CHAPTER XV

CRIMINAL BUSINESS : THE SADAR FOUJDARI ADALAT

The Sadar Foujdari Adalat was not an appellate court. It exercised a general supervision over the administration of justice in criminal cases, and to this end it had the power to call for the proceedings of the lower courts and pass such orders on them as it considered proper[1]. It was the court which alone had the power to confirm sentence of death, transportation for life or life imprisonment passed by the judges of the Court when on circuit[2] and to it had to be referred all sentences of imprisonment for more than two years passed by the lower criminal courts[3]. The Court construed its powers of revision widely[a].

The volume of criminal work in the Bombay Court was not excessive and it was not found necessary to empower single judges to act for the Court in judicial matters; a single judge was however authorised in 1827 to perform ministerial acts which did not "involve deliberation nor amount to passing any discretionary order or decision"[4].

The administration of criminal justice in the Bombay Presidency had always differed markedly from that in Bengal and Madras, and the prevailing system was radically altered in 1827. It is convenient to refer briefly to the position before and after that date.

From the beginning the responsibility for deciding whether the prisoner was guilty of an offence rested on the judge. If the trial judge found the prisoner guilty, and the latter was a Mohammedan or a Hindu, the appropriate law officer—the kazi or the pundit—declared the punishment prescribed by the Mohammedan or Hindu law for the offence, and judgment was pronounced accordingly. If the prisoner was a Christian or a Parsee the law officers were not consulted and the judge passed sentence on the principles of English law[b]. In 1820 the category of persons on which

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1. Bom. Regns. 7 of 1820, s. 10(1) and 13 of 1827, s. 29.
2. Bom. Regns. 7 of 1820, s. 17 and 13 of 1827, s. 21(3).
3. Bom. Regns. 7 of 1820, s. 48(1) and 13 of 1827, s. 13(3).

a Thus in a case in which the prescribed procedure had not been followed the Court, annulled the proceedings and ordered a fresh trial: *Wittoojee Rugshette* (1831), 1 Bellasis 52.

4. Bom. Regn. 13 of 1827, s. 28(4).

b Bom. Regns. 5 of 1799, s. 36, 3 of 1800, s. 36 and 8 of 1812, s. 11. These provisions, so far as they relate to Mohammedans and Hindus, are taken almost verbatim from s. 20 of the Judicial Regulations of 1793 for the Province of Malabar prepared by Jonathan Duncan who became Governor of Bombay in the following year. Volume II of the Joint Commissioners' Report on that Province contains Duncan's "Observations on the Administration of Justice as applicable to Malabar", to s. 79 and succeeding sections of which the

judgment was passed according to the principles of English law was widened to include persons of any religious persuasion other than the Mohammedan or Hindu[5]. If the judge entertained doubts about the proper application of English law those doubts were to be embodied in a report to the Governor in Council who would obtain legal advice thereon by which the judge was bound[c]. If the judge doubted the correctness of his law officer's opinion on a matter of Hindu or Mohammedan law he was to refer the proceedings of the trial to the Sadar Foujdari Adalat which would pass the final judgment[6].

The Regulations did not at this time state what acts constituted punishable offences. The assumption was that certain acts were so clearly repugnant to good order and morality that they were punishable under the law of his religion if the prisoner were a Mohammedan or a Hindu, or under the law of England if he professed some other faith. In the opinion of John Romer, a judge of great experience, there was in practice no difference in punishment for crimes of the same description whether the accused was a Hindu or a Mohammedan; the law of both persuasions, he considered, operated equally, save in the case of Brahmins[d]. The Bombay Government was also of the view that the quantum of punishment did not vary if the accused was a Parsee or a Christian[7].

The proceedings of trials referred to the Sadar Foujdari Adalat before 1827 were laid before a bench of two or more judges. If the Court concurred in the conviction and the accused persons were Hindus or Mohammedans, the Court's own law officers, Hindu or Mohammedan as was appropriate, were then required to state whether the declaration of the trial court's law officer as to the punishment assigned to the offence was that prescribed by the law of the prisoner's religion, and if not to state what it ought to have been. The Court then passed the final sentence[8]. Earlier regulations (3 of 1800 and 9 of 1812) had directed that the superior criminal court should pass such final sentence "as may appear consonant to justice and conformable to the law of the religion of the party, or parties, tried, or to the custom of the country". Both regulations were rescinded in 1820[9], and the fact that no

judge was authorised to refer for the purpose of checking the correctness of the views expressed by his law officers: Bom. Regns. 5 of 1799, s. 39, 3 of 1800, s. 39, 7 of 1820, s. 20.

5. [Bom. Regn. 7 of 1820, s. 17].

c The Governor in Council consulted the Advocate General. The latter's advice appears to have been sought infrequently and then only on the appropriate punishment under English law for offences such as manslaughter, the murder of persons suspected of sorecery, and varieties of assault: B.J.C., 7 Apr. 1824, fol. 1633, P/399/32; 10 Nov. 1824, fol. 8148, P/399/39; 12 Jan. 1825, no. 17, P/399/42.

6. Bom. Regn. 7 of 1820, s. 23.

d Judl. Letter from Bombay, 29 July 1818, para. 187; as regards Brahmins, see p. 136 below.

7. Judl. Letter from Bombay, 29 July 1818, para. 206.

8. Bom. Regn. 7 of 1820, s. 41(2).

9. *Ibid.*, s. 2.

like direction was given to the reconstituted court of 1821 suggests that the Sadar Foujdari Adalat was empowered to pass such sentences in the case of prisoners of the Hindu and Mohammedan persuasions as appeared to it in the circumstances to be just. If however the accused person was neither a Hindu nor a Mohammedan the Court passed sentence which it considered to be in accordance with the principles of English law[10].

The bench which considered such references consisted, if practicable, of three judges. If three judges were not available the bench was composed of two judges, one of whom was the Chief Judge who did not go on circuit. If the two judges differed in opinion, that of the Chief Judge prevailed, provided he agreed with the opinion of the referring judge; if he did not, the hearing was adjourned until another judge was able to sit with them[11].

In 1827 far-reaching changes were made. Acts and omissions which the law regarded as punishable offences were defined and classified, and with the scale of punishment for each offence were made the subject of a Code[12]. Provision was also made for the punishment of acts declared penal by the religious law of the accused person, although not included among the offences punishable under the regulations, if they constituted a breach of morality or the peace or good order of society[13]. Strong objection was taken by the Directors to this provision on the grounds that not only would it include the whole religious law of the Hindus and Mohammedans but would empower the courts to inflict any punishment, including death, sanctioned by the Hindu or Mohammedan religion. They desired that the provision be rescinded[14], but no action appears to have been taken[e].

The Code applied to all persons not British subjects, and made unnecessary any reference to English law which had been the cause of considerable inconvenience[15]. Determination of the degree of punishment, within the limits laid down in the Regulations for each offence, now rested with the presiding judge[16]. If the convicted person was a Hindu or a Mohammedan the appropriate law officer was still required to state in writing the punishment for the offence prescribed by the law of that person's religion, and this statement formed part of the record. The object of this provision is not clear for, save as regards one class of offences, the statement was specifically declared not to be for the purpose of directing the court's judgment[17]. The

10. *Ibid.*, s. 17.
11. *Ibid.*, s. 41.
12. Bom. Regn. 14 of 1827.
13. *Ibid.*, s. 1(7).
14. Judl. Letter to Bombay, 5 June 1833, para. 27.

e In 1846 the Court set aside the conviction of the appellant, a Christian, for adultery on the ground that this was neither an offence punishable under the Regulations nor under his religion: *Bernard Peaform*, 1 Bellasis 266.

15. Bom. Regn. 14 of 1827, Preamble.
16. Bom. Regns. 13 of 1827, s. 38(6); 8 of 1831, s. 9(1).
17. Bom. Regn. 13 of 1827, s. 38(6).

excepted offences were those under religious law (referred to in the preceding paragraph) for which no punishment was provided in the Regulations. In 1831 the law was clarified[18]. A declaration as to the prescribed punishment was henceforth to be given by the law officer only in the excepted cases of offences under religious law and that was ordinarily the sentence imposed by the Court[19]. If however the punishment was of a nature not authorised by the Regulations it was the duty of the trial judge to commute it to one which was, and in that event the sentence required confirmation by the Sadar Foujdari Adalat to which the proceedings had to be referred[20].

The criminal law having been reduced to a Code, it was the judicial function of the Sadar Foujdari Adalat to ensure that it was correctly applied. In addition to those cases earlier mentioned which had to be referred to the Court, the latter had also to decide cases referred to it by judges on circuit on account of doubt or difficulty[21] and to confirm sentences of solitary confinement for a period in excess of six months[22].

