REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT
PRETORIA

14/2/14

CASE NO: A691/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14 February 2014
DATE

SIGNATURE

In the matter between:

PATRICK LINDA MOKHANDA First Appellant

TSIETSI JOHANNES MABASA Second Appellant

and

THE STATE Respondent

JUDGMENT

TEFFO, J:

[1] The appellants were convicted in the Regional Court sitting at Sebokeng on 25 October 2011 for murder and sentenced to 15 years imprisonment.

[2] They appeal against their conviction with the leave of the court *a quo*.

[3] The evidence led at the trial was briefly as follows: Mathapelo Masuwa ("*Masuwa*") was in the company of the deceased from a tavern around 02:00 when she met the appellants at a corner in the street. She entered Matjape Manganyi's homestead to look for earnings in the company of the deceased and the appellants. She got the earrings and a fight over a beer started between the appellants and the deceased. The deceased had a bottle of Hansa beer in his possession and the first appellant who asked for a beer from the deceased, slapped the deceased twice on his face with an open hand after the deceased refused with his beer. Subsequent thereto the second appellant also asked for a beer from the deceased and he refused with it. He then took out a screwdriver from his pocket. Masuwa reprimanded them saying they should go as the police might come. She left the deceased in the company of the two appellants and went to Amstrong garage. She did not tell anyone that the deceased's life was in danger. She learned about the deceased's death in the morning. She saw the spot where the deceased fell and it was far away from the place where she left the appellants with the deceased.

[4] In her evidence-in-chief Masuwa mentioned that she knew the appellants. The first appellant was her brother's friend while the second appellant grew up in front of her as they stay in the same vicinity. She also stated that on the night of the incident she was excessively drunk, she had a blackout as she moved from one tavern to another. Furthermore she testified

that she drank about two cases (24 beers) of 750 ml Black label. She stated that the cause of death of the deceased was a Hansa beer. When asked who killed the deceased, she said she thinks the person who was holding the screwdriver killed him because he had taken the screwdriver from his pocket. Later on she said she was with the deceased and the appellants at the tavern after meeting them in the street.

[5] While she mentioned during examination-in-chief that she was used to drinking alcohol everyday and understood what was happening around her at the time of the incident, under cross-examination she said she could not see what was going on around her because she was drunk. She said at the time she was in the company of the deceased and the appellants at the tavern, she was already drunk. She did not know how late it was when they were at the tavern. She further said at 02:00 the second appellant had already left the tavern. At some stage she said she did not notice the appellants leaving the tavern. When asked whether the appellants knew the deceased, whether they were his friends, whether they were in good terms, she said no, she did not know what they wanted from him. When she was told that the second appellant left the tavern early, she disputed it and said may be she was walking with a ghost. She maintained that they walked together and only left the tavern when it closed. Upon being questioned as to when did the tavern close, she said it opens at 10:00 and closes at 02:00. She also disputed that the first appellant left with his cousin, Andile.

[6] Her evidence revealed that the deceased also had a conflict with other people at the tavern where they were watching soccer. People asked him to move away from the television as he was obscuring their vision but she said it ended there.

[7] She also disputed that the second appellant left the tavern and went home. When it was put to him that the first appellant also left the tavern and went to watch the game at Nomzwake's place she said she does not remember. She maintained that she was with the appellants at the tavern when they were watching soccer. When asked who left the tavern first between her, the appellants and the deceased, she said she does not know as she only met them in the street. When told that the first appellant left early at the tavern, she said she does not know who left first as she was not taking them into consideration. It was also put to her that the second appellant left the tavern as well and that he was not in the company of the deceased, she said she does not now.

[8] Upon questioning by the court she testified that she does not know when did the deceased leave the tavern and that she only met him in the street. She further said she cannot recall whether the deceased was at the tavern when it closed. She could not say whether the appellants were at the tavern when it closed. She also testified that she did not sit with the appellants and the deceased at the same table at the tavern. She said she sat with her boyfriend and the people who were buying alcohol for her.

