

If, on the other hand, a pardon was legally tendered to the accused in 1883, the proper sanction would be necessary for the present prosecution on each branch of the alternative charges—*In re Báláji Sitárám*⁽¹⁾. And, in respect of the statement made in 1883, the sanction of the High Court would be necessary under section 339 of the Criminal Procedure Code (X of 1882). That sanction has never been given, and could not now be given; (see section 195 of the Code of Criminal Procedure (X of 1882), clause (b)). We do not, under the circumstances, consider the question whether there was sufficient sanction as regards the branch of the charge having reference to the evidence given before Mr. Maconochie.

1885.

QUEEN-
EMPRESS
v.
DÁLÁ JIVÁ.

Appeal dismissed.

(1) 11 Bom. H. C. Rep., 34.

REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS v. SHAIK ADAM VALAD SHAIK FARID
AND SHAIK IBRA'HIM VALAD SHAIK UMAR.*

1886.
January 8.

*Theft—Possession—Fish in an enclosed tank—Penal Code (Act XLV of 1860),
Section 379.*

Where the accused were found fishing without permission in an enclosed tank belonging to the municipality of the town of Sirsi, it was held that they could be convicted of theft, as the tank, from which the fish were taken, was apparently an enclosed tank, and the fish were, therefore, restrained of their natural liberty, and liable to be taken at any time according to the pleasure of the owner, and were, therefore, subjects of theft.

Bhusun Parui v. Denonath Banerjee⁽¹⁾ and the *Queen v. Revu Pottheadu*⁽²⁾ distinguished.

THIS was a reference by the District Magistrate of Kánara under section 438 of the Criminal Procedure Code (X of 1882).

The reference, so far as it is material for the purposes of this report, was as follows:—

“On the 26th April, 1885, the accused were seen fishing with a rod in the “Kotekere” tank within the Sirsi municipal limits.

* Criminal Reference, No. 159 of 1885.

(1) 20 Calc. W. R. Cr. Rul., 15.

(2) I. L. R., 5 Mad., 390.

1885.

QUEEN-
EMPRESS
v.
SHAIK ADAM
VALAD
SHAIK FARID,

The right of fishing in this tank is annually farmed out to the highest bidder by the municipality, and the proceeds are credited to municipal funds. A prohibitory notice is also duly published by the municipality forbidding all persons from catching any fish from the tank. The accused did not refrain from fishing, although they were ordered by the municipal servants to desist from their action, which was in contravention to the notice, until the assistant surgeon, who is a municipal commissioner, took active measures in the matter.

“The sanitary inspector in the service of the municipality then lodged a complaint under its direction before the Second Class Magistrate, Azám Venkáji Náráin, against the two accused persons for fishing in the municipal tank without its permission. The inquiry before the Magistrate resulted in the conviction of the accused persons, under sections 379 and 511 of the Penal Code (XLV of 1860), for having attempted to commit theft of fish, and the first accused was sentenced to pay a fine of Rs. 4, or, in default, to undergo seven days’ simple imprisonment; and the second accused to a fine of Rs. 5 and, in default, to eight days’ simple imprisonment. The fines have been paid.

“The second accused, Shaik Ibráhim, only appealed against his conviction and sentence to Mr. J. H. Todd, the Sub-divisional Magistrate at Sirsi, who reversed the sentence on the ground that “fish are *feræ naturæ*” and, as such, cannot be the subject of theft. If the tank had been stocked with fish by the municipality the case would be different; but in this case the fish are, in reality, wild animals not in the possession of the municipality.” The first accused not having preferred any appeal, the conviction against him still remains in force.

“The view taken by Mr. Todd appears to be sound, and in conformity with the rulings of the High Court of Calcutta and the Sadar Court of Sind (*vide Bhusun Parui v. Denonáth Bamerjee*⁽¹⁾ and *Imperatrix v. Jeo. valad Pandhi*). But, on the other hand, a conviction for a similar offence, under sections 379 and 511, against twenty-three accused persons (Lingáppá Basáppá and 22

(1) 20 Calc. W. R., 15 Cr. Rul.

others), which took place in Mundgod Petha of this district in 1876, was upheld on review by the Bombay High Court on 20th November, 1876. The case does not appear to have been reported, and I have no record as to the arguments used in support of the conviction, or of any remarks made by their Lordships. The question involved being most important, inasmuch as it affects the right of Government and private individuals to fisheries, has already attracted the attention of the Legislature with a view to introduce some enactment to protect those rights.

1886.
 QUEEN-
 EMPRESS
 v.
 SHAIK ADAM
 VALAD
 SHAIK FARID.

“In the present case the right to the tank and fishery is vested in the Sirsi Municipality; and the point to be decided would be whether the fish in it are moveable property, so as to be in the possession of the municipality. If their Lordships come to the conclusion that fish are not the subject of theft, I beg that the conviction and sentence against the first accused, Shaik Adam valad Shaik Farid, may be reversed, and the fine ordered to be refunded.”

There was no appearance for the prosecution or defence.

Per Curiam.—This case cannot, we think, be governed by the ruling in *Blusun Parui v. Denonath Banerjee*⁽¹⁾, which refers to fish taken in a navigable river, nor by the Madras cases referred to in the *Queen v. Revu Pothadu*⁽²⁾, in which the High Court held that it was not theft to take fish from open irrigation tanks. In the present case, the tank from which the fish were taken was apparently an enclosed tank belonging to the municipality. The fish were, therefore, “restrained of their natural liberty and liable to be taken at any time, according to the pleasure of the owner, and were, therefore, upon principle and according to the better opinions, subjects of theft” (see 2 Russell on Crimes, 303). If the fish were unable to escape from the tank, they “were practically in the power and dominion of the prosecutor,” and the conviction was legal—*Queen v. Shickle*⁽³⁾.

Conviction affirmed.

¹⁾ 20 Calc. W. R. Cr. Rul., 15.

⁽²⁾ I. L. R., 5 Mad., 391, note.

⁽³⁾ L. R., 1 Cr. Ca., 158.