Before 1827 there had been no rule which laid down the course to be followed if the two judges differed on a miscellaneous matter not arising out of a referred trial and in 1825 the Court suggested to the Government that the Bengal rule be adopted, namely that in all cases of disagreement between two judges the opinion of a third judge be obtained[23]. The Government agreed and the necessary change was made in the new Code. Two judges were declared to constitute a Court, and if they differed in opinion, further consideration of the matter before them was deferred until it could be brought before a larger court. The majority view then prevailed, and if the judges were equally divided, the senior judge had a casting vote[24]. In contrast however to the earlier rule that the judge who tried a case or referred a question to the Sadar Foujdari Adalat should take no part at the hearing in that Court[25], it was now provided that the referring judge could vote if he was present when the reference was heard, and if he was not present his proposed sentence or recorded opinion counted as a vote[f].

The sentences which the judges thought fit to confirm, and the sentences which they imposed, were severe by modern standards. A man convicted of the rape of a girl aged 10 was sentenced to 14 years' imprisonment and to

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18. Bom. Regn. 8 of 1831, s. 9. S. 38(6) of Regn. 13 of 1827 was rescinded by s. 8(1) of the 1831 Regn.
19. *Ibid.*, s. 9(1), (2).
20. *Ibid.*, s. 9(3).
21. Bom. Regn. 13 of 1827, s. 22(2).
22. Bom. Regn. 8 of 1831, s. 4.
23. Beng. Regn. 25 of 1814, s. 9; B.J.C., 31 Aug. 1825, no. 32, P/399/49.
24. Bom. Regn. 13 of 1827, s. 28(3).
25. Bom. Regn. 7 of 1820, s. 41.

f Bom. Regn. 13 of 1827, s. 28(3). If the bench consisted of two judges such vote was sufficient to constitute a majority.

be twice flogged[26]. The usual punishment for infanticide appears to have been two years' solitary imprisonment[27]. The sentence for forgery, if the offence was regarded as serious, included public disgrace, the offender being led around the town on an ass with the fabricated document attached to his back[g]. In cases of murder in which the circumstances were particularly atrocious it was commonly the practice, until stopped by the Governor General in 1835, for the Court to direct that the prisoner's body be left hanging on the gibbet[28]. On the other hand, the death sentence was not imposed on Brahmins or women in those districts where the religious feelings of the community would be shocked, except in cases of "such deep atrocity as they may be expected to counteract the effect of these feelings"[h].

If a person was found to be insane at the time he committed the act the Court's order was that he be detained until declared by the medical authorities to be in a fit state to be set at liberty[29].

26. *Hussha Wullud Yeshnack* (1828), 1 Bellasis, 13.

27. *Amba* (1827), ibid., 4; *Baee Muthee* (1829), ibid., 32.

g *Bappoojee Luxumun Sona* (1828), 1 Bellasis, 19; *Babunshette Poondlickshette* (1829), ibid., 34. In the former case so much of the sentence as provided for public disgrace was remitted by the Court on the ground of the existence of special circumstances. Public disgrace as a punishment was abolished by Act 2 of 1849.

28. *Venkoo Wullud Hurjee Powar* (1828), 1 Bellasis, 8.

h Bom. Regn. 14 of 1827, s. 4(5). In the cases of *Mahaishwur Bhanjee* (1835), 1 Bellasis, 97, a Brahmin, and of *Luxumee* (1833), ibid., 87, a woman, the Court considered a death sentence to be proper. In its desire not unnecessarily to offend religious feeling, the Government in 1829 acceded to a request by the Parsee community that certain of their number be allowed to take the place of the common executioner and carry out the hanging of a Parsee convicted to murder, on the ground that if a person of another faith were to touch him at the time of execution his body could not enter the Parsee sepulchre: B.J.C., 18 Feb. 1829, no. 4, P/400/23. Brahmins in the province of Benares were also exempted from the death penalty (Bengal Regns. 16 of 1795, s. 23 and 21 of 1795, ss. 7, 9) but the exemption was removed by Regn. 17 of 1817, s. 15.

29. *Oomer Wullud Auwud* (1829), 1 Bellasis, 23; *Sheik Ghasee Wullud Sheik Boolla* (1833), *ibid.*, 79.