IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 31of 2014

BETWEEN	:	**HERBERT WISE**
		Appellant
AND	:	**THE STATE**
		Respondent

Counsel	:	Appellant in Person
		Mr. R. R. Kumar for the State
Date of hearing	:	16th and 30th January 2015
Date of Judgment	:	04th February 2015

JUDGMENT

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1. The appellant was charged in the Navua Magistrates Court with the following offence:

2. The background to this case cannot be any more clearly stated than as exposed by State counsel in his excellent submissions.

"**Background**

- On 7th July 2013, Michael Herbert Wise ("the Appellant") was arrested and escorted to Navua Police Station by PC 4610 ("PW1") based on information that persons were seen loitering around the

Navua area at about 0300hrs and were suspected of being in possession of dangerous drugs.

- The appellant was informed by PW1 as to the reason for his arrest and that PW1 needed to conduct a body search on him. The appellant who appeared drunk, to assist PW1 in conducting the search, stripped off all his clothes and entered a cell at the station.

- While inside the cell and naked, the Appellant exchanged some words with PW1 who was trying to get the appellant to put on his clothes again. During the exchanging of words between the Appellant and PW1, it was alleged that the Appellant swore at PW1 by saying "fuck you".

- On 9th August 2013 the Appellant was charged with one count of indecently annoying a person, being PW1, contrary to s.213(1)(a) of the Crimes Decree 2009. The matter was first called before the Navua Magistrates Court on 28 August 2013 and thereafter adjourned for disclosures until the Appellant entered his plea of not guilty after waiving his right to counsel on 28 November 2013."

3. At the hearing the prosecution case consisted of three Police witnesses who testified to the facts that the accused did indeed take his clothes off in the Police cell and when asked to put them on again had said "fuck you" to PW1.

4. The accused refused to cross examine the witnesses and elected not to give evidence. He requested the Magistrate if he could make written submissions to her, which she refused. The accused persisted but the Magistrate told him she would only hear him orally and she then put an end to the hearing.

5. The learned Magistrate then handed down judgment in the case and again the accused asked to file written submissions, a request again refused because judgment had been delivered.

6. Before sentencing the accused filed his written submissions in the Court Registry.

7. The Magistrate convicted the accused for annoying a person and sentenced him to a term of 9 months imprisonment.

8. The accused appeals sentence but not conviction.

9. The Magistrate convicted the accused in reliance on the evidence of the Police Officers. She found that his nudity rather than the indecent words used annoyed the Police. She said this in her judgment:

> "It was obvious by such evidence that the accused's purpose was not really to assist the police and that he intended to annoy the police

officers who were present at the scene and thereby insult the entire police station by such behavior. It was during this scenario that he was alleged to have annoyed PW1."

Based on that premise she found the accused guilty and convicted him.

10. The maximum penalty for annoying a person is 12 months' imprisonment, and the normal sentence being handed down by the Magistrates is a binding over order. (see **Semo** [2014] FJHC per de Silva J. and **Prakash** [2013] FJHC 656 per Bandara J.)

A sentence of 9 months would appear to be excessive.

11. A difficulty with this case is that the charge was the annoyance to another by saying "fuck you" and not the nakedness of the accused. The Magistrate appears to have confused this point and relied on his nudity as the offensive behaviour rather than the words used as set out in the charge. The accused has not appealed his conviction but if he had he would have probably succeeded. In any event it is difficult to imagine that the words "fuck you" would have insulted the modesty of a typical police officer. The phrase must be said and heard many times per day in any police station in this land and probably even said by the officer himself to others.

12. It is rather disturbing that the Magistrate would not receive the written submissions of the accused below. It is the fundament right of an accused to defend himself at trial and to indeed have a fair trial. Where the accused is representing himself and elects not to give evidence but to make written submissions, then no tribunal should stand in his way. It is the interests of justice that would override the Magistrate's insistence that proper criminal procedure be followed rather that written submissions being handed up, and his rights under s.15(1) of the Constitution (2013) were prejudiced by the Magistrates intransigence.

13. The appellant tells me that the Magistrate became visibly irritated and impatient and told him that he had "disrespected the judiciary". He believes that that attitude led to the harsh sentence she passed; however there is no evidence of that in the Court Record.

14. I have seen the written submissions that the accused was so anxious to place before the Magistrate and which he subsequently did by filing them in Court. They are for the most part rambling and irrelevant but that is not the point. The Magistrate had no idea what those submissions might contain and it was the only manner by which an unrepresented accused wanted to place his defence before the Court. The Court had a constitutional duty to accept them and consider them, despite their irrelevance and despite the fact that "I have not asked for written submissions".

15. In the premises, given the erroneous reliance by the Magistrate on what was causing the Police to be "annoyed", and her refusing to accept submissions, I quash the conviction passed below and the sentence is set aside.

16. Were I to be considering sentence alone I would have ordered that it was manifestly excessive in the circumstances, and would have ordered his release, his time already served being more than enough.

17. For clarification the conviction is quashed and the sentence set aside.

P.K. Madigan
Judge

At Suva
04th February 2015