

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: A93/2022

Lower court case number: SWS 35/2018

In the matter between:

AZILA GILA Appellant

and

THE STATE

Respondent

**Before the Honourable Mr Justice Erasmus and
The Honourable Ms Acting Justice De Wet**

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for handing down judgment is deemed to be 12h00 on 19 January 2023.

JUDGMENT

DE WET AJ:

[1] Violent attacks against foreigners have become a real and common reality in South Africa. These senseless and mostly unsolicited xenophobic incidents are difficult to reconcile with a post-apartheid reality. The role of the law in curbing xenophobia is found in the Constitution which states: “Everyone has the right to freedom and security of the person”, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Refugees Act 130 of 1998, the Protection of Harassment Act 17 of 2011 and the Immigration Act 13 of 2002. In the matter of Kiliko and Others v Minister of Home Affairs and Others 2006 (4) SA 114 (C) at para 28, Van Reenen J explained the situation in our law in respect of foreign nationals as follows: “The state, under international law, is obliged to respect the basic human rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights, save those expressly restricted to South African citizens ...”

[2] There is no law against xenophobia, and it consequently rears its toxic head through other crimes such as murder, robbery, assault, theft, discrimination and many others. It is thus only through other laws that the courts can assist in combatting this kind of infringement on basic human rights.

[3] This is an appeal against sentence. The violent crimes in respect of which the appellant was found guilty and sentenced, were plainly underpinned by xenophobia.

Factual background:

[4] The factual matrix to this appeal can be briefly summarised as follows: On Saturday, 25 February 2017, the deceased and his brother, Mr K, both Congolese nationals, were walking home at approximately 18h00 after work. They were talking and passing other people in the street when they were approached by four men who started attacking them, without any provocation, by stabbing them with knives and hitting one of them with a beer bottle. The deceased managed to run away from the attackers but returned to the scene to try and rescue his brother, Mr K, who was still under attack. Both the deceased and Mr K were stabbed again by two of the attackers (the other two had fled the scene at this stage) and they again tried to run away. This time the deceased was kicked in the leg and he fell. One of the assailants, he was identified by Mr as the appellant, kneeled over the deceased, who was lying on his back, and stabbed him repeatedly. As Mr K saw the blood running from his brother's body, he took a screwdriver from his backpack and stabbed the assailant in the back to get him off the deceased. The remaining two assailants ran away and Mr K and his brother were eventually taken to hospital for treatment. His brother did not survive. According to the affidavit in terms of s 212(4)(a) of the Criminal Procedure Act 51 of 1977 (the "CPA"), the post mortem examination showed that the deceased had a total of 6 penetrating stab wounds in the chest, back and left hand. On the same evening there was another attack on foreign nationals in the same area but the complainant was too scared to press charges.

[5] The appellant and his co-accused were charged on 25 February 2017, at the Regional Court, Strand, with one count of murder and one count of attempted murder. The appellant was legally represented and pleaded not guilty. He claimed that he was

not in Cape Town at the time of the attack as he had travelled by taxi from Cape Town to Duduza in the Eastern Cape on 24 February 2017 to show his one and a half year old child to his parents and only returned on the 26th of February 2017.

[6] At the commencement of trial, with the consent of the legal representative of the appellant's co-accused, Mr Bavuma, the court *a quo* received into evidence a statement made by him as Exhibit B. It read as follows:

“On Saturday I cannot remember the date I went to the Sangoma to get medicine for the vomiting. I saw this black guy that worked at the Sangoma. I went home and later I saw this black guy with another black guy at the shebeen. I bought 4 beers and we were drinking. Two foreigners walked past us with bags. The one black guy that was sitting with me called the one foreigner and he just walked on. The black guy stood up and ran after this foreigner. The black guy started to stab this foreigner with a knife. I saw the other foreigner turned around and took a screwdriver out of his bag. The foreigner started to stab this black guy with the screwdriver at his back. I took a bottle of beer and throw the foreigner with the screwdriver on this chest. The foreigner got up and ran away. I went to the black guy and took him away from the foreigner that was lying on the ground. I took him away and we went to another shebeen to drink. That is all that I can say. I do not know the black guy's name and I threw the foreigner with a beer bottle to stop them from fighting.”

[7] Mr Bavuma identified the “black guy” as the appellant. Mr K identified the appellant as the person who stabbed and killed his brother.

[8] The appellant had an injury on his back which was consistent with the evidence of both Mr K and Mr Bavuma, that Mr K had stabbed the appellant on the back to get

him off the deceased. The appellant persisted with his alibi defence and explained the mark on his back as being an injury he sustained whilst in the Eastern Cape from a sharpened pole used for building huts. His alibi and explanation for the injury to his back was, correctly so in my view, rejected by the court *a quo* as being false.