[9] In the course of her evidence she mentioned that she was also drinking the morning she came to court and that she was having a headache.

[10] Matjape Manyanyi ("*Matjape*") testified that on 27 March 2011 at 02:02 Masuwa came to her house looking for earrings. She told her that she was in the company of the appellants and the deceased but she did not see them.

[11] The first appellant testified that on 27 March 2011 he watched soccer at Nomzwake's place which ended after 22:00. His cousin Andile phoned him while he was at Apollo and he joined him at Apollo. He disputed ever being with the second appellant that night and maintained that he did not see the deceased that night. He also disputed ever seeing Masuwa at Apollo that night. He stated that he was with Andile and Sibusiso at Apollo and he left Apollo tavern around 23:00 together with Andile. From Apollo tavern they went to Amstrong tavern to buy chips. On their way to Amstrong around 23:30 they met Masuwa who told them that she was going to Amstrong. He never saw Masuwa at Amstrong. They went to the chips section, bought the chips and left to his home where they slept. He was awakened by the police who came with Masuwa's brother. He disputed being in an altercation with the deceased in the street over a Hansa beer and slapping him in the company of Masuwa and the second appellant. He disputed murdering the deceased.

[12] Andile confirmed that he was the first appellant's cousin. He corroborated his evidence with regard to the fact that he was with him on the night of the incident.

[13] Nomzwake Peter also corroborated the first appellant's evidence to the effect that he was at her place when they were watching the soccer game and the time he left her place to Apollo tavern to meet Andile.

[14] The second appellant's evidence was that he left Madolo's place to Apollo tavern around 18:00. He sat at Apollo and took some drinks. He watched the soccer game at Apollo but left before the game ended and went home where he arrived around 20:40 and proceeded to bed. He was awakened by the police in the early hours of the morning.

[15] Under cross-examination he testified that he knew Masuwa by sight. Further that he knew the first appellant, they schooled together, they were friends and they all came from Room 12. Masuwa could have mistaken him for someone as he was not used to her. At times they used to drink together. He disputed that Masuwa saw him at Apollo. He conceded that he was at Apollo but not in Masuwa's company. He disputed that Masuwa met him on her way to Amstrong in the company of the deceased. He maintained that he knew nothing about the first appellant hitting the deceased with open hands for a beer. He also disputed that he took out a screwdriver intending to stab the deceased.

[16] Doreen Mabaso (the second appellant's mother) testified that she was at home around 20:00. There was a soccer match. At the time the game started, her son was not yet at home but he arrived around 20:40. She was the person who opened the door for him. He went to bed and never went out.

Police came to her house around 05:00. She disputed that the second appellant was seen by Masuwa at 02:00 with a screwdriver in his possession and maintained that he was asleep at the time.

[17] According to the Post Mortem Report the cause of death of the deceased was a stabbed chest with signs of blunt force trauma to the head. It was mentioned that the characteristic of the wound suggested that it was caused by an object similar to a thin screwdriver.

[18] The grounds on which the first appellant relies for this appeal are the following:

18.1 That the learned magistrate erred in accepting the evidence of Masuwa and rejecting his;

18.2 The learned magistrate erred in not approaching the evidence of Masuwa with the caution and circumspection it required, not only because she was a single witness but because she admitted to having been excessively drunk on the date of the incident;

18.3 The learned magistrate erred in relying solely on the evidence of Masuwa without it having been corroborated.

[19] The second appellant bases his appeal on the following grounds:

19.1 That the State relied on the evidence of a single witness who was drunk when the offence was committed;

19.2 That the evidence of Masuwa who was a single witness did not satisfy the test as required in section 208 of Act 51 of 1977;

19.3 That evidence of Masuwa was not corroborated. It was contradictory and lacked clarity on a number of material aspects;

19.4 That the appellants' version was reasonably possibly true.

[20] In terms of section 208 of Act 51 of 1977, an accused can be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (*Stevens v S* 2005 (1) All SA 1 (SCA)).

