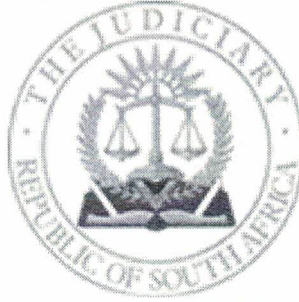



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A137/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. ✓
	08/06/2023
	DATE
	
	SIGNATURE

In the matter between:

LAMOLA XOLANI COMFORT

APPELLANT

And

THE STATE

RESPONDENT

NEUTRAL CITATION: *Lamola Xolani Comfort vs The State* (Case Number:
A137/2022) [2023] ZAGPJHC 668 8 June 2023

MABESELE J ET KUMALO J

J U D G M E N T

MABESELE, J:

[1] The appellant was convicted of murder and sentenced to imprisonment for a period of 10 years. Three years were conditionally suspended. The charge of murder was read with the provision of section 51(2) of the Criminal Law Amendment Act, 105 of 1997.

[2] The appellant contends that the trial court wrongly convicted him of murder. Counsel for the appellant, in his heads of argument, submits that the appellant should have at least been convicted of culpable homicide or assault with intent to cause grievous bodily harm, if ever conviction stands. Counsel submits, further, that a sentence imposed on the appellant should be revisited, accordingly.

[3] It is common cause that in the evening of the 31st December 2016 the deceased and friends, including her fiancé, attended a party at Glenvista to celebrate New Year's Eve. The party was hosted by a friend known as Kagiso. The appellant, too, honoured the invitation and was part of the guests at the party. In the early hours of the following morning (17 January 2017) the deceased was involved in a fight which resulted to his death. A post-mortem examination that was conducted on the body of the deceased revealed that the deceased died as a result of "brain injury".

[4] The eyewitnesses who were called by the state testified that the deceased was assaulted. It is common cause that the deceased died on his

way to the hospital. The evidence of each witness, which the court relied on for conviction of the appellant, is summarised as follows:

[5] Simphiwe Buthelezi was a friend of the deceased. He was about to leave the party at 04:00 on 17 December when he saw the deceased and Kagiso arguing. They were standing at a car outside the premises of the house. He went to them and took Kagiso away from the deceased. A few minutes thereafter he had common behind him. He turned and saw a group of about 6 people assaulting the deceased. They were kicking and hitting the deceased with fists. He approached the group and tried to move them away from the deceased. He was assisted by Sipho and Tebogo. After they had moved the group away from the deceased, the deceased went to his car and took a stick. He came to them (Sipho, Tebogo and Simphiwe) and threatened to beat them with the stick. He threatened also, to beat someone who was standing at his car. He was again beaten by the same group of people. This time around he saw the appellant among the group. The appellant was holding a spanner. Kagiso moved him away from the group and took him into the yard. However, he came back with a stick and hit the deceased on the legs. He was reprimanded by Kagiso. At that stage the deceased was speechless and bleeding. He was ultimately taken to the hospital.

[6] Natalie Letsega was a girlfriend of the deceased. She attended the party with the deceased. At about 03:00 she and the deceased decided to go home. As they walked around the pool area to their vehicle that was parked outside the yard she saw the deceased taking down a cellphone number of

the lady who was seated at the pool area. She became upset because the deceased bullied her and hit her with a beer bottle. She walked to the vehicle, leaving the deceased behind. While she was seated inside the vehicle and some friends standing near the vehicle, she heard someone utter the following words: 'Did you hit her ?' Subsequent to the words being uttered she saw the deceased coming to the vehicle and opened the boot. The deceased took a stick out of the boot and approached the person who had ask him whether he beat her. Subsequently, she saw a group of about 10 people attacking the deceased. The group emerged from the house where the party was held. The group kicked and punched the deceased with fists as he lay on the ground. She approached the group and tried to stop them from assaulting the deceased further. However, the group continued to assault the deceased. Someone in the group had carried a wheel spanner. She was unable to identify his face. The deceased became unconscious. She and some friends transported the deceased to the hospital. She testified during cross-examination that the group joined the fight between the deceased and appellant.

[7] Kagiso Jaxa hosted the party. Approximately 22 guests were present. Most guests left the party in the early hours of 1 January 2017, at approximately 02:00. While he was seated in his vehicle in the garage he saw the girlfriend of the deceased coming out of the house and running to her vehicle that was parked in the street. The lady was crying. He and Gugu followed her. When they reached the vehicle he pleaded with the lady not to drive off and calmed her down. While he was talking to the lady the deceased

joined them. The lady alighted from the vehicle and approached the deceased. Subsequently, the deceased opened the boot of the vehicle and took out an object, which he was unable to identify, and chased Simphiwe.

[8] The deceased threatened to shoot everyone, including his friends. One of the friends called Aku slapped the deceased after the deceased threatened to shoot him. The deceased did not retaliate. The deceased later on broke a bottle and threw it to the crowd of people that was standing not far from him. The crowd did nothing to the deceased. The deceased then chased Lesedi. The deceased was holding a stick in his hand. Lesedi grabbed the stick and slapped the deceased and ran away. Thereafter the deceased approached the appellant with a stick. The appellant hit him with a car jack. Both the deceased and appellant started to fight. Both were drunk. Ultimately deceased ran away and the appellant followed him. Both were followed by a crowd. He saw the deceased fall on the ground and was assaulted by the crowd. In the process, the appellant hit the deceased with a stick on the leg. Karabo took the appellant away from the crowd that was assaulting the deceased.

