



Summary of Judgment

SHAFIUL MILKY v THE KING

[2024] VSCA 136

17 June 2024

The Court of Appeal (Emerton ACJ, Priest and Kaye JJA) today allowed an appeal by Dr Shafiul Milky against his convictions by a jury in the County Court of Victoria on 20 March 2023 and ordered a retrial.

Dr Milky was charged with two counts of rape, four counts of indecent assault, eight counts of sexual assault, and one count of sexual assault by compelling sexual touching. All six complainants were patients of a clinic at which he worked.

As part of its case, the prosecution alleged that Dr Milky had a tendency to use his position as a doctor to engage in touching or penetration which was sexual and not warranted by a legitimate medical purpose during consultations with female patients.

In advance of the trial, the prosecution gave notice of the evidence that it intended to rely upon to establish this tendency: the 15 charged acts in the indictment, and three additional uncharged acts. It did not extend to other evidence of unprofessional, sexualised conduct by Dr Milky towards the complainants. However, the trial judge mistakenly directed the jury it could use this conduct as evidence of the tendency alleged.

This was a material error in that it impermissibly added weight to the evidence which the jury was entitled to take into account as tendency evidence. More significantly, it undermined the important requirement for the jury to exercise intellectual discipline and precision in its use of tendency evidence.

As a second error, the trial judge failed to give a direction to the jury about the prosecution's failure to call witnesses whose evidence was relevant to the determination of the two most serious charges against Dr Milky. Medical records showed that at the time one of the complainants said that she was raped by Dr Milky in the course of a particular medical examination, another doctor had carried out an examination of the same type on the complainant. There was no record of Dr Milky carrying out that type of medical examination at the time. The prosecution did not call the other doctor as a

witness, or provide any explanation about the discrepancy in the medical records. Furthermore, a nurse who gave evidence that she was present as a chaperone during examinations of this kind contradicted the evidence of a second complainant. The prosecutor told the jury that a receptionist may have been present instead, but did not identify and seek to adduce evidence from the receptionist.

Following a request by defence counsel, the trial judge refused to direct the jury that, if the prosecution does not call a particular witness, the jury may conclude the witness would not have assisted the prosecution's case.

The judge erred in declining to give such a direction to the jury.

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.