

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

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S v Tembani [2006] SCA 151 (RSA)

In a judgment delivered today, the Supreme Court of Appeal has held a Tembisa man liable for the murder of his girlfriend after he inflicted a life-threatening wound on her that was readily treatable, but the treatment she received at Tembisa Hospital was sub-standard and negligent.

The SCA has held that where an attacker with murderous intent inflicts a wound that will ordinarily cause death, the fact that subsequent medical treatment is negligent, or even grossly negligent, does not relieve the attacker from criminal responsibility for the injured person's death.

Mr Tembani, the appellant, argued that the doctors and medical personnel at Tembisa hospital, where his girlfriend was admitted on the night he shot her in the chest, were grossly negligent. Had his girlfriend been properly treated, she would not have died from the gunshot wound he inflicted. Therefore, he contended, he should be not be held responsible for her death, but only for attempted murder.

The SCA has rejected this argument. It has confirmed the trial court's finding that Mr Tembani was guilty of murder, and dismissed his appeal against his conviction and his 18-year sentence.

The murder conviction arose from an incident on Friday night 14 December 1996 at the Ivory Park informal settlement near Kempton Park in which the appellant shot his 28 year old girlfriend, Ms Thandi Lamani, at least twice. One bullet entered her chest and penetrated her right lung, diaphragm and abdomen, perforating the duodenum. At his trial, the trial court (Hellens AJ with two assessors) accepted a first-hand account from a relative who witnessed the appellant shoot the deceased a number of times at point-blank range in the one-roomed shack they shared.

She was admitted to Tembisa Hospital on the night of her shooting, and died there fourteen days later. The evidence established beyond doubt that the appellant intended to kill, and the sole issue on appeal was whether he is responsible for her death. If not, a conviction of attempted murder would have had to be substituted, and his 18-year sentence reconsidered.

The cause of death was officially recorded, and proved at the trial, to be septicaemia in consequence of a gunshot wound through the chest and abdomen.

The medical evidence showed that the wound inflicted would have proved fatal without any medical attention. On the other hand, an expert testified for the defence that a laparotomy, promptly performed with proper attendant treatment, would have ensured a 95% chance of survival.

The SCA held that negligent medical attention did not exculpate the deceased's assailant. The SCA held that the deliberate infliction of an intrinsically dangerous wound, from which the victim is likely to die without medical intervention, must generally lead to liability for an ensuing death, whether or not the wound is readily treatable, and even if the medical treatment later given is sub-standard or negligent, unless the victim so recovers that at the time of the negligent treatment the original injury no longer poses a danger to life.

The SCA found the justification for this approach in two considerations of policy. The first relates to the culpability of the assailant; the second to the context in which he harms his victim. First, an assailant who deliberately inflicts an intrinsically fatal wound embraces, through his conscious conduct, the risk that death may ensue. The fact that others may fail to intervene to

save the injured person does not, while the wound remains mortal, diminish the moral culpability of the perpetrator, and should not in my view diminish his legal culpability. That is so even where those others fail culpably in breach of a duty they independently owe to the victim. It would offend justice to allow such an assailant to escape the consequences of his conduct because of the subsequent failings of others, who owe no duty to him, whose interventions he has no right to demand, and on whose proficiency he has no entitlement to rely. Their failings in relation to the victim cannot diminish the burden of moral and legal guilt he must bear.

The second consideration reinforces the first. In a country where medical resources are not only sparse but grievously maldistributed, the SCA considered it quite wrong to impute legal liability on the supposition that efficient and reliable medical attention will be accessible to a victim, or to hold that its absence should exculpate a fatal assailant from responsibility for death. Such an approach would misrepresent reality, for it presumes levels of service and access to facilities that do not reflect the living conditions of a considerable part, perhaps the majority, of the country's population. To assume the uniform availability of sound medical intervention would impute legal liability in its absence on the basis of a fiction and this cannot serve the creation of a sound system of criminal liability.

The SCA therefore dismissed the appeal.