[9] The appellant and his co-accused were found guilty of murder and attempted murder on 31 August 2021. In terms of s 51(1) of the Criminal Law Amendment Act 105 of 1977 (the “CLA”), Part 1 of Schedule 2, the appellant faced a minimum sentence of life imprisonment on the murder charge unless the court *a quo* found compelling and substantial circumstances which justified a deviation therefrom. The appellant did not testify in mitigation of sentence and his attorney placed very limited personal circumstances before the court *a quo* by way of submissions. He was sentenced to 20 years imprisonment on count 1 and to 10 years imprisonment on count 2. The sentences were ordered to run concurrently. The appellant was also declared unfit to possess a firearm in terms of s 103(1) of the Firearm Control Act 60 of 2000. His application for leave to appeal against both conviction and sentence was dismissed, and he proceeded to file a petition for leave to appeal in this court. He was granted leave to appeal against sentence only.¹

Grounds of appeal:

[10] The appellant contends, in general terms, that:

10.1 The court *a quo* erred in that the personal circumstances of the appellant were not sufficiently taken into account;

¹ An order was granted by way of petition by the honourable Justices Ndita and Lekhuleni on 11 April 2022 under case number P16/2022.

10.2 The court *a quo* erred in imposing an excessively harsh and shocking sentence in the circumstances of the case and had thereby over-emphasised the retributive aspect of sentencing; and

10.3 The court *a quo* erred in over-emphasising the interest of the community as opposed to the interest of the appellant.

[11] It is trite that the imposition of sentence is pre-eminently a matter for the discretion of the trial court and must be based on the correct facts and legal position. The trial court is thus free to impose whatever sentence it deems appropriate provided that it exercises its discretion judicially and properly. This presupposes that the trial court must sentence on the correct facts and must take the correct legal position into account.

[12] In exercising this discretion, the sentencing court must strive to find a balance between competing interests in its sentence. In order to achieve this, it must not sentence in anger or hastily, or take into account, irrelevant matters. As set out in the well-known and often quoted case of *S v Zinn* 1969 (2) SA 537 (A) 540G-H, a court, when imposing sentence, must consider 'the triad consisting of the crime, the offender and the interests of society' and the duties of a judge in imposing sentence is as follows:

“As regards the duties of a Judge in imposing punishment, we have been referred, *inter alia*, to Voet, vol 1 p 57, where in a note, it is said (Gane’s translation, vol 2, p 72):

‘It is true, as Cicero says in his work on Duties, Bk 1, Ch 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the

too little. It is also true that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity.”

[13] With regard to the test on appeal, the legal position as set out S v Rabe 1975 (1) SA 855 (A) 857D-F still holds true:

“In every criminal appeal against sentence whether imposed by a magistrate or a judge, the Court hearing the appeal –

- (a) should be guided by the principle that punishment is ‘pre-eminently a matter for the discretion of the trial Court’;
- (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been ‘judicially and properly exercised’.

The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”

[14] In S v Pillay 1977 (4) SA 531 (A) 535F-G the court held:

“As the essential enquiry in an appeal against sentence, however is not whether the sentence was right or wrong but whether the Court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence: it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or

exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence."²

[15] Against these general well accepted principles, the grounds of appeal are considered below.

Did the court a quo sufficiently consider the personal circumstances of the accused?

[16] The personal circumstances of the appellant can be summarised as:

16.1 He was 22 years old when he committed the crimes;

16.2 He has no previous convictions;

16.3 He only completed Grade 4;

16.4 He is unmarried with two children who live with their maternal aunt in the Eastern Cape and previously contributed R 600.00 a month per child for their maintenance;

16.5 At the time of his arrest he had a small house shop where he sold cigarettes, chips and sweets;

16.6 He was awaiting trial for a period of 3 ½ years of which he spent 16 months incarcerated due to a violation of his bail conditions.

[17] The court *a quo* in its judgment on sentence makes reference to these personal circumstances of the appellant and correctly finds that there is nothing about the personal circumstances of the appellant which is of such a nature that it can be said to

² See also *S v Jimenez* [2003] 1 All SA 535 (SCA) para 7 and *S v Kgosimore* 1999(2) SACR 238(SCA) para 10.

be special or out of the ordinary. Further to this, the aggravating circumstances, in my view, by far outweigh the personal circumstances of the appellant. He was the perpetrator of a violent unsolicited assault based on xenophobia which led to the death of an innocent person, he presented a false alibi, he stabbed the deceased several times and continued to do so after he had fallen to the ground, and he showed no remorse whatsoever. More importantly, the court *a quo* deviated from the prescribed minimum sentence of lifelong imprisonment on the murder charge by taking into account his young age and the fact that he had been awaiting trial for 3 ½ years. To have deviated any further from the prescribed minimum sentences imposed by the legislature would in my view, in the circumstances of this matter, have rendered the sentence of the appellant shockingly inappropriate.