[21] The correct approach to the application of the so-called '*cautionary rule*' was set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G:

> "*There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness ... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in R v Mokoena*

1932 OPD 79 at 80, may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded ...' It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[22] Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449c-450b said the following:

"*Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence that incriminates the accused and evidence which exculpates him, cannot both be true – the one is possibly true only if there is an equivalent possibility that the other is untrue.*

... The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logic corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must count for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable; but none may simply be ignored."

[23] In *R v Mokoena* referred to *supra* De Villiers JP made the following remarks at 80:

"*Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by* [the person], *but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for*

instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc."

[24] The State relied on the evidence of Masuwa to prove that the appellants were involved in the murder of the deceased. The crux of her evidence was that the appellants and the deceased had an altercation over a Hansa beer which the deceased was drinking at the time. The first appellant slapped the deceased twice on his face with an open hand after he refused to give him the beer and the second appellant took out a screwdriver from his pocket. Masuwa left the deceased with the appellants. She did not witness what actually happened which led to the deceased's death. She only learnt in the morning about the deceased's death and she went to the place where she found the body of the deceased. This place according to her was far away from where she left the appellants with the deceased.

[25] The defence initially raised the issue of identity claiming that Masuwa could have mistaken them for other people. Counsel for the first appellant made a submission that even if he concedes that Masuwa could be knowing the first appellant, because of the state of her sobriety at the time she could have mistaken him for someone else. Masuwa mentioned in her evidence that on the night of the incident she moved from one tavern to another. She drank ± 24 beers, she was excessively drunk and at some stage she said she blacked out. What puzzles one with her evidence is that while she said she was used to drinking everyday, she understood what was happening around

her. Under cross-examination she could not respond to some questions due to the fact that she said she was drunk and could not see what was going on around her.

[26] Masuwa explained how she knew the two appellants. From this explanation I am satisfied that she could not have mistaken them for other people even if she was not of sound and sober senses.

[27] She testified that the deceased was murdered because of a beer. Later on she said she did not know what the appellants wanted from the deceased.

[28] At some stage she mentioned that she was with the appellants at Apollo on the night of the incident when they were watching soccer. Afterwards she said she did not sit with them at the same table but she sat with her boyfriend and people who were buying her liquor. When asked who left the tavern (Apollo) first between her, the appellants and the deceased, she said she does not know as she met them in the street. She further said she did not take them into consideration while they were at Apollo. When she was told that the second appellant left the tavern and that he was not in the company of the deceased, she said she did not know.

[29] She testified that the person who killed the deceased is the person who held the screwdriver. How can she say this while she did not witness the stabbing?

[30] It is also strange that she mentioned that she saw the second appellant producing a screwdriver at Apollo. Nothing was said as to what was happening when the screwdriver was allegedly produced.

[31] She stated that the appellants killed the deceased because she left them with him. She did not witness the killing.

[32] Under cross-examination she could not remember the time she saw the first appellant earlier in the night because she was already drunk.

[33] Counsel for the first appellant submitted that if Masuwa was already drunk early in the evening and kept on consuming liquor till the next morning, her evidence about the events of the night should be approached with caution.

[34] It was also submitted that Masuwa said she took some drinks before she came to court on the day of the trial.

[35] Counsel for the first appellant further made a submission that there was a short time span from the time Masuwa left the tavern at 02:00 and the time of the incident. Further that according to the Post Mortem Report the deceased died at 03:05. He argued that there was a lapse of an hour between the death of the deceased and the time Masuwa left the deceased with the appellants. He also submitted that coupled with this, the deceased was found a distance away from where Masuwa allegedly left him with the

appellants. He submitted that something could have happened to the deceased especially given the fact that from Masuwa's evidence the deceased had a quarrel with other people at Apollo. He submitted that it can therefore not be the only conclusion that the appellants murdered the deceased. He also submitted that the evidence of Masuwa which was not corroborated is not clear and it is lacking the necessary quality for the court to rely on it.

