LORD ADVOCATE'S REFERENCES NOS 2 AND 3 OF 2023

HCA/2023/00024/XM

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JOINT SUBMISSIONS FOR THE RESPONDENTS

Ref No.2 [redacted]

Ref No.3 [redacted]

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INTRODUCTION

[1] The present References stem from comments made by the Court in *Lord Advocate's Reference No 1 of 2023* [2023] HCJAC 40 at para [226], in particular,

> "There is…a body of authority which suggests that, where the jury is satisfied that a true *de recenti* statement which is intimately bound up with the alleged events has been made, they would be entitled to treat it as corroborative, even in the absence of distress."

[2] The Lord Advocate submits that there is a clear and consistent line of authority for the above proposition. As a result, *inter alia*, the Lord Advocate invites this Court to conclude that:

> "*de recenti* statements which either form part of the *res gestae* (properly understood) or are a consequence and continuation of the *res gestae* are admissible for proof of the truth of their contents." [emphasis added]
> (Crown Written Submissions, p2 in answer to Q2; p51, para 110i)

The Lord Advocate's submission is wrong. The effect of her submission is to introduce, as a separate additional category, statements which do not form part of the *res gestae* (properly understood). No such additional category (separate and different from the first) is vouched by the authorities.

[3] The Lord Advocate further submits that, in respect of this additional category, there is a "particular latitude for sexual offences and child complainers" (Crown Written submissions, p2 in answer to Q1; paras 11, 51, 62iii). This is to misconstrue the authorities.

[4] The caselaw is relatively limited and the reports often lack detail. What can be taken from the cases and is supported by the Institutional Writers are the following broad propositions:

a. The *res gestae* is not limited to the duration of the 'event' (proof of which is the subject matter of the case - in crime, the *actus reus*). It may continue beyond the end of the 'event';
b. Statements which can be brought within the *res gestae* are 'real evidence' and therefore can be used to corroborate the complainer's testimony;
c. The test for whether a statement or utterance forms part of the *res gestae* has two components, namely temporal proximity and spontaneity of the expression;
d. Statements are deemed to be after the *res gestae* if they are made at a time or in circumstances where the feelings aroused by the crime have subsided or there is an opportunity for that to have occurred;
e. Unless the statement has been made before the *res gestae* ends, even if it can be described as *'de recenti'*, it cannot be proof of fact and cannot corroborate the complainer's testimony.

[5] The questions posed in the References are answered in full by the Respondents in the Conclusion (Part Nine).

PART ONE: THE HEARSAY RULE

[6] It is uncontroversial that the general rule in criminal cases is that hearsay evidence is inadmissible. This is clear from the Institutional Writers and throughout the caselaw. The common law has always permitted exceptions to that general rule -

such as the admissibility of a dying declaration. Now, of course, there are also statutory exceptions (e.g. section 259 of the Criminal Procedure (Scotland) Act 1995).

The *Res Gestae* Exception:

[7] One of the common law exceptions was (and is) that evidence of a statement which can be said to form part of the *res gestae* is admissible as proof of fact and therefore available as corroboration (see Hume: Commentaries (4th ed), vol. ii, p406, f/n 1; Burnett: A Treatise on Various Branches of the Criminal Law of Scotland (1811), pp601-602; Alison: Practice of the Criminal Law in Scotland, vol. ii, (1833) pp510, 517-518; Dickson: A Treatise on the Law of Evidence in Scotland (3rd ed)(1887), vol. i, Part III, Chapter V, para 254).

[8] The rationale behind the exception is that things said as part of the *res gestae* are 'real evidence' (e.g. *Teper v R* [1952] AC 480, p487 per Lord Normand; *O'Hara v Central SMT Co Ltd* 1941 SC 363, p389 & 390 per Lord Moncrieff).

***De recenti* statements:**

[9] Prior to *Morton v HMA* 1938 JC 50 the expression '*de recenti* statement' was not a term of art. Historically, the Court used the expression '*de recenti*' merely as a descriptive term. This is illustrated by the report writer's use in *McNamara v HMA* of the different expression - '*recenti facto*' ((1848) Ark 521, p522).

[10] Since *Morton*, and because of it, '*de recenti* statement' has come to have a particular meaning concordant with the decision in that case: classically, a statement by a rape complainer given at the first opportunity to a natural confidante and which is admissible to persuade the fact-finder to a favourable assessment of the credibility of the complainer's evidence on oath.

[11] In looking at the Institutional Writers and case law prior to *Morton*, it is important not to transpose this ingrained modern understanding of the phrase '*de recenti* statement' onto material from a different era.

PART TWO: WHAT IS THE *RES GESTAE*?

[12] It is not the definition of '*res gestae*' which has proved problematic or controversial. It simply means "the thing done; the whole transaction or circumstance" (Traynor: Latin Maxims, p551).

[13] The real debate relating to *res gestae* has concerned its scope – what are the start and end points of the whole transaction or circumstance?

[14] In *Cinci v HMA* 2004 JC 103, the trial judge allowed hearsay evidence that the complainer said "He raped me" upon the door to the shower cubicle being opened. The complainer and appellant were both naked in the cubicle. She was in obvious distress. The trial judge's opinion was (following *O'Hara v Central SMT Co Ltd*) that the words were part of the *res gestae*. The Appeal Court, by contrast, took a very narrow view of the scope of *res gestae*, confining it strictly to the duration of the *actus reus* of rape, meaning that when penetration ceased, the *res gestae* ended. The effect of this was to exclude as proof of fact evidence that the complainer said "He raped me" in circumstances redolent of a rape having just occurred. In that context, Lord McCluskey's statement in defence of the Appeal Court's approach that "Sexual intercourse had taken place earlier; but there was no clear evidence as to how long an interval had elapsed between the conclusion of the intercourse and the opening of the shower door" may be described as extraordinary (para [19]).

[15] This Court, of course, over-ruled *Cinci* in *Lord Advocate's Reference No 1 of 2023*, preferring instead to ascribe a wider scope to the *res gestae* in accordance with the approach in *O'Hara*. On that basis, this Court concluded that the statements of the complainer made after she had exited the flat where the incident took place and while in a state of distress were part of the *res gestae* (para [19] and [225]). The Respondents respectfully agree.

[16] The scope of the *res gestae* (that is, where it starts and where it ends) is not capable of being set out in a rule to apply to all cases. Not only will there be different start and end points depending on the nature of the event or transaction itself, but the scope of *res gestae* may also vary depending on the role in the transaction of the person making the statement. As was explained by Lord Moncrieff in *O'Hara*,

> "In considering whether a statement so forms part of an event as to become open to be proved as hearsay under what is styled the doctrine of *res gestae*, I take the view that 'the event', or *res gestae*, of which the statement must form part, will necessarily vary as regards its commencement and termination with the share in the event which is taken by the person who is reported to have made the statement. It appears to me to be only on this view that a statement can in any case be regarded under this doctrine as an item of real evidence. Unless the words be uttered by an actor as part of his action, they cease to be part of 'an event' and become merely a statement." (p389)

[17] He continued by way of illustration,

> "[in respect of the driver] that event might be found to have commenced with the swerve and to have terminated when he drove away. Again in the case of the victim, 'the event' might readily be taken as extending even to a change of

scene, so as, for example, to introduce statements made after recovery of consciousness in an infirmary." (p390)

[18] Properly understood, the scope of *res gestae* is flexible depending on the nature of the 'event' and the role of the statement maker within it.

