

# Crown 'can't solve the jigsaw'

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By Bret Christian

Queen's Counsel Malcolm McCusker berated the prosecution this week for the way it handled a "flimsy circumstantial case" in the high-profile charges against three men charged with wilful murder.

He described the prosecution case as "disturbing" in his closing address to the jury.

"They present the parts of the case that suit them," said Mr McCusker, a lawyer for one of the three men, said.

Simon Freitag, lawyer for another of the charged men said that the prosecution picked and chose the bits of evidence that fitted its theory.

It was trying to squash the pieces together.

Mr Freitag said: "Where the evidence doesn't fit they say 'put that piece of the jigsaw back in the box and get another one'.

"The state has a theory, but it can't get the pieces together."

The 10-week trial of men charged with murdering Phillip Walsham at Stirling railway station came to an end when the jury retired on Thursday.

On trial were Jose Martinez, Salvatore Fazzari and Carlos Pereiras, all teenagers at the time.

They were charged with the wilful murder of Mr Walsham (21) by throwing him off the footbridge over the freeway at Stirling station in the early hours of Saturday, February 28, 1998.

In his closing address, prosecutor Bruno Fiannaca described the alleged murder as "a cowardly act".

He said the men had lied to police, invented an alibi and behaved very aggressively to Mr Walsham shortly before his death.

Two of the defendants had each kicked him once as he sat on a bench near the station.

They were "prepared to act violently" towards him when people were watching.

"What were they prepared to do some 15 minutes later when no one was watching?" Mr Fiannaca said.

He said one of the men in a police interview had known more about the crime than had been published or broadcast in the media - known as esoteric knowledge.

The accused man said reports of the event had been published in a newspaper.

He had asked police whether they were investigating the case of the man "thrown" off the bridge.

The defence produced a cutting from The West Australian of the previous day that said police were investigating whether a man "was pushed, thrown or jumped".

Mr Fiannaca said there was no evidence that Mr Walsham had been hit by a car, rather than dying from a fall off the bridge.

"It beggars believe that Phillip Walsham met his death as the result of a car accident," Mr Fiannaca said.

Mr McCusker said that on the night, it was not possible in the time available for the three men to have returned to the scene to throw Mr Walsham off the bridge without their car being seen by the state's star witness, her mother and her sister.

There was no other evidence that the men had returned to the bridge to enable them to commit the murder.

"There is not the slightest evidence that they went back," Mr McCusker said.

Kicking Mr Walsham was "reprehensible - unprovoked, callous and quite undeserved," he said.

But what the state was alleging was "cold-blooded murder".

Mr Walsham had done nothing to the three men. They did not want his money and they did not know him.

The state had not called one witness because it knew her evidence did not fit the prosecution case, Mr McCusker said.

At the last trial, she had said that she met the three men, smoked a cigarette and chatted for eight or nine minutes.

This evidence, if accepted, would remove the possibility that the men had returned to the footbridge in time to commit murder.

A second witness, engineer Toby Vangolovski, not one of the men charged, had said the same thing.

"Without justification, the state portrays them as liars and perjurers," Mr McCusker said.

The judge later asked the jury to consider whether Mr Vangolovski would jeopardise his professional career by lying under oath for an acquaintance..

Another disturbing feature of the trial was evidence about an abrasion on Mr Walsham's shoulder, Mr McCusker said.

The state said it was caused by one of the accused men hitting Mr Walsham with a tyre lever before they threw him off the bridge.

This aspect of the evidence was a key to the prosecution, because, if established, it would directly connect the accused men to the death of Mr Walsham.

"This abrasion is suddenly so important, but no biopsy was taken to establish the time of the wound before death," Mr McCusker said.

The state's pathologist had said 12 to 24 hours, with a minimum of six hours.

"That's a vital question," Mr McCusker said.

Mr Walsham died three hours after he was found badly injured on the road near the footbridge.

Evidence was also given that skin was found on Mr Walsham's T-shirt near the abrasion.

But it also was not DNA tested to see whether it matched Mr Walsham's skin.

Simon Watters, a lawyer for one of the other men, criticised the prosecution, saying "the skin" was never tested, even though the test cost \$200 and it was an issue at the first trial last year.

It had not been tested since that trial.

Mr Watters said more than an abrasion would be expected if a person was attacked with a 1kg tyre lever.

Mr Freitag said a state forensic pathologist, Dr Karin Margolius, "has torpedoed to some degree some of the state case".

Dr Margolius gave evidence that the shoulder abrasion was suffered at least six hours before death.

Mr Freitag said: "You've seen what a tyre lever can do to a stainless-steel railing".

"What would it do to flesh and bone if it was swung hard?"

There were traces of the railing on the tyre lever, but no forensic evidence connecting Mr Walsham.

Mr McCusker said an attack with a tyre lever would cause an injury much more serious than an abrasion.

A witness who said she saw a man do a backflip off the bridge could simply be wrong, Mr McCusker said.

"Perfectly honest witnesses can get things wrong," he said.

"She had had a few drinks at the sister's 21st and the number of men she saw on the bridge ranged from two to five over eight years.

"Maybe what she saw was Mr Walsham's body, having been hit by a car and flung in the air.

"Her mind played a trick and what she thought she saw was someone backflip off the bridge.

"She saw no one running, no one attacked, no sign of a struggle, no one being picked up and thrown off the footbridge."