[36] Counsel for the second appellant submitted that it is highly improbable that Masuwa could remember the events of the day of the incident.

[37] Both appellants raised alibis. Although they concede that at some stage on the evening of the incident, they did go to Apollo, they all mention that they left Apollo early. The second appellant testified that he left and went home to sleep. He arrived at home around 20:40. He was never with the first appellant that night. This evidence was corroborated by Doreen, his mother. The first appellant said he was at Apollo with Andile. From Apollo they went to Amstrong to buy chips and they went home.

[38] It is trite that the State has to prove the guilt of the accused beyond a reasonable doubt. It is clear from the record that Manganyi did not corroborate Masuwa's evidence to the effect that when she came to her homestead to look for earrings she was in the company of the deceased and the appellants. She testified that although Masuwa told her about them, she did not see them.

[39] It is not clear from the evidence whether, when Masuwa allegedly met the appellants and the deceased, she was on her way home or to Amstrong. Initially she said she was on her way home. Later on she said she left the deceased with the appellants and went to Amstrong garage. Her evidence was confusing and not credible.

[40] Counsel for the State conceded that Masuwa testified that she had taken some drinks when she came to court on the day of the trial. She also conceded that she testified that she was excessively drunk at the time of the incident. She further conceded that although Masuwa testified during examination-in-chief that she was used to drinking and understood what was happening around her, under cross-examination she testified that she did not see what was going on around her. Counsel also conceded that Masuwa's mind could have been impaired at the time.

[41] Given the state in which she was on the night of the incident and in court when she gave evidence, her testimony could not be relied upon as it was lacking, contradictory and not credible.

[42] As already discussed *supra*, the evidence of Masuwa was lacking, unreliable and not clear in every material respects as required in section 208 of Act 51 of 1977. The alibis of the appellants were confirmed by witness. They could have been reasonably possibly true.

[43] The submission by the appellants' counsels that something could have happened to the deceased after Masuwa allegedly left him with the appellants as a period of an hour had lapsed since then and his body was found a distance away from where she left them, has merit. Although the court *a quo* made a finding that the deceased's body was found where Masuwa left him with the appellants, that was not the evidence of Masuwa. Her evidence was that the deceased's body was found a distance away from where she left him and the appellants. By making such a finding the court *a quo* misdirected itself as to the evidence.

[44] The court *a quo* also misdirected itself by relying on the evidence of Masuwa, whose evidence was lacking, inconsistent, not credible, unreliable and not satisfactory in every material respects to justify a conviction.

[45] The court *a quo* should therefore not have convicted the appellants at all given the evidence of Masuwa. They should have been given the benefit of doubt.

[46] In the result I make the following order:

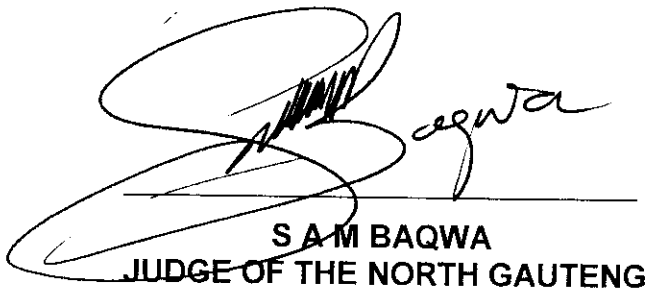
46.1 The appeals against conviction of the appellants are upheld;

46.2 The convictions of the appellants by the court *a quo* are hereby set aside and replaced with the following:

"The first and second appellants are found not guilty and discharged."

M J TEFFO
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

I agree:



S A M BAQWA
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA