

Vital video evidence ruled out on technicality

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By Bret Christian

Court rules prevented the jury in the Walsham murder trial from seeing a police video in which a man said he pushed Phillip Walsham to his death.

Suppression of the video shows the law needs changing because relevant material was kept from juries on technicalities, a senior lawyer not involved in the case said.

The man on the tape was not one of the three men convicted by the jury on Sunday of Mr Walsham's murder, and he was not known to them.

The man on the video said he drove a white Holden Commodore, the same colour and model as the one used on the night by the convicted men.

He said he was in the vicinity of the Stirling station on the night Mr Walsham died.

Three men are in jail waiting to be sentenced for the murder of Mr Walsham at Stirling station on February 28, 1998.

The men face life in prison.

They are Jose Martinez (27), Salvatore Fazzari (27) and Carlos Pereiras (26).

The jury returned a guilty verdict at noon last Sunday after deliberating since Thursday morning.

Part of the defence case was that someone else who was around Stirling station on the night of Mr Walsham's death eight years ago might have pushed him from the bridge.

The existence of the police video was discovered by the defence team shortly before the trial began.

Towards the end of the 10-week trial, the jury was sent out of the Supreme Court while prosecution and defence lawyers argued in front of the judge about whether the tape should be played to the jury.

The judge, Justice Eric Heenan, summed up the contents of the tape this way without the jury present:

"There are certain passages in it in which there are unequivocal statements that Mr (name) pushed the deceased (Mr Walsham) off the bridge to his death.

"He did not repeat them in court."

The court had been told that the witness had gone to the police voluntarily in the year after Mr Walsham's death and was interviewed on video by police.

The tape could not be played to the trial jury because of the technicality in the rules of evidence.

The witness was subpoenaed by the defence to give evidence.

Initially he declined to answer a question on the grounds that the answer might incriminate him.

Justice Heenan granted him a certificate of immunity, which meant that any honest answers he made in the court could not be used in evidence against him later.

Asked in court if he had any involvement in Mr Walsham's death, he said: "I thought it could be me."

He did not make the same statements in court that he made in the video.

Under the rules of evidence, lawyers cannot cross-examine their own witnesses.

The lawyer for Mr Fazzari, Malcolm McCusker QC, asked that the judge declare the man a hostile witness.

This would enable Mr McCusker to play the tape of the police video and cross-examine the witness with

questions about it.

But the hostile witness application was opposed strongly by the prosecution.

Justice Heenan ruled that the witness was not hostile, because he was answering questions to the best of his knowledge.

As the witness could not be cross-examined, the tape could not be played.

"What this means is that people can be tried and convicted or acquitted of the most serious charges possible where guilt or innocence may be decided on an unusual quirk in the evidence law," the senior lawyer said.

"By trying to cocoon jurors from evidence that may be considered prejudicial, we are not giving them credit for the commonsense they are expected to have.

"Because it is unlawful to ask jurors why they made their decision, we will never know whether the outcome was affected in any way.

"Perhaps it is time to reconsider the entire question, let juries hear everything and place more faith in juries."

He said the usual cry was that guilty people walked free because they exploited the rules of evidence.

"This is a somewhat rarer situation where the accused believe they have been disadvantaged by the strict rules of evidence."

In the Walsham trial, there was a series of applications by the prosecution in the absence of the jury to exclude defence evidence.

Such hearings, mini-trials known by their Latin name *voir dire*, took up many days of court time over the 10 weeks of the trial.

Many of them were successful.

The prosecution successfully opposed evidence from a car crash expert, Robert Davey, who was prepared to

give evidence that indicated Mr Walsham may have died from being hit by a car, rather than being thrown from the bridge.

However, after several voir dire, Mr Davy was prevented from drawing on his long experience as a police crash investigator to list injuries recorded by pathologists in pedestrian fatalities.

The prosecution successfully argued that this amounted to medical evidence, and Mr Davey was not a doctor.

The prosecution also successfully opposed hearing evidence from a psychologist about suggestibility and the unreliability of memory over years of repeated questioning, especially when hypnosis is involved.

The main prosecution witness, who said she saw someone backflip off the footbridge, was subjected to hypnosis by police.