[18] In *S v Matyityi*³ the Court stated that an offender of “20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor”.⁴ As in *Matyityi*, there is nothing on record to suggest that the appellant’s relatively young age was a factor which contributed to him committing the offences he was found guilty of or that he was influenced by the other perpetrators to commit these serious crimes. As the deceased and his brother were not robbed and randomly attacked by strangers on the street in the presence of bystanders who did nothing to assist, the only motive for the attack appears to have been the fact that they were foreigners. The nature and motive for the attack should in my view be treated as an aggravating factor for purposes of sentencing.

³ 2011 (1) SACR 40 (SCA).

⁴ *Ibid* para 14.

[19] The trial court, when weighing the relatively young age of the appellant against the circumstances of the attack, exercised its discretion and showed the appellant mercy and an opportunity to rehabilitate.

Did the court a quo impose an excessively harsh sentence and over-emphasized the retributive aspect of sentencing?

[20] The starting point to answer this question is that the court *a quo* could have imposed a life sentence in respect of count 1 and could have imposed a sentence in excess of 10 years in respect of count 2. It could further, in the exercise of its discretion, have decided to not invoke s 280(2) of the CPA. It did not.

[21] Section 280(2) of the CPA deals with cumulative or concurrent sentences and states as follows:

“(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

(3) ...”

[22] In terms of this section it is clear that the default position in terms of the CPA is that sentences of imprisonment imposed for two or more offences will run consecutively, unless the court directs that they run concurrently. The purpose of the section is clearly to ensure that the cumulative effect of several sentences imposed in one trial is not too severe in the light of the aggregate sentence⁵ or unduly harsh,⁶ whilst not underestimating the seriousness of the offence⁷ as explained in *Nhlapo v The State* (Case no 835/2021) [2022] ZASCA 125 (26 September 2022). In this matter the SCA dealt on petition in terms of s 316(1) of the CPA, with the issue of whether the high court had erred in confirming a sentence for robbery imposed by the trial court in excess of the prescribed minimum in terms of s 51(2) of the CLA, and in confirming that only a portion of the sentence for attempted murder was to run concurrently with that of the sentence for robbery. It held, citing the matter of *Mthembu v S*⁸, with reference to Swain J's exposition in the court below⁹ that the 'starting point' when considering the imposition of a sentence higher than the minimum is the following:

"Although the prescribed minimum sentence should be the starting point, this is solely for the purpose of deciding whether a sentence less than the prescribed minimum sentence should be imposed. The exercise of a discretion by the presiding officer to impose a sentence greater than the prescribed minimum sentence, does not have to be justified by reference to the prescribed minimum sentence." (my emphasis)

⁵ *S v Cele* 1991 (2) SACR 246 (A) at 248j.

⁶ *Moswathupa v S* 2012 (1) SACR 259 (SCA) and *S v Dube* 2012 (2) SACR 579 (ECG) para 11.

⁷ *S v Maraisana* 1992 (2) SACR 507 (A) at 511g.

⁸ 2012 (1) SACR 517 (SCA).

⁹ *S v Mthembu* 2011 (1) SACR 272 (KZP) para 19.1.

[23] The SCA further pointed out that the language used in s 51(2) of the CLA, when compared to s 51(3)(a) of the CLA, dictates that a presiding officer, if satisfied that there are substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum, must enter such circumstances on the record.

[24] The court *a quo*, in sentencing the appellant to 20 years imprisonment, which is to run concurrently with the 10 years for attempted murder, exercised its discretion and considered the cumulative effect of several sentences to ameliorate the impact of a cumulative lengthy sentence given his young age and the time spent awaiting trial. The appellant was unable to point to any misdirection in respect of the court exercising its discretion in this regard.¹⁰

[25] In the matter of *Zinjanje v S A75/2021* [2021] ZAWCHC 185 (15 September 2021), the appellant was convicted to 12 years imprisonment for robbery with aggravating circumstances and to 15 years for rape. The court *a quo* found that substantial and compelling circumstances existed which warranted a deviation from the minimum sentence in respect of both convictions but made no order in terms of section 280 (2) of the CPA that the sentences or part thereof, run concurrently with the other. On appeal the court held that the court *a quo*, in the exercise of its discretion, did not invoke s 280(2) as some time had lapsed between the commissioning of the offences. To the benefit of the appellant herein, the court *a quo* correctly so, must have come to the conclusion that the offences committed by the appellant were sufficiently closely

¹⁰ *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12: 'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court'.

connected and inextricably linked, in order to receive the “discount” afforded to him in terms of s 280(2).

[26] In the matter of Yose v The State 2022(2) SACR 603 (WCC)(22 June 2022) the issue of when and how sentences run concurrently was discussed and it was aptly set out in para 15 as follows: “Sentences thus generally run cumulatively unless there is an express order that they are to run concurrently. That is, however, not the end of the matter. There are certain instances in which sentences will be served concurrently in the absence of a specific order.”¹¹

[27] By applying s 280(2) the court *a quo* tempered the harshness the prescribed minimum sentence of life imprisonment despite the fact that the appellant had tried to kill yet another person.

Did the court a quo over-emphasise the interest of the community as opposed to the interest of the appellant?

[28] Davis J in the matter of Osman v Minister of Safety and Security & Others [2011] JOL 2743 (WCC), in the Equality Court, dealt with a complaint of unfair discrimination based on the grounds of ethnicity and social origin instituted in terms of section 20 of the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000 (“the

¹¹ See in this regard S v Moswathupa 2012 (1) SACR 259 (SCA) at para 8 and S v Mokela 2012 (1) SACR 431 (SCA) at para 11 read with Section 39(2)(a)(i) of the Correctional Services Act 111 of 1998, provides that:

“(2)(a) Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently but-

(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with a sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal; ...”

Act"). He quoted with approval the description by Sachs J in the minority judgment in the Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others 2007 (4) SA 395 (CC) at paras 143 and 144, of xenophobia as: "...the deep dislike of non-nationals by nationals of recipient state. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances." and that:

"This prejudice is strong in South Africa. It strikes at the heart of our Bill of Rights. Special care accordingly needs to be taken to prevent it from even unconsciously tainting the manner in which laws are interpreted and applied. If refugees are treated as intrinsically untrustworthy, with their capacity to perform honestly and reliably being placed presumptively in doubt, then xenophobia is given a boost and constitutional values are undermined...

The constitutional response to xenophobia need not, of course involve exaggerated xenophilia. Just as refugees should be protected from irrational prejudice, so they should not be able to lay claim to irrational privilege. The law... must be applied in a manner that is fair, objective, appropriately focused and keeping with the letter and spirit of our international and national legal obligations. Exercises of power that purport to have a neutral foundation, but track stereotypes are often seen as flowing from a reinforcing negative presupposition. Indeed, the routinised way in which power is exercised, can readily become entangled in the public mind with existing prejudicial assumptions reinforcing prejudice as establishing a downward spiral of disempowerment. One of the purposes of refugee law is precisely to overcome the experience of trauma in displacement and make the refugee feel at home and welcome. Disproportionate and uncalled for adverse treatment would defeat that objective and induce an unacceptable

and avoidable experience of alienation and helplessness. It would be most unfortunate that the left hand of government supervises the security industry took away what the right hand of government, that accords to accredited refugees a special status, gives.”

[29] In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC), Mogoeng CJ in para 8 referred to this ongoing problem as follows: “...But why is it that racism is still so openly practiced by some despite its obviously unconstitutional and illegal character? How can racism persist notwithstanding so much profession of support for or commitment to the values enshrined in our progressive Constitution and so many active pro-Constitution no-governmental organizations” and answers this question in para 14 as follows: “..racist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaning fully towards the eradication of racism and its tendencies.”

[30] In *S v Msimango* 2018 (1) SACR 276 (SCA) Bosielo JA considered the appropriateness of a sentence of 20 years imprisonment for robbery with aggravating circumstances where a firearm was used in a xenophobic attack. He correctly referred to xenophobia as a cancer and that it has a negative effect our country's image and needs to be rooted out wherever it rears its ugly head¹². The fact that the attack was based on xenophobia was taken into consideration and a further 5 years was added to the sentence of the accused in that matter.

[31] The deterrent value of appropriate sentencing, especially in crimes of this nature, cannot be underestimated. Everybody, be it South African citizens or foreign nationals,

¹² See para 20 of the judgment.

is entitled to move around freely and in a safe environment. The attitude displayed by the appellant, and the community by not lending assistance whilst the deceased and his brother were openly attacked in daylight, evidences the harsh reality that these kinds of crimes are not regarded with the seriousness it should and undermines our constitutional democracy. The court *a quo* quite correctly described the incident as “a heartless, relentless callous, pitiless attack on these two people” (sic), yet, in the exercise whilst sending a strong message that such attacks will not be tolerated by the courts, tempered the sentence of the accused by deviating from the minimum prescribed sentences and by employing s 280(2).

[32] In the circumstances, the following order is made:

The appeal is dismissed.

I agree:

A De Wet
Acting Judge of the High Court

N Erasmus
Judge of the High Court

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