

Re MUNEYIA,
 SUNDARA
 AYYAR AND
 SPENCES, JJ.

Narasimham is found on investigation to be true; I sanction the prosecution of Parala Muneyya and Lingam Appayya for the offence of perjury and of Sikkala Papayya for presumably abetting them". No sanction can be granted of a provisional character in case certain conditions are satisfied in the future. It was the duty of the Magistrate before granting sanction to satisfy himself that there was, at the time of the order, a *prima facie* case against the petitioners here.

We set aside the order.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

1911.
 December
 6 and 15.

Re SUBBIAN SERVAI AND FIVE OTHERS (ACCUSED IN CALENDAR
 CASE No. 744 OF 1911 ON THE FILE OF THE SUB-
 MAGISTRATE OF PALNI).*

Theft of fish in irrigation tank—Fish, offence of theft of—dependent upon power of fish to leave the tank.

Although the capture of fish in an ordinary irrigation tank will not of itself amount to theft, yet if the water in the tank become so low as to permit the fish leaving the tank the offence may be committed.

Subba Reddi v. Munshoor Ali Saheb, [(1901) I.L.R., 24 Mad., 81], explained.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code (Act V of 1898) by J. R. HUGGINS, the Additional District Magistrate of Madura, in his letter, dated 16th September 1911.

The facts of this case appear from the following Order:—

P. R. Grant for the Public Prosecutor on behalf of the Government.

AYLING, J.

ORDER.—The accused were convicted of theft in removing fish from a Government irrigation tank. They pleaded guilty: but the District Magistrate relying on the ruling in the High Court Proceedings No. 663, dated 10th April 1880, has referred the case on the ground that the capture of fish in an ordinary irrigation tank does not amount to theft.

The ruling quoted, which has been followed in a later case, *Subba Reddi v. Munshoor Ali Saheb*(1), is authority for the

*Criminal Revision Case No. 588 of 1911 (Referred Case No. 120 of 1911).
 (1) (1901) I.L.R., 24 Mad., 81.

general principle above referred to: but there is reason to doubt whether that principle is to be applied to all cases and under all circumstances or was intended to be so applied. A somewhat different view has been taken both by the Bombay and Calcutta High Courts: *vide Queen Empress v. Shaik A'dam*(1) and *Maya Ram Surma v. Nichala Katani*(2). In the former case the tank in question was an enclosed municipal tank; but the *ratio decidendi* was that the fish, being unable to escape from the tank, were practically in the power and dominion of the owner so as to be capable of being the subject of theft. It has been pointed out that even in an open irrigation tank after the water has fallen to such an extent that both the supply and distribution channels are dry, the freedom of the fish is equally circumscribed and the learned Judges of the Calcutta High Court in the ruling above quoted appear to clearly recognise that under such circumstances a conviction for theft might be sustainable. It was presumably in view of these considerations that MILLER, J., in the latest Madras case to which I have been referred—*Re Raghunadha Mahanti*(3)—held that each case must be decided on the particular facts thereof, in other words that the general principle laid down in *Subba Reddi v. Munshoor Ali Saheb*(4) and the earlier case was not universally applicable. He accordingly refused to interfere with a conviction based on very similar facts to those in the present case.

In this view I cannot but concur; though I fully realise the desirability of a more positive exposition of the law, if it were possible, and the drawbacks inevitably attendant on a state of affairs in which an act which is lawful today may become a criminal offence tomorrow and *vice versa*.

In the present case the judgment gives no indication of the state of the tank but the District Magistrate says that the sub-magistrate's statement that the water was so low that the fish could not escape is probably correct. In view of this and of the fact that the accused pleaded guilty and have only been awarded small fines, I do not feel it necessary to call for further evidence or to interfere in any way with the conviction and sentence.

H. SUBBIAH
SERVAL.
AYLING, J.

(1) (1886) I.L.R., 10 Bom., 193.

(2) (1888) I.L.R., 15 Calc., 402.

(3) Criminal Revision Case No. 580 of 1909. (4) (1901) I.L.R., 24 Mad., 81.