

# Walsham witness knocked back

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By Bret Christian

A man who defence lawyers say has vital evidence about the death of Phillip Walsham has been refused permission to appear before the Court of Appeal.

Albert Magistro, then aged 17, was the controversial fourth man in a car with three men convicted this year of murdering Mr Walsham.

On six occasions, Mr Magistro has said the four men had not returned to Stirling station, where Mr Walsham was found dying on the road in February 1998.

But he did not give evidence at the trial in March this year of the three men, Jose Martinez, Sam Fazzari and Carlos Perieras, all teenagers at the time Mr Walsham died.

The prosecution's case was that two of the men had kicked Mr Walsham, all left the scene in a car but returned 15 minutes later and threw him off a 7m high footbridge.

The new Chief Justice, Wayne Martin, ruled at a pre-appeal hearing last week that he would not hear Mr Magistro's evidence.

But Mr Magistro may yet get his day in court.

Mr Martin said he would leave it open for Mr Fazzari's lawyers to apply to the three judges of the Appeal Court to hear Mr Magistro's evidence when the full appeal is heard next May.

He said it had been a tactical decision by the convicted men's lawyers and Mr Fazzari not to call Mr Magistro as a witness at the trial in March this year.

Mr Magistro is Mr Fazzari's cousin. He was also charged with wilful murder but acquitted by the direction of

the judge in the middle of the first trial of the four in 2005.

Chief Justice Martin said the law was clear that accused people must live with tactical decisions.

He said he could not set a precedent that would encourage accused people to hold back a piece of evidence in the hope that if convicted, they could later use the "hidden" evidence as a lever to reopen the case in the Court of Appeal.

There was provision to over-ride this in the interests of justice but "the new evidence must be strong enough to show the applicant (the convicted person) is innocent", Mr Martin said.

Lawyers for Mr Fazzari had been unable to speak directly with Mr Magistro before the second trial in March this year, said Malcolm McCusker QC, for Mr Fazzari.

He applied for Mr Magistro to be brought before the Appeal Court to be questioned about his reasons for not wanting to give evidence.

"Every effort should be made to get him before the court," Mr McCusker said.

He said that in two social conversations with Mr Fazzari before the 2006 trial, Mr Magistro said he could no longer remember the events of eight years ago.

Mr Magistro's lawyer also told Mr Fazzari's solicitor Michael Bowden that Mr Magistro had difficulty remembering the events.

"He gave a very clear impression he (Mr Magistro) was going to be a difficult witness," Mr McCusker said.

"It would be unwise to call him (as a witness) unless he could clearly remember the events of the evening."

Yet in a tape-recorded interview with the Sunday Times newspaper after the 2006 trial, Mr Magistro had repeated his much earlier statements that the four men did not return to the area of Stirling Station on the night Mr Walsham died.

In October this year, Mr Magistro had agreed to look at a draft affidavit, but since then would not answer phone calls about signing it.

There were indications that he was afraid of the police, Mr McCusker said.

Chief Justice Martin said there was no evidence of this before his court.

He said Mr Magistro had consistently maintained the same position about the non-return to Stirling Station on five occasions, in signed statements to police, in a police video interview and in sworn evidence to the Coroner.

The transcript of his interview with the Sunday Times showed he was clear and emphatic in repeating his earlier statements, Mr Martin said.

Four of the statements were made in 1998, shortly after Mr Walsham was found dying on the road almost under the footbridge over the Mitchell Freeway at Stirling station.

The fifth was under oath before the Coroner's Court in 2003.

Chief Justice Martin said Mr Magistro could have been summonsed as a witness at the trial this March and questioned on the statements he had made previously.

Failure to do so was a "tactical forensic decision" by Mr Fazzari and his advisers, he said.

There are 18 grounds of appeal to be heard at the May appeal, expected to last two weeks.

(The POST's coverage of the Walsham case and related items can be read by clicking on the link at the top of [postnewspapers.com.au](http://postnewspapers.com.au).)