217</sup> *Id.* For example, Abdul Sattar was sentenced to death for murder in 1992 and was executed 22 years later, in 2015. Haseeb Bhatti, 'Four More Prisoners Sent to the Gallows', Dawn, 19 Mar. 2015, available at: <https://www.dawn.com/news/1170589/four-more-prisoners-sent-to-the-gallows>. Javed alias Jeeda was sentenced to death for double murder in 1989 and was executed 25 years later in 2015. Express Tribune, 'Two More Murder Convicts Sent to the Gallows', 4 June 2015, available at: <https://tribune.com.pk/story/897494/two-more-murder-convicts-sent-to-the-gallows/>.

<sup>218</sup> Law and Justice Commission of Pakistan, 'Consolidate Statement Showing Pendency, Institution And Disposal of Cases During the Period 1-30th September, 2018 in The Supreme Court of Pakistan, Federal Shariat Court, High Courts and District Judiciary', available at: [http://ljcp.gov.pk/nljcp/assets/dist/news\\_pdf/courts.pdf](http://ljcp.gov.pk/nljcp/assets/dist/news_pdf/courts.pdf).

<sup>219</sup> See, e.g., *Pathan v. the State* (2015 SCMR 315); *Mst. Sughra Begum v. Qaiser Pervez & another* (2015 SCMR 1142); *Ali Sher v. the State* (2015 SCMR 142); *Azeem Khan v. Mujahid Khan* (2016 SCMR 274); *Javed Khan alias Bacha v. the State* (2017 SCMR 524); *Hashim Qasim v. the State* (2017 SCMR 986).

<sup>220</sup> For each Supreme Court case reviewed, researchers recorded the date of the original trial where available and the Supreme Court decision date, and calculated the time elapsed between these dates. This data was available for 152 judgments, and the average time elapsed was 9.81 years.

<sup>221</sup> The same data referenced above revealed that 11% of appellants waited 15 years or more from their trial court date for their Supreme Court appeal to be decided.

<sup>222</sup> United States Department of State Bureau of Democracy, Human Rights and Labor, 'Country Report on Human Rights Practices for 2016 – Pakistan', pp.7-8, available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dldid=265546>; United States Department of State Bureau of Democracy, Human Rights and Labor, 'Country Report on Human Rights Practices for 2015 – Pakistan', pp.7-9, available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dldid=252973>.

<sup>223</sup> United States Department of State Bureau of Democracy, Human Rights and Labor, 'Country Report on Human Rights Practices for 2016 – Pakistan', p.7, available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dldid=265546>.

<sup>224</sup> Asad Hashim, 'Welcome to 'the world's largest death row'', Al Jazeera, 11 April 2017, available at: <https://www.aljazeera.com/indepth/features/2017/04/world-largest-death-row-170411075033482.html>. In 2018, the prison occupancy level was at 157.3% its official capacity. Institute for Criminal Policy Research, 'World Prison Brief Data: Pakistan', available at: <http://www.prisonstudies.org/country/pakistan>.

<sup>225</sup> Home Office [United Kingdom], 'Country Information and Guidance – Pakistan: Prison Conditions', June 2016, paras.2.5.2 & 5.3.2.

<sup>226</sup> Dawn, 'SC Orders Provinces to End Overcrowding of Jails', 4 July 2018, available at: <https://www.dawn.com/news/1417818>.

<sup>227</sup> *Hilaire and Ors. V. Trinidad and Tobago*, IACHR Series C No. 9, IHRL 1477.

<sup>228</sup> Hasnaat Malik, 'SC Acquits Man Two Years After His Death', Express Tribune, 9 Oct. 2016, available at: <https://tribune.com.pk/story/1195917/sc-acquits-man-two-years-death/>.



---

<sup>229</sup> HRCP, 'State of Human Rights in 2016', pp.65-66, available at: <http://hrcp-web.org/hrcpweb/wp-content/uploads/2017/05/State-of-Human-Rights-in-2016.pdf>.

<sup>230</sup> *Id.* at 65.

<sup>231</sup> Hasnaat Malik, 'SC Acquits Man Two Years After His Death', Express Tribune, 9 Oct. 2016, available at: <https://tribune.com.pk/story/1195917/sc-acquits-man-two-years-death/>.







**FOUNDATION FOR  
FUNDAMENTAL RIGHTS**

47-B, Street 38, F-10/4  
Islamabad, Pakistan

+92 51 229-3103  
[www.rightsadvocacy.org](http://www.rightsadvocacy.org)  
Twitter: @FFR\_PK

**REPRIEVE**

PO Box 72054  
London, UK EC3P 3Bz

+44 (0) 20 7553 8140  
[www.reprieve.org.uk](http://www.reprieve.org.uk)  
Twitter: @Reprieve