PART THREE: THE COURTS' APPROACH PRE-*MORTON*

[19] The statement in *O'Hara* by Lord Moncrieff (above) that it is only under the doctrine of *res gestae* that hearsay evidence of a statement made can be regarded as 'real evidence' – and therefore admissible as proof of fact and available as corroboration – finds its reflection in the approach taken by the courts through the 19th century and into the early 20th century. Where they were considering the admissibility of a statement made *'de recenti'* (that is shortly after the event, as opposed to being strictly contemporaneous with it), they asked whether the statement could be brought within the *res gestae*.

[20] For example, in *Livingstone v Strachan, Crerar and Jones* 1923 SC 794, Lord Anderson, discussing the general rule, described four exceptions to the hearsay rule. The third was "Statements made by witnesses *de recenti* may be proved as part of the *res gestae*." (p809)

[21] The scope of the *res gestae* was not confined to things that were contemporaneous with the 'event'. In criminal cases, the *res gestae* can be seen to extend beyond the completion of the *actus reus*.

[22] In *Moran & Others* (1831) 1 Swin 231, a robbery case, the Court held that a statement which the complainer made to a policeman about the incident, shortly after it and in the presence of the accused, was part of the ongoing *res gestae.* A further statement made 5 or 6 hours later was excluded.

[23] Similarly in *Alexander* (1838) 2 Swin 110, in a case of serious assault, the Court admitted a statement by the complainer which was made very shortly after the incident and in the presence of the accused in which he accused him of having cut his throat with a razor. The complainer had testified that he had a scratch on his throat but did not know how he got it, and specifically denied that the accused caused it. The statement was admitted, not to contradict the complainer's evidence, but as proof of fact. The Court concluded that the particulars of the conversation were "undoubtedly part of the *res gestae*" (p111 per Lord Meadowbank). In addition to that conclusion about the remarks being part of the *res gestae*, the Court addressed the significance of the accused's failure to respond to what was said. This is discussed below in Part 8: Identification.

[24] While no doubt the presence of the accused was material in determining that the *res gestae* was ongoing in each of the above cases, that was not a pre-requisite for admissibility of a statement very shortly after the event as real evidence.

[25] For example, the case of *Hardie* (1831) Shaw 237. The case report is extremely brief but the case is more fully narrated by Alison (Practice, p525). While the case itself concerned an unsuccessful attempt by the accused to lead evidence of an inconsistent statement the complainer made on the Monday after the alleged offence (which was on a Saturday), the Court's judgment covered the general principle. As Alison notes,

"In pronouncing judgment, the Court proceeded on the ground that it is competent to contradict the testimony of a witness by what he said at the time when the subject of the trial happened, or shortly after, such matter being in fact part of the *res gestae*, just on the same principle on which it is competent to support his testimony by similar statements made to by-standers at the time, or those with whom he communicated shortly after..." [emphasis added]

[26] In *Stewart* (1855) 2 Irv 166, a murder case, the prosecution sought to introduce evidence from a witness Margaret Shaw whether, within 24 hours of the murder, the accused had made statements indicative of violence towards the victim. While to the modern lawyer, this would fall within the exception to the hearsay rule that extra-judicial statements made by the accused at any time are admissible against him, in fact the Court determined that this statement could be adduced because it was made *de recenti* (by which they mean within a short time of the event) and formed part of the *res gestae* (p179).

[27] In *Kelly*, a police officer was permitted to give evidence of the account given to him by the victim of a robbery immediately after the crime, but not what the man said to him on the day of the trial. (Bell's Notes, p288)

[28] These cases permit the conclusion that prior to *Morton* the focus of the Court's consideration for admitting a statement made shortly after the event was whether it could be brought within the *res gestae* (which may continue after the event itself - the *actus reus* - is complete).

'*De recenti* statements' not forming part of the *res gestae* were not admissible:

[29] The cases mentioned above show that the Court admitted statements that were part of the *res gestae*. As noted in the Introduction, the Lord Advocate submits that the

Courts also admitted another category of statements that were *de recenti* (but which did not form part of this wider *res gestae*) as proof of fact. This is incorrect, as is demonstrated by, for example, the case of *Moran* (mentioned above). There, the statement made to a policeman at the scene in the presence of the accused was admitted but a statement five or six hours later was not. This latter statement was, on any view, '*de recenti*' and made as a consequence of the crime, yet it was excluded. The reported reason was that it was not part of the *res gestae* (Bell's Notes, p288).

[30] As noted already, the Lord Advocate submits that there is some further category of statements that is admissible as proof of fact even though it falls outside (comes after) the wider *res gestae*. At paragraph 51 of her submissions, she suggests there is a "clear line of authority…that: (i) the *res gestae* did not end with the commission of the crime but extended a short while afterwards; (ii) *de recenti* statements were admissible and corroborative when given by an injured party in the period after the crime, with a particular latitude for sexual offence cases and the evidence of children."

[31] She goes on then to discuss three cases which, she says, fall outside this line of authority and are explained by the fact that they involved incompetent witnesses (except *McNamara* which she says is wrongly decided). It serves to look at the first of the three cases (*Hill v Fletcher* (1847) 10 D 7) to illustrate the flaw in the Lord Advocate's submission. While the risk of admitting a pursuer's account of the incident 'by the back door' through leading a prior statement is part of the Court's reasoning, it is also a key component of its decision to exclude the evidence of the statement that it did not form part of the *res gestae* (had it done so, it would have been admissible regardless of her competence as a witness).

[32] *Hill v Fletcher* was a reparation action arising out of an assault with intent to rape. The pursuer was not a competent witness in her own cause. Her counsel led

evidence from a witness with whom the pursuer had been staying at the material time and to whose house she had returned "in a state of grief and disorder." He posed the question, "Did she say she'd been with Fletcher?" An objection was taken. (p8) The pursuer's counsel sought to persuade the Court that the question should be allowed to be answered on two grounds. First, that it was *de recenti* and explanatory of the occasion of the condition the pursuer was in. He argued there was no difference between civil and criminal cases. Second, he contended it was part of the *res gestae*. In addition to noting the danger of effectively substituting a prior statement by the pursuer for her evidence in the cause, the Lord Justice Clerk held the evidence of the statement incompetent (inadmissible) because it formed no part of the *res gestae* – "The statement sought to be proved formed no part of the *res gestae*. In truth it was made some time after the transaction sought to be proved by means of it, and after the girl had time to concoct her story." (p8) He noted that between the incident and her statement, she had met two people to whom she made no disclosure and who had observed no agitation in her or disorder in her dress. (p9) From this it is apparent that, regardless of the issue of competency of the witness, the Court took the view that a statement made *de recenti* could only be proof of fact if it was made during the *res gestae*.

[33] In relation to the cases relied upon by the Lord Advocate, in a significant proportion of them, the circumstances in which a statement was made are not specified (apart from the Court's use of the description *de recenti*), the purpose for which the statement was admitted is unclear, with the result that the conclusion urged upon this Court by the Lord Advocate cannot safely be reached.

[34] In short, there is no "clear and consistent line of authority" supporting the Lord Advocate's submission. In particular, the proposition that "*de recenti* statements which either form part of the *res gestae* (properly understood) or are a consequence and continuation of the *res gestae* are admissible for proof of the truth of their contents"

(Lord Advocate's submission, p2 in answer to Q2; p51, para 110i) is not borne out by a proper reading of the caselaw. The Lord Advocate's submission that, in addition, a "particular latitude" for complainers in sexual offence cases and child complainers is addressed in Part Five below.

