



SUPREME COURT OF WESTERN AUSTRALIA

Stirling Gardens
Perth WA 6000

Media Contact: Manager, Media & Public Liaison
Ph: (08) 9421 5303; Pager: (08) 9324 4319

This statement is not intended to be a substitute for the reasons of the Court of Appeal or to be used in any later consideration of the Court's reasons.

Summary – Martinez, Fazzari & Pereiras v The State of Western Australia (CACR 94, 95 & 96 of 2006)

These three appeals were heard by a court comprising Steytler P, Miller JA and myself. After a trial by Judge and jury, each appellant was convicted of murdering Phillip John Walsham on 28 February 1998. The primary ground of appeal relied upon by each appellant was the ground expressly provided for by s 30(3)(a) of the *Criminal Appeals Act 2004* (WA) to the effect that the verdicts of the jury were unreasonable or could not be supported, having regard to the evidence.

A number of decisions of the High Court have established that when that ground of appeal is invoked, it is incumbent upon the Court of Appeal to make its own independent assessment of the evidence for the purpose of ascertaining whether it is dangerous to allow the verdict of guilty to stand, even though there was evidence upon which a jury could lawfully have convicted.

The Court has therefore undertaken a complete review of all the evidence that was adduced in the course of the lengthy trial of the appellants. Consistent with the decisions of the High Court, we have undertaken that review bearing two things strongly in mind: first, the consideration that in our system of criminal justice, the jury is the body entrusted with the primary responsibility of determining guilt or innocence; second, the great advantage which the jury had in seeing and hearing the witnesses giving their evidence.

The authorities also establish that if, after reviewing the evidence with these two important considerations in mind, the Court is left with a reasonable doubt as to the guilt of an appellant, it is appropriate to conclude that a jury should also have entertained such a doubt, and that the verdict should therefore be set aside on the ground that it is unsafe or unsatisfactory.

In each case, the prosecution sought to establish that after an initial unprovoked assault upon Mr Walsham by Mr Fazzari and Mr Martinez at the carpark adjacent to the Stirling train station, all appellants, accompanied by Mr Alberto Magistro, travelled in a car driven by Mr Pereiras to the corner of Odin Drive and Fulmar Road in Balcatta, where a discussion took place. The prosecution allege that following that discussion, the appellants and Mr Magistro returned to Stirling station

where the appellants caused Mr Walsham to fall to his death from a footbridge over the Mitchell Freeway on ramp.

We have critically analysed the evidence available to sustain that contention beyond a reasonable doubt in the case against each appellant. A detailed analysis of that evidence is set out in our joint reasons for decision, which will be published at the conclusion of this summary.

We have concluded that the cases against the appellants Mr Fazzari and Mr Martinez contain the following principal components.

First, their unprovoked assault upon Mr Walsham, displaying evidence of a heightened state of anger, and a propensity for unprovoked violence. In evaluating that component of the prosecution case, we also take into account the fact that there was no evidence of continued anger in the course of the discussions at Odin Drive, nor of any motive for returning to Stirling station either at all, or for the purpose of a renewed assault upon Mr Walsham, who for all the appellants knew, may have left Stirling station after they did.

Second, each of Mr Martinez and Mr Fazzari denied "throwing" Mr Walsham from the footbridge when initially interviewed by the police, before having any apparent knowledge of an allegation to that effect. These denials might provide evidence that they knew more of the circumstances of Mr Walsham's fall from the footbridge than they have admitted. In evaluating the weight to be given to that evidence, we also take into account, first, the fact that it has not been established that Mr Walsham was, in fact, "thrown" from the footbridge, and second, that their denials of "throwing" Mr Walsham from the footbridge might also be explained by a reasonable assumption that the reason they were being interviewed at length by the police was because of the possibility that Mr Walsham's fall may have been the result of human intervention.

Third, each of Mr Fazzari and Mr Martinez lied to both the police and in court about having gone to McDonald's after the incident at Stirling station, when in fact they had gone to McDonald's before that incident. Those lies are capable of providing evidence that they were attempting to conceal their guilt with a false alibi. In evaluating the weight to be given to that evidence, we also take account of the fact that innocent people under investigation for murder might lie to diminish the risk of being charged or convicted.