[9] Sipho Mabuza confirmed the evidence of other witnesses insofar as it relates to a fight between the deceased and appellant. Other people joined and they all assaulted the deceased with fists.

[10] Tuluselo Maithufi is in the employ of the Netcare 911. Her duties include treatment of patients and respond to calls regarding injured people.

On 1 January 2017 around 05:30 she and her team attended to a call from Ormonde. On their way to Ormonde they were stopped by the occupants in a white vehicle that was parked outside the road. After they had stopped their vehicle, the occupants in the vehicle informed them that they were the ones that made a call. The occupants told them that someone in the vehicle was injured. She and her colleague took their first-aid bags and went to the patient who was seated at the backseat. They asked the patient to get into the ambulance. The patient refused. Subsequently, the occupants drove the patient to hospital and they followed them.

[11] Dr Klepp who conducted a post-mortem examination on the body of the deceased testified that the deceased died as a result of a brain injury. The doctor testified that the deceased suffered broken ribs, among other injuries he had sustained.

[12] The appellant testified. He said that around 04:00 (1 January 2017) he was in the yard and saw the deceased and his girlfriend arguing. The deceased was threatening the girlfriend with a bottle. He approached them and told them to go outside the yard. The deceased threatened him. He left them and they walked to the vehicle that was parked outside the yard. While he was still in the yard he heard the deceased threatening to shoot everyone. Subsequently, the deceased opened a boot of his vehicle and took out something which was not clearly visible to him. He went to his vehicle and took out a wheel spanner to defend himself in case the deceased attacked him. He saw the deceased chasing people around him (deceased), including

Lesedi (appellant's friend). He went to them and pulled Lesedi. As he and Lesedi were about to get into the yard, the deceased followed them and hit him twice on the head with a stick. He dropped the wheel spanner and pulled the deceased by his chest and punched him with fists. Subsequently, a group of people joined and assaulted the deceased. As the people disarmed the deceased, he punched him few times with fists and Tebogo pulled him away from the deceased. The group continued to assault the deceased.

[13] It is clear from the evidence of the eye witnesses and appellant that everyone, including the deceased and appellant were drunk. The deceased assaulted his girlfriend and was chasing people with a stick and threatening to shoot them. At some stage he was slapped on the face by one of the guests called Aku as he threatened to shoot him.

[14] The deceased can be described as a 'nuisance' on the day of the incident, due to drunkenness. It is common cause that at some stage he was involved in a fight with the appellant. The deceased was carrying a stick and the appellant a wheel spanner. The appellant's version is that he was defending himself. The appellant, on his own version, hit the deceased few times with fists after a group of people had joined the fight and were assaulting the deceased after they had disarmed him. The appellant was pulled away from the deceased by Tebogo.

[15] The question that arises is whether the appellant was still defending himself after the group of people had disarmed the deceased and were

assaulting him. The appellant became part of the group that was assaulting the deceased, thus associating himself with the conduct of the group. He was pulled from the deceased by Tebogo. The witnesses, too, testified that the appellant was part of the group of people that were assaulting the deceased.

[16] The next question is whether the appellant was correctly convicted of murder. The evidence of the witnesses that the deceased was kicked and hit with fists is corroborated by the medical evidence, stating that the deceased suffered broken ribs and died as a result of a brain injury. From this evidence it cannot be said that the state has proved *dolus eventualis* on the part of the appellant, that is, the appellant foresaw the possibility of the deceased being killed and had reconciled himself to that possibility. Regard being that had no one in the group had carried weapons. The evidence, however, proves negligence on the part of the appellant. Therefore, the appellant should have been convicted of culpable homicide. Consequently, the sentence imposed for murder should be revisited. In my view, the sentence to 7 years imprisonment of which 2 years is suspended, seems appropriate.

[17] In the result, the following order is made.

17.1 The appeal is upheld, partially.

17.2 The conviction for murder is set aside and replaced with the following order:

‘The accused is guilty of culpable homicide’

17.3 The sentence of 10 years imprisonment, of which three years is suspended conditionally, is set aside and replaced with the

following:

17.3.1 'The accused is sentenced to a period of 7(seven) years imprisonment. Three years of this sentence is suspended for a period of 5(five) years on condition that the accused is not convicted of the same offence, committed during the period of suspension.

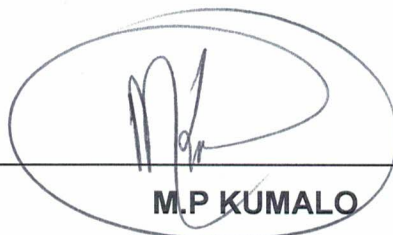
17.3.2 The sentence in paragraph 17.3.1 above is backdated to 25 September 2020.



M.M MABESELE

(Judge of the High Court Gauteng Local Division)

I agree



M.P KUMALO

(Judge of the High Court Gauteng Local Division)

Appearances

On behalf of the Appellant	: Mr P Du Plessis
Instructed by	: BDK Attorneys
On behalf of the Respondent	: Adv. V. Mpekana
Instructed by	: Director of Public Prosecutions
Date of Hearing	: 29 May 2023
Date of Judgment	: 8 June 2023