PART FOUR: THE INSTITUTIONAL WRITERS' APPROACH

[35] The approach taken by the courts and illustrated above was consistent with the Institutional Writers. They describe a flexible scope for the *res gestae* and recognise the admissibility, as real evidence, of statements which fall within it.

[36] Contrary to the submission of the Lord Advocate, the Institutional Writers do not describe as admissible as proof of fact a further category of statements falling outside this flexible (or wider) *res gestae* (that is, they do not describe a category such as the Lord Advocate terms '*de recenti* statements that are a consequence and continuation of the *res gestae*'). From the perspective of the Institutional Writers, once the *res gestae* (in so far as it relates to the person making the utterance) has come to an end, statements made (regardless of whether they might also be described as *de recenti*) necessarily fall foul of the hearsay rule and cannot be admitted as proof of fact/as corroboration.

[37] Starting with Burnett, discussing what might amount to corroboration of a direct witness, he sets out the basic rule that statements, even those that might be described as *de recenti,* are admissible, not for corroboration, but only to enhance credibility because they emanate from the same original source:

> "This only may be noticed, that the circumstances founded upon must be extrinsic to the witness. No evidence, which goes merely to support the

credibility of the witness in the account he has given of the fact to be proved, as by establishing that he had recently after communicated what he had seen or heard to another person, and had been all along consistent in his story, will be held as sufficient to supply the want of another witness to the fact. For though the circumstances of this sort be competent and admissible to strengthen the credit of the witness, they still leave the fact, he speaks to, resting on his single testimony." (p519)

[38] Properly understood, this is not, as was suggested in *Lord Advocate's Reference No 1 of 2023*, at odds with Alison and Dickson. All the writers agree that as a general proposition. It finds its reflection in the cases in which the court seeks to establish whether the 'recent communication' is part of the *res gestae* or not.

[39] The Lord Advocate submits that the passage in Burnett at p553 (p8, para 12, Crown Written Submissions) that "the recency and manner of her complaining is still a circumstance of weight as a matter of evidence" contains nothing which suggests that 'recency and manner' of complaint are limited only to matters of consistency. This submission fails to recognise that, in the 19th century, any delay in reporting an allegation of rape or other sexual offence weighed heavily against the jury accepting the truthfulness of the allegation. In her submission the Lord Advocate says a failure to make an early report was at one time fatal to the prosecution (para 50, Crown Written Submissions, ref *Tweedie*). As a matter of law, that would be incorrect. By Burnett's time a plea in bar of trial could no longer be based on the failure to report promptly. Rather, the issue was that such an unexplained or unjustified failure to report at an early opportunity was so damaging to a complainer's credibility that cases were withdrawn or failed to prove. As Mackenzie stated,

"a strong presumption…is…in our practice, that the pursuit [of a rape allegation] is malicious when it is delayed, for it is most presumable that a

woman would not conceal any time such an injury." (MacKenzie: Matters Criminal, Part 1, Title 16, Section 4, [p126 Stair Society 59])

[40] A similar point is made by Hume,

"Not that any long delay to prosecute, and still more to disclose the injury to those who should naturally be made acquainted with it, will not always have its due weight with a jury, as a matter of evidence in judging the probability of the charge; but neither of these circumstances is not admitted *in limine*, as a bar to the prosecution." (Hume: Commentaries, vol i, p308)

[41] The Lord Advocate then discusses Burnett's next comment:

"In the case of a child under age and incapable of understanding the nature of an oath, her declaration is admissible, as affording often very satisfactory evidence; and in connection thereof, may be received what she said to her parents or others recently after the assault." (p554)

[42] It is correct to say, as the Lord Advocate does at paragraph 14 of her submissions, that "once the child's declaration is received, the evidence from her parents of what the child has said is also admissible and indeed good evidence." This of course does not make clear that *any* such statement can be used as proof of fact, as opposed to merely to persuade the Court that the declaration, not on oath, can be relied upon (that is, for credibility).

[43] At pp601-602 of Burnett, he sets out the fourth exception to the hearsay rule, namely evidence forming part of the *res gestae*, which evidence, he says, is a fact. The quote contained in the Crown Written Submission at paragraph 16 regarding the use of what a witness said *de recenti* as corroboration is contained within the discussion of the *res gestae*. It is important to read it in that context. Even if the Lord Advocate is

correct to suggest that the earlier passages, discussed above, indicate that a *de recenti* statement by a complainer can be corroborative, this later passage qualifies the circumstances in which that can happen, and restricts it only to those situations where they are part of the *res gestae*.

[44] From this passage in Burnett, it can be seen that the *res gestae* was not confined to the duration of the *actus reus*.

[45] Hume is similarly clear that the *res gestae* has a wider scope than strict coincidence with the *actus reus*. That is clear from his illustration of John and James (vol. ii, p407). While in part that illustrates a separate 'primary hearsay' point (to allow John to explain why he runs off in a particular direction), it is also clear that the exchange between them, while James is bleeding having just been shot, is admissible as proof of fact because it is within the *res gestae*. From the victim's perspective, this is an immediate sequel to the assault on him. Beyond this, Hume has nothing to say about *de recenti* statements not brought within the *res gestae*.

[46] Alison makes the same point as Burnett in relation to the need for corroborative evidence to be extrinsic to the witness (Alison: Practice, Chapter XIII, p553).

[47] The Lord Advocate points to page 217 of Alison: Principles as well as the case mentioned therein of *James Burtnay* in support of her argument that once a *de recenti* statement was admitted, there was no qualification and it could be corroborative (paras 26-28 Crown Written Submissions). Caution is needed here.

[48] First, the passage from Alison quoted at paragraph 26 of the Crown Written Submissions relates to evidence which is admissible on behalf of the accused, not in proof of the Crown case. The purpose would be to impeach the witness's credibility. Alison does not suggest such statements were admissible as proof of fact on behalf of the accused.

[49] In relation to *James Burtnay*, a proper reading of the brief accounts available of this case tend to suggest that the statements were admitted, not for corroboration, but to assist with credibility. First, again, the reference by Alison is in connection with evidence which the accused wishes to lead to undermine the Crown case (p217). The later reference (p224) is also found under a heading dealing with challenges to credibility. His initial comment (in the generality) is simply that a child of tender years is permitted to give a declaration (that meant, at that time, evidence at the trial but not on oath), and "in confirmation of her account", the *de recenti* statement is admissible. He does not make clear the purpose of admitting it. Given that he is discussing challenges to credibility, his use of the words "in confirmation" cannot be ascribed the meaning confidently given to it by the Lord Advocate – that of corroboration.

[50] That the Lord Advocate's submission goes too far in that assertion of their meaning becomes clear when one reads Alison's various descriptions of *Burtnay* alongside Hume's account of the same case (which is not referenced in the Crown Written Submissions).

[51] Hume records that there was a challenge to the child being called as a witness on grounds of her being of 'weak intellect' and suffering 'derangement'. Evidence was led from two witnesses (not further described) and the objection was withdrawn (Hume, vol. i, p303-304).

[52] Alison notes that the declaration of an 8-year-old girl was "admitted, and proved the principal evidence against the accused". At page 514 of vol. ii, Practice, he records that the girl has "disclosed the particulars of the rape to her mother, at the same time that she exhibited the consequences of the injury on her person."

[53] The Respondents accept it is possible that the girl's statement to her mother was admitted as corroboration (it being part of the *res gestae* in the same way as

Hume's example of James and John). However, it is equally possible or arguably more likely (given the heading under which the case appears which concerns credibility challenges by use of inconsistent statements) that the *de recenti* statement was adduced to counter any suggestion that the child's declaration could not be relied on (it having been suggested she was of weak intellect and she was not on oath). What Alison records is that the declaration "proved the principal evidence". On a plain reading, this may mean nothing more than the declaration "turned out to be" the principal evidence because the *de recenti* statement was consistent with it. The declaration would be readily corroborated by the injury shown to the mother.

[54] In the Lord Advocate's continued exploration of Alison (paragraph 31, Crown Written Submissions), she quotes from pages 224-225 that a complainer can "support [her] testimony by the accounts she had previously given to others *de recenti* after the outrage." The Lord Advocate notes it is worth remembering that "support" means "corroborate". The Respondents suggest is it also worth remembering that this quote comes from a section where Alison is dealing with challenges to a complainer's credibility by the use of prior inconsistent statements. He is not dealing with sufficiency of evidence for proof of the charge. Once again, the Lord Advocate invites the Court to attach a meaning to the passage which it may struggle to bear given its context.

[55] At paragraph 34 of the Crown Written Submissions, the Lord Advocate turns to what she describes as Alison's "second exception" to the hearsay rule which references statements made *de recenti* by the injured party. The live question is whether this is in any way different to what Burnett describes as statements shortly after the 'event' which form part of the (wider) *res gestae*. It is not. In fact, in support of the 'second exception' Alison simply cites Burnett at p602 (Alison, vol. ii, Practice, p513, f/n 5).

[56] Alison states that the admissibility as proof of fact of such statements is restricted within narrow limits. (p514) He says, "It is those accounts only to which this privilege is extended, which are connected, more or less directly, with the *res gestae* of the injury, or which were so recently given after it as to form, in some sort, a sequel to the actual violence." (p515) He goes on to say that accounts after an interval with no connection to the *res gestae* will not be admitted. (p515)

[57] This confirms that Alison and Burnett are at one. They are both describing the admissibility as corroboration of statements by injured parties falling within the (wider) *res gestae*. But once the *res gestae* has ended, the statement is not allowed as proof of fact. Alison, like Burnett before him, is not suggesting there is an additional category of statements *de recenti* which can be used as proof of fact.

[58] Turning to Dickson, the Respondents recognise that the phrase used by the Lord Advocate "consequence and continuation of the *res gestae*" originates in Dickson. The Lord Advocate, as noted already, postulates *de recenti* statements which are a consequence and continuation of the *res gestae* as being something different from statements which are part of the *res gestae* (hence "either/or"). This is so, even though the Lord Advocate asserts that the *res gestae* "(properly understood)" is wider than the duration of the *actus reus*. The Lord Advocate goes on to submit that in relation to this extended window of 'consequence and continuation', an even longer period (latitude) is permitted for sexual offences and child complainers.

[59] At paragraph 62(ii), she submits that what is to be taken from Dickson is, "*Res gestae* statements (defined as extending beyond merely the commission of the crime) and *de recenti* statements which are a consequence and continuation of the crime are corroborative." All of this is to read into Dickson something he did not intend.

[60] At paragraph 258 (vol. i) Dickson describes the statements of an injured party made shortly after the crime (the *actus reus*) as "the natural outpourings of feelings

aroused by the recent injury, and still unsubsided, are a consequence and continuation of the *res gestae*." Two things are clear. In order to be admissible as proof of fact, the utterance must be the 'consequence of' what has happened to cause the injury. The Respondents say this simply means 'caused by' or 'the result of' the crime. That is a familiar concept, for example in cases of distress, where the question is whether the distress is genuine and attributable (in whole or in part) to the crime.

[61] The second thing that is clear is that the *res gestae* must be ongoing, that is, it must have not ended, at the time the statement is made. That is the plain meaning of "continuation". It is the fact that the feelings generated by the injury are unsubsided that indicates the *res gestae* is not yet over. The Lord Advocate's interpretation, by contrast, appears to suggest that there is the 'original' *res gestae* and then some further *res gestae* period beginning some time after that. The Respondents say, once the *res gestae* as properly understood is at an end, it is at an end and any statement thereafter, even if a consequence of the crime, cannot revive a completed *res gestae* at some later stage (even if still relatively proximate to the event). That Dickson means nothing more or less than earlier Writers is apparent from his citation – which is, again, Burnett page 602. In short, the statement must be made proximate in time to the event (*de recenti*) and while the feelings aroused are unsubsided.

[62] At paragraph 62(iv) of her submission, the Lord Advocate submits that it can be taken from Dickson that "the principle that *de recenti* statements are corroborative is appropriately circumscribed in that 'a statement which resolves into a narrative of a past occurrence (in the sense of having been produced at a time and in a manner which would allow for concoction) will not be admitted.'" She endorses that approach.

[63] But that is not what Dickson means by the passage at paragraph 92 of the 1st edition. The full quote is,

"On the other hand, a statement which resolves into a narrative of a past occurrence will not be admitted to qualify or explain it." (p61)

[64] What Dickson means is not that the point at which a statement becomes inadmissible hearsay is when it resolves into a narrative of a past occurrence. What he means is that while an utterance that is part of the *res gestae* may be admissible, where it turns into a statement by way of exposition or qualification (even if made at the same time), it will be excluded. It is clear that this is what he means from one of the examples which he sets out immediately after.

[65] At paragraph 93, he explains that in a murder trial, a witness was allowed to say that a boy asked for poison, but not where the boy said he came from. The case is *Elder or Smith* (1827) Syme 92. An issue in the trial was where the poison came from. A witness was called by the defence who overheard a boy in a shop asking for poison. An objection was taken by the Crown on grounds that this was hearsay. The defence argued that "speech made by a person when it enters into and makes part of a fact to be sworn by another was not hearsay". The Lord Justice Clerk held that it would be permitted to ask "Did a boy come to buy poison?" but that if it was asked "Did the boy say he came from Denside?" that would be hearsay (p121).

[66] Similarly in *Murray* (1866) 5 Irv 232, Lord Ardmillan was asked to rule on an objection to admitting the hearsay statement of a girl who was the victim of an alleged rape made to her mother immediately afterwards. The judge decided that evidence from the first witness who saw the girl afterwards about the first "statement or exclamation she made" would be admitted as part of the *res gestae*, explaining it could be laid before the jury as an "incidental fact, like the cry of a child or the scream of an animal." But, he ruled, he would not allow the witness "to mention the details even of a conversation that took place immediately after the assault, nor anything said by the girl at a little distance of time, e.g. on the next day." (p233-234)

[67] That the Court did not admit the details that followed the first exclamation is in line with (and illustrative of) what Dickson means by "a statement which resolves into a narrative of a past occurrence will not be admitted to explain or qualify it" – meaning to explain or qualify the initial account or exclamation.

[68] The proper interpretation of the point at which a statement will no longer be admissible as part of the (wider) *res gestae* is clear from Dickson at paragraph 258 (vol. i, 1887). He references *inter alia* the case of *Moran* (above) where a statement made by the victim of a robbery five or six hours later was not admitted "because the party's feelings have had time to subside during the interval".

[69] Dickson expands on this 'cut-off' point at paragraph 260 (p194) where he states,

> "In considering the admissibility of this kind of evidence, regard must not only be had to the time which intervened between the alleged offence and the statement, but to the whole circumstances, e.g. the extent and nature of the injury, and the opportunities which the sufferer had of expressing his feelings. For example, while the statement which a party seriously injured, made at a short interval to the persons he first met should be received, yet if he uttered no complaint, and manifested no symptoms of excitement to them, his statements to other persons, although at no greater interval, should be rejected because they are the narrative of a previous occurrence, and not the expression of unintermitted excitement." [emphasis added]

The critical question is whether the feelings have subsided, rather than the form of the statement made (e.g. having the character of a narrative rather than an outburst). The reasons for this and the application of it to sexual offence cases and children will be considered in the next section.

[70] Drawing all of this together, the Institutional Writers demonstrate that:

a. the *res gestae* was not confined to a strict coincidence with the duration of the *actus reus;*
b. statements falling within the *res gestae* were admissible as proof of fact and could be corroborative;
c. statements made after the end of the *res gestae* cannot "revive" it;
d. statements are deemed to be after the *res* gestae if they occur at a time or in circumstances when there is either evidence that the feelings aroused have subsided, or there is opportunity for that to have occurred; and
e. statements after the end of the *res gestae* were not corroborative because they are not extrinsic to the witness – they come from the same source.

PART FIVE: THE RATIONALE FOR ADMITTING ONLY *RES GESTAE* STATEMENTS AS PROOF OF FACT

[71] Why is it, then, that only those statements which can be brought within the *res gestae* were allowed as proof of fact? What is the mischief the Writers and the Courts were guarding against?

[72] The starting point is that statements forming part of the *res gestae* are considered to have a measure of assurance as to their accuracy 'built in'. That is because they are considered to be forced from the individual as a result of the pressure of the incident. They are, in that sense, spontaneous utterances.

[73] While they need not be strictly contemporaneous with the 'event', the requirement that they have the character of spontaneity provides assurance that what is said is not the product of a process of reflection (which might lead to editorialising

or explaining/qualifying) or indeed concoction. As Lord President Clyde stated in *Gilmour v Hansen* 1920 SC 598,

> "In cases of crime or delict, and also where the facts are of an intimate personal character, statements more or less similar in their circumstances to that now in question are admitted in evidence. But it is a condition attached to their admissibility that the time elapsing between the alleged occurrence and the making of the statement must be so exiguous as to exclude the risk of concoction, consequent on reflection, or at least to reduce such risk to a minimum." (p603)

[74] That this is the correct analysis of whether the statement is made within the *res gestae* can be seen from e.g. *Tweedie* (1836) 1 Swin 22. The Lord Advocate relies on *Tweedie* as showing a wide, but not unlimited, approach to *res gestae*. That is not what should be taken from it. In fact, the case is illustrative of the Court carefully investigating whether the *res gestae* was actually ongoing when a particular statement was made, or whether it had ended and any statement thereafter was not available as corroboration even if it could be described as *de recenti*. The case illustrates how jealously the Court guards against the material risk presented by a statement made once it was clear the emotions had subsided and there had been an opportunity for reflection (and perhaps concoction).

[75] In *Tweedie*, the complainer gave evidence that she was raped on the Saturday afternoon by the accused, as a result of which she was injured and bleeding. This was before 4pm. She gave evidence that she did not go home until into the evening (about 830pm). That night, or the following morning, she told the accused's sister (with whom she shared a room) what happened and that it was against her will. The sister did not give evidence. The complainer said she next told Margaret Muir. This was on the Tuesday following. Margaret Muir confirmed that the complainer did indeed

attend on her on the Tuesday, at which time she disclosed that she had been raped. But she also gave evidence that she had seen the complainer on the Saturday afternoon at 4pm (i.e. on the day of, but after the time of, the alleged rape) at which point no disclosure was made and indeed the complainer was her normal self, laughing and playing with her child. The Crown led no further evidence and abandoned the case.

[76] The Court concurred with the Crown's decision and expressed its view that no suspicion was thrown on the veracity of the complainer. From that we can infer that the issue was an absence of corroboration, not that the credibility of the complainer had been fatally undermined. It must mean that the Crown (and the Court) concluded that the statement made on Tuesday was not part of the *res gestae*. This demonstrates the need for any corroborative statement to be made in circumstances recent to the incident, where the complainer is still labouring under the emotional pressure of the crime and before she has had a chance to reflect. Her demeanour and failure to disclose on the Saturday along with the absence of distress on the Tuesday combine to illustrate that, in this case, the *res gestae* ended so far as the complainer was concerned before she got to Margaret Muir's house on the Saturday afternoon.

[77] If the Lord Advocate's submission is correct that *de recenti* statements were available as corroboration when they did not form part of the *res gestae* but rather were made in circumstances that can be described as a 'consequence and continuation' of it, then this case would almost certainly have had a different outcome. At the very least, the Court would not have expressly commented on the veracity of the complainer's account.

[78] From all of this it can be seen that the test for whether something is *res gestae* has two elements: a requirement of temporal proximity; and a requirement that the statement is made while the complainer is still labouring under the emotions provoked by the incident.

Sexual offences and child complainers:

[79] The Lord Advocate submits that the authorities (including the Institutional Writers) demonstrate that in considering whether to admit statements given by the injured party in the period after the crime, there was "a particular latitude for sexual offences and the evidence of children." (para 51, Crown Written Submissions) In fact, the evidence for this submission in the authorities is not particularly strong.

[80] In the case of *Mackenzie* (1828) Syme 323, while evidence was admitted of accounts given by the complainer on a Tuesday about an alleged rape on Sunday or Monday, the report does not specify the purpose for which the evidence was admitted. It is correct to say (as per para 18, Crown Written Submissions) that the Lord Justice Clerk "pointed out all the circumstances that tended to corroborate or discredit the principal witness", but the corroborating evidence was not further specified. The accounts given by the complainer had been inconsistent as to what happened and whether it was without her consent (evidence of Mrs McLean and Mrs Ross, p330). Her demeanour prior to disclosure had been unremarkable (evidence of John Jack, p329).

[81] In *Murray* (1866) 5 Irv 232, the Court allowed evidence of what was said by a girl complainer of "low intellect" on her return home to her mother "immediately after the alleged outrage", but not what she may have said the following day.

[82] In *Simpson* (1870) 1 Couper 437, an incest case, the Court would allow statements made by the accused's wife to her sister provided it could be brought "to the day of the occurrences libelled" as part of the *res gestae* (p439, per LJG).

[83] The Lord Advocate relies on *Anderson v McFarlane* (1899) 1 F (J) 36 as "a good example of the latitude" (para 70, Crown Written Submissions). Evidence of a

statement the girl (who was alleged to have been assaulted) made to her parents three days after the incident was admitted. The Lord Advocate argues that, without this statement, there was no other source of corroboration. It appears that this submission may have been made based on the reported judgment but without the benefit of having considered the underlying Justiciary Papers.

[84] It is correct that in the appeal against conviction (which was by way of Bill of Suspension) one ground of complaint was that there was no direct corroboration of the girl's testimony, save for the statement to her mother. The complaint was that this was not made *de recenti*. Firstly, in his opinion, the Lord Justice Clerk (Macdonald) expressly states that "It is not so much leading corroborative evidence as eliciting that the injured party made a complaint at the earliest opportunity, thus preventing the forcible objection to credibility that the witness had not made the complaint after the assault to her own relations" [emphasis added]. (p37) It must be borne in mind that one of the other grounds of complaint was that the child had not been put on oath to give her evidence. So it was clear that a challenge to credibility was front and centre in the case. Further consideration of the Justiciary Papers shows that there was other indirect evidence before the trial court which could support and corroborate the assaults. There was medical evidence of injuries consistent with the circumstances of the assaults spoken to by the complainer. There was evidence of distress (separate and prior to the disclosure to her parents). There was what appears to be an admission by the accused that he had made threats to another servant girl in terms that reflected the manner of the assault on the complainer (Justiciary Papers 1897-1900 JC, 56 and 57).

