

# 'Prejudice sent trio to jail'

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By Bret Christian

Prejudice may have led a jury to convict the "Walsham Three" on the "flimsiest of circumstantial evidence", a lawyer for one of the jailed men said in court this week.

In a stinging address opening an appeal for the three men, Malcolm McCusker QC, said the murder trial of the three men had been based on prejudice, conjecture and speculation.

The three are in jail for life for the murder of Phillip Walsham (21) in 1998.



Two lawyers for the jailed men - Simon Watters (left) and Malcolm McCusker QC.

The jury found they had murdered Mr Walsham by throwing him off the footbridge at Stirling Station, seven metres to the road below.

They are Salvatore Fazzari (28), Jose Martinez (29) and Carlos Pereiras (27).

One of the three appeal judges, Justice Geoffrey Miller, said this week that the prosecutor at the murder trial last year had "intrinsically linked" an assault on Mr Walsham by two of the men with his later death.

Mr McCusker agreed: "The problem of prejudice was highlighted by the way the prosecution dwelt on that ad nauseum.

"A major problem is the conduct of the prosecutor in this and other respects." This led to a miscarriage of justice, he said.

The prosecutor had made an "absolute welter" of this issue, Mr McCusker said.

He said the core of this week's appeal was that the jury had got it wrong.

He said the jury could not have reasonably reached a guilty verdict on the evidence they heard.

There are 19 other detailed grounds of appeal, all of them opposed by the Director of Public Prosecutions.

Mr McCusker said an explanation for the jury's verdict was flimsy circumstantial evidence, coupled with the way the trial was conducted.

"The jury was told that if the men kicked him (Mr Walsham), they could have come back and killed him," he said.

Mr McCusker's submissions highlighted words spoken to the jury by state prosecutor Bruno Fiannaca at last year's trial: "They are the ones who showed a preparedness to use violence earlier.

"On that basis you could conclude that they were the ones who would be committing the crime later on."

Mr McCusker said this was an invitation to the jury to apply "forbidden reasoning".

He read out other examples from the trial transcript.

Mr McCusker said such statements by the prosecution required a very, very strong direction to the jury from the trial judge.

The judge, Justice Eric Heenan, had given the jury an inadequate direction on this point, Mr McCusker said.

His direction was not sufficient to overcome the prejudicial nature of the argument.

"He should have said that you must not conclude from the assault that the accused are guilty of the offence (murder)," he said.

"That's part of the reason why this was a miscarriage of justice."

Mr McCusker told the appeal court that after the assault on Mr Walsham at a bus shelter opposite Stirling Station, the men had left and did not return.

Fifteen minutes later, Mr Walsham was found dying on the freeway on-ramp some metres from below a footbridge.

A witness on her way home from a party, Clare Pigliardo, had said at last year's trial that she saw three or four people on the footbridge above.

One of them had done an "athletic backflip" off the bridge, the witness said.

Mr McCusker said this witness had not identified any of the people as the convicted men, and was unclear whether they were men or women.

There was no forensic evidence linking Mr Walsham to the footbridge, although he had been bleeding, and none on the convicted men.

Justice Miller said that Ms Pigliardo's evidence had been clear and direct that she had seen people on the bridge and that one had fallen to the road.

The jury would be entitled to accept her evidence as accurate if necessary, Justice Miller said.

"We say it's worthless," Mr McCusker said.

Ms Pigliardo had not said that she saw the man thrown or pushed.

"Mr Walsham had previously attempted to commit suicide at a railway station," Mr McCusker said. "Ms Pigliardo might have got it wrong."

The trial judge had refused the defence permission to call to court an expert witness who would give evidence about the reliability of Ms Pigliardo's evidence and the fact that she had undergone hypnosis by police.

"She said the body bounced, and that is very strange," Mr McCusker said.

Her evidence was contradicted by a delivery driver who saw a body on the road at an earlier time.

This driver, Joseph Leone, had been on his way to work at about 2.28am, while Ms Pigliardo had been returning from a party at about 2.38am.

Because of the times and the position of the body on the road, the evidence of both could not be right.

Mr Leone had said he stopped his car in front of the apparently uninjured man and blown his car horn.

"It may be that the jury did not accept Mr Leone's evidence," said Justice Miller.

Ms Pigliardo had described about four men walking briskly up the stairs of the footbridge.

She saw no struggle. The men were at "talking distance", she said in evidence.

If these people were the convicted men escorting Mr Walsham, they would have convinced a man who was so drunk he was "legless", had been kicked, and - on the prosecution case - hit with a tyre lever, to accompany them up the stairs willingly, Mr McCusker said.

"What's he doing walking briskly up the footbridge? It doesn't make sense," he said.

Over an eight-year period Ms Pigliardo had changed her story about the number of people she had seen on the footbridge.

Mr McCusker said: "The judge should have warned (the jury) that it would be dangerous to rely on her evidence."

The appeal papers listed more than 20 other people in the vicinity that night, and the court had heard evidence of assaults and confrontations by various gangs in the station area late at night in the months and years before Mr Walsham's death.

A taxi driver gave evidence that he saw five "shitheads" at the station at 2.30am - just eight minutes before Ms Pigliardo saw the group of men on the footbridge, and after the convicted men had left the area, Mr McCusker said.

"It's a dangerous place at night," Mr McCusker told the appeal court.

The prosecution had not begun replying to the appeal case at the time of going to press.