

JOSHUA ALFRED LOURENS  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 10 June 2021

### **Criminal Review**

CHITAPI J: The accused appeared before the provincial magistrate at Harare Magistrate court on 8 April, 2021 on trial on four counts of theft as defined in s 113(3)(a)(b) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] committed at four different residential properties in Hatfield suburb, Harare between the period of October and December 2020. In count one, the accused had been given a place to stay by the complainant at the latter's house. The accused abused the complainants' kindness and stole the complainants' Samsung phone and three pairs of shoes from the complainants' house. The property was not recovered.

In the second count, the accused unlawfully entered the complainants' house by opening a locked door. He stole various items of property. The accused should have been charged with the offence of unlawful entry committed in aggravating circumstances as defined in s 131(1)(a) as read with 131(2) of the Criminal Law Codification and Reform Act because the accused effected unlawful entry into the complainants' locked premises. The aggravating circumstances as defined in s 131(2) were firstly that the accused entered a dwelling house and secondly that the accused committed or intended to commit some other crime, such being theft.

In count three, the accused approached the complainant and pretended not to be feeling well. The complainant in a good will gesture allowed the accused to lie down and rest in the lounge so that upon gaining his strength, the accused would proceed on his errands. When the complainant went outside the house to attend to a neighbour who had visited him, the accused in typical fashion abused the complainant's kindness by opening the complainant's handbag and stealing the complainant cell phone handset before stealthily leaving the complainant's house. The cell phone handset was not recovered. In count four,

the accused in December 2020 entered the complainant's yard and stole a bumper for a Nissan March motor vehicle. The bumper was lying on the ground in the yard of the complainant's residence. He again entered the complainant's yard for a second time in the same month and stole a spare tyre for a Mazda vehicle. None of the car parts were recovered. Again it is not clear as to why the accused was not then charged with two counts of theft as revealed by the undisputed facts.

The provincial magistrate disposed of the trial by way of guilty plea procedure as provided for in s 271(2)(b) as read with s 271(3). On 19 May 2021 I raised a query minute with the magistrate on three issues as follows:

“19 May 2021

The Provincial Magistrate

**HARARE**

**REVIEW MINUTE: THE STATE v JOSUA ALFRED LOURENS**

The above review was placed before Honourable Justice Chitepo (sic) who commented as follows:

- “1. Section 271(3) of Criminal Procedure & Evidence Act, [*Chapter 9:07*] provides *inter alia* that ‘the explanation of the charge should be recorded’ was such recording done?
2. In count 1, the accused was ordered to retribute the complainant \$4100 ‘RTGS’ through the Clerk of Court Harare ‘forthwith’ what is the meaning of forthwith.
- 3 The sentence for count 2 and 3 on the review cover is inconsistent with the sentence endorsed on back of charge sheet.”

Yours faithfully

I Musavengana

**FOR: REGISTRAR”**

The provincial magistrate responded to the issues raised by reply minutes dated 26 May 2021 in which the following was stated:

“26 May 2021

The Registrar  
High Court of Zimbabwe  
HARARE

**RE: REVIEW MINUTE: THE STATE v JOSHUA ALRED LOURENS: CRB NO.: 12477/20**

Reference is made to the above matter.

May you kindly place the record before the Honourable Justice Chitapi with the following comments.

1. I did not expressly reduce to writing the explanation I gave to accused, in future, I will not repeat the error.
2. In count 1, I wrote 'forthwith' and the meaning is 'immediately'. The synonyms are 'at once' or 'without delay' (Cambridge English Dictionary).  
It was my view that accused was supposed to retribute the complainant instantly or be jailed.
3. I apologize for the typing error which i also did notice during the proof reading.  
I stand guided

J. Taruvinga

**TRIAL MAGISTRATE**

It is noted that the provisional magistrate admitted her error in not reducing the details of the explanations of the charges which she gave to the accused persons to writing. The omission to do so amounts to a gross irregularity which vitiates proceedings in which that has not been done see *S v Enock Mangwende* HH 695/20; *S v Tamiriraishe Moyo* HH 697/20.

In relation to the second query on the use of the word "forthwith" in expressing a time within which the accused was required to pay restitution, the provincial magistrate referred to the definitions of the word "forthwith" and stated that it was her view that the accused was "supposed to retribute "instantly" or be jailed. It is true that the word forthwith is used in inter-alia legislation, legal documents including court orders. It connotes immediacy of doing something.

I would favour a construction where the use of the word forthwith is avoided in favour of an expressed time by which the accused must have complied with the order. That said, the use of the word forthwith by the provincial magistrate cannot be impugned. I have also taken note that the accused against whom such an order has been made is not released until he or she has paid the fine or the restitution as the case may be. It is the accused who must request the court for extension of time to comply with the order of immediate or a forthwith payment. The provincial magistrate was correct in expressing the time to retribute order in the manner that she did.

The last query related to the inconsistency of recordings on the summary jurisdiction and review cover. The inconsistency was rectified. I will only impress upon the magistrates that whilst they work under pressure and may miss some detail in preparing records for

review it is important that court records are accurate on recordings because the records constitute official public information.

Having made the observations recorded herein on the failure by the magistrate to record the details required to be recorded in a guilty plea trial as set out in s 271(3) of the Criminal Procedure and Evidence Act, the proceedings are grossly irregular and cannot be saved by the provisions of s 29(3) of the High Court Act, [*Chapter 7:06*] which provides that no conviction or sentence may be set aside on the ground of irregularity unless a substantial miscarriage of justice actually resulted. This is so because that provision must be read together with s 86(3)(e) of the Constitution which provides that no legislation may limit the right to a fair trial. An unprocedural trial is not a fair trial and cannot be sanitized by the provisions of s 29(3).

In consequence:

1. the proceedings in the case *S v Joshua Alfred Lourens* CRB HREP 12474/20 are quashed and set aside
2. the Prosecutor General may as he may decide in his discretion prosecute the accused afresh provided that if the accused be convicted, he shall not be sentenced to a sentence which exceeds the sentences imposed for each count in the quashed proceedings and the period already served shall be taken into account as a served portion of the sentence which will be imposed.
3. A warrant to liberate the accused shall issue if the accused is still serving sentence

MUSITHU J agrees.....