[85] The Respondents acknowledge that in *Anderson v McFarlane* a statement made 3 days after the incident was admitted. Even if it was admitted as proof of fact, it is apparent from the papers that the Court considered the circumstances that might explain the passage of time – including the remoteness of the locus and that she told her parents the first time she saw them after it happened. Viewed in that light, the case

illustrates not a 'particular latitude', but a proper examination of whether the *res gestae* was still ongoing at the time of disclosure.

[86] In *Stewart* (1855) 2 Irv 166, evidence was admitted of a *de recenti* account given by a young boy of 7. This was a murder case and he was a witness, not a complainer. He gave an account within 24-48 hours. From the case report, it does not appear that evidence of his prior account was admitted as proof of fact. He was called as a witness and gave evidence, albeit not on oath. It was then proposed to lead the witness to whom he made the prior statement. The objection was that this was incompetent because his testimony in court was the best evidence. The prosecution argued,

> "The Court, in the case of witnesses who are so young, are in use to allow the line of examination proposed, chiefly for the purpose of testing the value of the testimony, by shewing whether or not *de recenti* the child gave the same account of the occurrence. In the case of criminal assaults on children under age, this is always done, and also in the case of grown females." [emphasis added] (p179)

The objection was repelled. Given that, in relation to other hearsay evidence which was admitted at trial (see discussion of *Stewart* in Part Three above, re evidence of Margaret Shaw), the Court expressly referred to it as being *res gestae*, it appears that the boy's prior statement was admitted to support the credibility of his declaration (and allow that to be given weight by the jury) rather than as proof of fact.

[87] The reference in *Stewart* to a practice of seeing whether *de recenti* the same account was given in order to test the value of the evidence (that is, its credibility) warrants further examination.

[88] The Lord Advocate refers to Dickson in support of her submission of a 'particular latitude' for *de recenti* statements in sexual offence cases and for child

complainers to be admitted as proof of fact (para 61, Crown Written Submissions). *Stewart* suggests a different position.

[89] The quote relied on by the Lord Advocate is at paragraph 261 of Dickson (3rd ed., vol. i). This follows immediately upon his description of the need for any prior statement, if it is to be an exception to the hearsay rule, to be made at a short interval and for it to be the expression of unintermitted excitement. At paragraph 261, he discusses the need to consider the whole circumstances including the nature of the injury, the opportunities for the complainer to disclose, and the potential consequence of not doing so at the earliest opportunity. It is in this context that he goes on to say,

> "When applying this principle to cases of rape, and assault with intent to ravish, the Court has admitted a very extensive investigation into the party's statements [emphasis added]."

Referencing *McMillan* and *Grieve* (see below), he notes examples of statements that have been admitted for the prosecution after certain periods of time. He notes examples of the timing of a complainer's prior statement introduced by the accused. But he does not confirm that any of them were admitted for proof of fact.

[90] What Dickson does say by way of explanation is,

> "The reason for this peculiarity is the importance of sifting the woman's whole conduct and explanations regarding the charge, which is easily made in order to restore a lost character or to gratify jealousy; while it is difficult for the prisoner to disprove it, where there has been a voluntary connection."

[91] Dickson goes on (consistent with the other Institutional Writers) to observe, "immediate disclosure was expected and concealment created suspicion" (para 261). But there was a recognition that,

> "allowance must be made both for the extreme excitement, sometimes amounting to a frenzy, which so terrible an outrage causes in the sufferer's mind, and for her natural reluctance to publish her disgrace. It is therefore always important to ascertain the footing on which she stood towards the person she first met as compared with those to whom she told her story; and her state of health and spirits during the interval…Without considerable light on such circumstances, the jury cannot estimate the value of the woman's subsequent narrative." (para 261)

[92] While the context is about establishing whether something is a *res gestae* statement, Dickson is also discussing how the courts deal with issues around credibility relating to 'late' disclosure.

[93] In *McMillan*, 9 January 1833 (Bell's Notes p288 and mentioned by Dickson), as the Lord Advocate observes (para 45, Crown Written Submissions), a partial disclosure by the child complainer made within a week (not further specified) was admitted. But the purpose for which it was admitted is not clear. The report (such as it is) notes that "evidence of the act was clear; and there was no ground to believe that she had been at all consenting". What is apparent from the report, is that there was a great deal of scrutiny of delayed reporting – "the concealment was persevered in for one month". The issue of credibility, rather than sufficiency, seems to have been the focus.

[94] Similarly the case of *Grieve* which immediately follows in Bell's Notes. There the objection was that a statement to a husband by his complainer wife made two days after the incident was not *de recenti*. Repelling the objection, reference was made to *MacMillan*. However, again, the report does not specify the purpose for which the evidence was sought to be admitted. Nor is there any discussion of what other evidence was available in proof of the charge.

[95] One case where there is clarity around both the timing of the *de recenti* statement and the purpose for which it was admitted is *Henderson* (1836) 1 Swin 316. It is perhaps a good illustration of how the Court should consider the issue of whether the *res gestae* has come to an end prior to the making of the statement, but bearing in mind the particular nature of rape and the 'delicacy' around disclosure.

[96] In *Henderson*, the complainer alleged a rape occurred on the Thursday evening. She told a lady Mrs Turcan about it on the Friday evening. She was in a state of distress, crying. An issue arose because when she had gone home on the Thursday, she did not rouse her uncle (with whom she lived), she did not tell her cousin (with whom she shared a bedroom), nor did she tell her aunt. Explanations were, however, given by the complainer (who was 18) as to why she did not tell her relatives (her uncle was a man, her aunt was very poorly, her cousin was asleep). As the Court noted,

> "Then it is necessary that there be no undue delay or unreasonable delay on her part in informing her friends. There was nothing extraordinary in her not at first telling her bed-ridden aunt, or even her cousin, who does not appear to be a very intelligent person. It is said it is singular that she should not have roused her uncle and told him. But great allowance must always be made, in a case of this kind, for the delicacy which prevents full disclosure to a male relation." [emphasis added] (p327, per LJC)

The Lord Justice Clerk went on to note that the accounts which she gave were part of the corroboration of her testimony, along with her distress and the marks of violence on her.

[97] This case illustrates, properly, the approach to admissibility of statements as proof of fact. It examined the temporal proximity (within 24 hours). It considered the condition of the complainer when she made her disclosure – she was distressed. This

was indicative of unintermitted excitement. The Court considered, also, what happened in the intervening period, allowing it to assess whether her account was truly the product of unintermitted excitement. Finding that there was a clear and valid explanation for why she had not disclosed at the first opportunity to her relatives, the Court has implicitly concluded that the *res gestae* was ongoing and that her account to Mrs Turcan was the natural outpouring of the feelings aroused by a recent injury.

[98] By contrast, the case of *Thomson* (1857) 2 Irv 747. Here the issue was whether the Court should hear the evidence (not on oath) of a three-year-old child. The girl was a witness in a murder case, involving the poisoning of her aunt. She had been in the room with the accused and the deceased. She made a statement to her mother 16 days after her aunt took ill. While the question for the Court here was not whether to admit her statement to her mother as proof of fact, but rather for purpose of persuading the judge to exercise his discretion to allow the girl to give evidence, the decision is informative. The Lord Justice Clerk, declining to admit her statement and recognising its importance, noted that, had she told her mother at the time her aunt was ill, or had she said something on learning of the death on the night it happened, he would have considered it part of the *res gestae* but as it was, she may have heard the adults talking in the meantime (p751). The Advocate Depute offered to prove that between the death and the statement being made, the accused was permanently in the house with the child and took her out when her family were at their meals, and further that he promised her money not to tell. Still the Lord Justice Clerk concluded the statement could not be admitted as it was not *res gestae*.