In the case against Mr Martinez, there is also the evidence of an alleged confession made to Ms Michelle Howson, in the presence of her then boyfriend, Mr Phillip Andrews. In evaluating the weight to be given to that evidence, we also take into account the fact that the alleged confession was retracted immediately after it was made, and was not reported to police for more than a year after it was made, and then only after an incident involving Mr Martinez connected with the breakdown in the relationship between Ms Howson and Mr Andrews.

The case against Mr Pereiras consists only of his participation in the events which preceded the initial assault upon Mr Walsham by Mr Martinez and Mr Fazzari,

and his assertion of a false alibi about going to McDonald's after the incident at Stirling station.

We have given little or no weight to a number of aspects of the case relied upon by the prosecution. Those aspects include the "C" shaped abrasion on the back of Mr Walsham, said to be connected with a blow from a tyre lever of the kind carried by the appellants prior to the initial assault upon Mr Walsham. The evidence of Dr Margolius established that in order to present a mark of the kind observed, the blow would have to have been struck at least six hours prior to Mr Walsham's death – that is, before 11.30 pm on 27 February 1998. It cannot have occurred at Stirling station.

Nor do we place any weight upon the lies told by Mr Fazzari and Mr Martinez in their initial police interviews concerning the circumstances of the original assault upon Mr Walsham. Those lies are just as readily explained by a desire to avoid suspicion of assault, as by a desire to avoid suspicion of murder, and are therefore incapable of amounting to evidence of complicity in the murder.

We have not placed any weight upon the initial failure of each appellant to mention the visit to Odin Drive when first interviewed by police. Having regard to the contexts of those omissions, and the fact that the visit to Odin Drive was neutral in relation to the vital issue of whether they returned to Stirling station, in our opinion, those omissions are not capable of providing evidence of consciousness of guilt.

Nor have we placed any significant weight upon the evidence given by Mr Lione about his observations of a body on the on ramp on the relevant morning. There were many inconsistencies between that evidence and the established facts. Put at its highest, it went no further than to establish that there was a white car in the carpark at the time.

There are two aspects of the prosecution case which weighed very heavily in the view which we have taken of each appeal.

The first concerns the amount of time available to the appellants to do the various things which, on the prosecution case, they had to do between the time of the initial assault upon Mr Walsham and his fall from the footbridge 14 or 15 minutes later. For reasons which are set out in our detailed reasons, we do not consider that the evidence establishes beyond reasonable doubt that there was sufficient time for the appellants to have done all those things necessarily done to make good the prosecution hypothesis.

The second major consideration concerns what we consider to be a vital gap in the prosecution case relating to the precise circumstances in which Mr Walsham came to fall from the footbridge.

While the evidence might sustain the proposition that there were three men on the footbridge with Mr Walsham at the time of his fall, given that there were four men in the car in which the appellants were travelling, the evidence is incapable of establishing which three of those four were on the footbridge at the time of Mr Walsham's fall.

Further, the appellants can only be guilty of murder if one or perhaps two of them pushed Mr Walsham from the bridge, and the others or other were accessaries to that offence, or if all had the common purpose of committing an assault of which Mr Walsham's death was a probable consequence. But the prosecution case at its highest was that Mr Walsham did a backflip from the bridge while surrounded by a group. That evidence is incapable of sustaining a conclusion that there was an offender or offenders who had committed the principal offence of murder to which others were accessaries, or that all three had a common purpose to commit an assault of a kind which had Mr Walsham's death as a probable consequence. Such conclusions could only be arrived at by a process of speculation. Our system of justice requires guilt to be established beyond reasonable doubt, and does not countenance speculative processes of reasoning.

For these reasons, explained in much greater detail in the written reasons which I now publish, after reviewing all the evidence the Court is left with a reasonable doubt as to the guilt of each appellant. We have therefore concluded that the verdicts of guilty are unsafe and unsatisfactory.

These appeals must therefore be allowed and those verdicts must be quashed and substituted with verdicts of acquittal – and the Court so orders.

THE HON WAYNE MARTIN
CHIEF JUSTICE OF WESTERN AUSTRALIA