[99] These two cases demonstrate that while there may be some degree of flexibility allowed in terms of the temporal proximity and requirement of spontaneity, admissibility is still determined by recency and whether or not there has been an opportunity for reflection. The 'particular latitude' is not a given. The Respondents

submit that this is the correct interpretation of the passage in Dickson relied on by the Lord Advocate.

PART SIX: *MORTON V HMA*

[100] In *Lord Advocate's Reference No 1 of 2023*, the Court stated,

> "It is tolerably clear from the remarks in *Burgh v HMA* 1944 JC 77 (Lord Justice Clerk (Cooper) at 81) that the bright line distinction in *Morton* between a statement which was deemed to be part of the *res gestae* and one which was *de recenti* was a departure from the previous understanding that the latter was, contrary to *Morton*, normally part of the *res gestae;* hence the reference to the modern rule." (para [224])

[101] The Court in *Morton* was correct to say that a statement that does not come within the *res gestae* is not available as proof of fact and can only be admitted to bolster credibility (by establishing consistency). Where the Court in *Morton* fell into error was in defining the scope of the *res gestae* too narrowly. They interpreted the *res gestae* in the same way as the Court in *Cinci* – that is, strictly coincidental with the duration of the *actus reus*. As can be seen from the analysis of the caselaw and Institutional Writers, this was too restrictive and a departure from the previous approach. The Respondents agree that the complainer's statement to her brother was capable of being considered part of the *res gestae* given the proximity in time to the incident, her distressed state in relaying her account and the fact that it did not resolve into a narrative to qualify or explain the initial utterance.

[102] In *Lord Advocate's Reference No 1 of 2023*, the Court at para [223] referred to the dicta of the Lord Justice Clerk (Aitchison) at p53 that in cases of sexual assaults on women and children a *de recenti* statement was admissible to show that the complainer had been consistent rather than her complaint being an afterthought and, "in the case of assaults on women, to negative consent." The Court observed, "There may be a slight anomaly in this, since, if a statement could 'negative consent', it must be evidence of that fact."

[103] The Respondents' interpretation of this passage differs. It is not anomalous. It must be borne in mind that in relation to sexual assaults on children, consent was not an issue. That is, firstly, the reason Lord Aitchison separates off assaults on women in this comment. The second point is that rape involves an activity which is, in normal course, entirely lawful. What the Lord Justice Clerk is emphasising here, is that in order to provide support for the complainer's credibility, any *de recenti* statement must be consistent with the allegation now made – and therefore must include some indication that would counter any suggestion of consensual sex. An example in the authorities of a statement that Lord Aitchison may not, for this reason, admit might be *Mackenzie* (1828) Syme 323 where one of the complainer's accounts did not suggest the use of force.

De recenti but not _res gestae_:

[104] The Court is invited to accept the Respondents' submission that the error in *Morton* was in defining the scope of *res gestae* too narrowly but that the judges were correct that statements that are not part of the *res gestae* (properly understood) are only admissible to demonstrate consistency and not as corroboration. '*De recenti*' statements, that is statements that are made shortly after the event but which fail the test of unintermitted excitement and therefore cannot be brought within the *res gestae*

should continue to be available for credibility purposes (as they would be in current practice).

PART SEVEN: THE *RES GESTAE* EXCEPTION IN THE COMMONWEALTH AND IRELAND

Introduction:

[105] The Court should be cautious when comparing Scots law to the judicial or legislative approaches to prior consistent statements that have been adopted in other jurisdictions. Those approaches do not exist in isolation but are always part of a complex and comprehensive modern legal approach to the law of evidence. All the jurisdictions under consideration here adhere to the same general principles of the presumption of innocence and the fundamental importance of ensuring that innocent people are not convicted of criminal offences. However, the ways that the law of evidence has evolved (both at common law and by statute) to protect those principles and balance the myriad other factors that influence the admissibility and use of any particular type of evidence are unique to each jurisdiction. The safeguards chosen vary from jurisdiction to jurisdiction. In particular, no other jurisdiction has chosen a blanket requirement of corroboration as a fundamental safeguard as Scotland has. However, they do have various other safeguards that are not present in Scotland. For example, jury unanimity or super majority, a stricter approach to mutual corroboration, or a pre-jury qualitative assessment of evidentiary sufficiency that can remove an exceptionally weak case from the jury's consideration.

[106] Nonetheless, it is accepted that a broad strokes comparison with other similarly situated jurisdictions can be a useful cross-check exercise. Undertaking that exercise

in relation to the admissibility of prior consistent statements supports the following propositions:

a. Other common law jurisdictions have generally adopted a somewhat more expansive *res gestae* than the approach taken in, say, *Cinci*, in that precise contemporaneity of the statement with the duration of the *actus reus* is not required for such statements to be admissible for their truth. Rather the test is based on a slightly looser contemporaneity requirement and an additional spontaneity or absence of opportunity for concoction requirement. However, temporal connection/proximity remains an important consideration and none of the cases cited by the Lord Advocate or the Respondents involve time lapses of more than three hours. Most involve much shorter time periods.

b. Beyond that there is no jurisdiction canvassed that has, at common law, rendered a separate category of prior consistent statements (such as *de recenti* statements, or statements which are 'a consequence and continuation of the *res gestae*') admissible for the truth of their contents.

c. In the jurisdictions where prior consistent statements that do not form part of the *res gestae* have become admissible for the truth of their contents, those changes have been made legislatively and the legislative scheme contains various safeguards and restrictions to ensure that the accused receives a fair trial and to guard against wrongful conviction. These statements, even when admissible for their truth, are not considered evidence that is independent of the complainer. That is, the statement is recognised as being from the same source.

[107] These general principles are entirely consistent with the Court's reasoning in *Morton* that "[a] statement made by an injured party *de recenti*, unless it can be brought within the rule of *res gestae*, is ordinarily inadmissible as being hearsay only" and that in cases where a *de recenti* statement is admitted it "is admissible as bearing upon credibility only, and the statement of an injured party, although made *de recenti* of the commission of a crime, do not in law amount to corroboration." To hold otherwise would, in fact, be contrary to the general approach in the jurisdictions that are canvassed below.

[108] What follows is a necessarily cursory review of the law in relation to *res gestae* and prior consistent statements in England and Wales, Northern Ireland, Ireland, Canada, Australia, New Zealand, and South Africa to illustrate the three propositions set out above.

[109] It may be helpful at this point to provide a quick note regarding terminology. Some jurisdictions have adopted the phrase 'spontaneous utterances' in place of '*res gestae* statements' but they intend to convey the same. The term '*de recenti*' does not appear to be in broad usage outside of Scotland whether as a term of art or otherwise. This section of the submissions will use the term '*res gestae*' to refer to the category of statements that is admissible for its truth at common law and 'prior consistent statements' for any statement made after the *res gestae* ends.

England and Wales:

Res Gestae

[110] The Respondents agree with the Lord Advocate that the modern approach to *res gestae* evidence in England and Wales at common law is set out in *Ratten v R* [1972] AC 387 and *R v Andrews* [1987] AC 281. In *Ratten*, Lord Wilberforce rejected the test of whether the statement was made as part of the event or transaction in favour of the judge having "to satisfy himself that the statement was so clearly made in

circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded." (p389F) With respect to the timing of such statements, Lord Wilberforce indicated that the statements must be "those of approximate but not exact contemporaneity" (p391C). The phone call at issue in *Ratten* had been made within 5 minutes of the event.

[111] The utterances in *Andrews* had been made within a matter of minutes. Lord Ackner summarised the principles governing the admissibility of *res gestae* statements as follows:

> "1. The primary question which the judge must ask himself is—can the possibility of concoction or distortion be disregarded?
>
> 2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.
>
> 3. In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement

was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error." (pp300-301)

[112] The law relating to admissibility of hearsay evidence has been codified to a significant extent in England and Wales. However, section 118(4) of the *Criminal Justice Act 2003* preserves the common law exception of *res gestae*, which is described as

including a "statement… made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded."

[113] The approach set out in *Ratten* and *Andrews* has been applied in various cases, including *Ibrahim v CPS* [2016] EWHC 1750 (Admin) (utterances within an hour and a half of the event), *Higgins v CPS* [2015] EWHC 4129 (Admin) (utterances 10 minutes after the event) and *Barnaby v DPP* [2015] 2 Cr App R 4 (utterances within half an hour of the event). It is noted that in *R v S* [2018] 4 WLR 24 the offences were ongoing at the time of the 999 call.

Prior Consistent Statements

[114] Section 120 of the *Criminal Justice Act 2003* statutorily overrules the common law prohibition on using prior consistent statements for the truth of their contents. At common law, under the rule against self-corroboration, such statements were admissible only for the purpose of supporting credibility. Section 120 sets out a series of conditions under which prior consistent statements can be admitted. It reads, in part:

> "(1) This section applies where a person (the witness) is called to give evidence in criminal proceedings.
>
> "(4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—
>
> (a) any of the following three conditions is satisfied, and
>
> (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.
>
> "(7) The third condition is that—

(a) the witness claims to be a person against whom an offence has been committed,

(b) the offence is one to which the proceedings relate,

(c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,

(e) the complaint was not made as a result of a threat or a promise, and

(f) before the statement is adduced the witness gives oral evidence in connection with its subject matter."

[115] It will be immediately apparent that this section requires that a number of criteria must be fulfilled before such a statement can be relied upon by a jury for its truth. This includes the need for the witness to be called to give evidence, which is not a requirement for the admission of a *res gestae* statement at common law in England and Wales. The admissibility of any such statement is also subject to the Court's power to stop a case where a conviction based on hearsay evidence would be unsafe (under s.125 of the 2003 Act). Furthermore, the Court has a power to exclude any evidence if "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it" under s.78 of the *Police and Criminal Evidence Act 1984*.

[116] In addition, the English Court of Appeal has specifically held that such evidence is not "independent confirmation" of the witness's evidence. In *R v Ashraf A* [2011] EWCA Crim 1517, at para. 20, Lord Justice Pitt explains the effect of s. 120(7) in the following terms: "By virtue of section 120 of the 2003 Act, the complaint is evidence of what happened between the complainant and the appellant; it is not evidence independent of the complainant" (para 20). This poses no problem in England and Wales where corroboration is not a requirement for quantitative sufficiency.

[117] Lord Justice Pitt endorses a jury direction that had been proposed by Laws LJ in *R v AA* [2007] EWCA (Crim) 1779 and says that it "should routinely be given" (*R v Ashraf A* at para 24). That proposed direction, and the consequences of failing to give it to the jury, are set out in paragraphs 16-17 of *AA*:

> "17. In our judgment, in order to reflect (a) the substantive change in the law effected by section 120 and (b) the circumstance that a previous consistent statement (whether in a sexual case or otherwise) comes from the same person as later makes the accusation in the witness box, juries should be directed that such a previous consistent statement or recent complaint is, if the jury accepts it was given or made and the conditions specified in section 120 are fulfilled, evidence of the truth of what was stated: but in deciding what weight such a statement should bear, the jury should have in mind the fact that it comes from the same person who now makes the complaint in the witness box and not from some independent source.
>
> 18. ... It is of particular importance that very careful directions be given in a section 120 case because the section expands the scope of evidence which may be adduced to prove the guilt of a defendant. Given the terms of the direction here, it is perfectly possible that the jury may have considered that the hearsay report of the recent complaint offered solid and indeed independent support for AB's primary evidence. In all those circumstances the absence of a direction of the kind we have indicated should be given in our judgment renders this conviction unsafe and on those grounds the appeal against conviction must be allowed."

Conclusion

[118] There is a common law exception to the hearsay rule for *res gestae* statements, where *res gestae* is defined with reference to a lack of opportunity for concoction rather

than a strict requirement of contemporaneity. It is noted that in the cases cited by the Lord Advocate (*Ibrahim, Higgins, Barnaby*), the witnesses were in a state of distress, which is consistent with the requirement that the person be "emotionally overpowered." It is questionable the extent to which these cases support the proposition that a *de recenti* statement made without accompanying distress can be corroborative.

[119] The extension of admissibility of prior consistent statements for their truth beyond the *res gestae* is entirely a creature of statute and is part of a broader legislative scheme dealing with the admissibility of hearsay evidence that includes various criteria and safeguards. Even then, it is explicitly not admissible as evidence independent of the witness.

[120] No support can be found in the law of England and Wales for the proposition that *de recenti* statements (separate from the *res gestae*), unaccompanied by distress, should be admissible to corroborate a complainer's evidence.

Northern Ireland:

Res Gestae

[121] Like England and Wales, Northern Ireland has codified the law in relation to hearsay evidence in the *Criminal Justice (Evidence)(NI) Order 2004*, the relevant sections of which are in virtually identical terms to the equivalent provisions of the *Criminal Justice Act 2003*. Section 22(1).4 of the Order preserves the common law admissibility of statements forming part of the *res gestae*, if "the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded."

[122] In *McGuiness v DPP* [2017] NICA 30 the Appeal Court adopted the approach set out in *Andrews*. In *McGuiness*, the Court admitted evidence of utterances the

complainer had made to police on the scene within 20 minutes or so of the event. The statement was captured on a body-cam. The Court pointed to a number of factors that supported the conclusion that the utterance was admissible, for example, that her words were "spilling out of her in a highly emotionally charged way" and she was unconcerned about possible injury from glass fragments to her bare feet.

[123] As in England and Wales this approach has been applied in various cases, including *R v Singleton* [2003] NICA 29 (no time-line specified, but witness still dazed and bleeding profusely) and *R v Edwards* [2003] NICA 11 (3 hours after the event). It is noted that *DPP's Ref No 6 of 2019* [2020] NICA 8, which is cited by the Lord Advocate, is a Crown sentence appeal after the offender had pled guilty and there is no legal analysis with respect to the admissibility of the emergency services call (which in any event was made while the event was ongoing), making this decision irrelevant to the issues before this Court.

Prior Consistent Statements

[124] Section 24(4) and (7) of the 2004 Order are the Northern Irish equivalent of the s.120(4) and (7) of the 2003 Act in England and Wales. However, s.24(7)(d) retains the requirement that "the complaint was made as soon as could reasonably be expected after the alleged conduct" which has been removed from the 2003 Act.

[125] Similar to England and Wales, the jury must be told that the recent complaint is not independent evidence of the truth of the allegations made by the complainer and that they should exercise caution in giving such evidence weight (*R v Chakwane* [2013] NICA 24, para 17 per Morgan LCJ for the Court). It has been noted that although the terms of s.24 permit the judge to direct the jury that they can rely on the recent complaints for their truth, "in most cases a judge would be unlikely to charge a jury in this way because the evidence is not independent. It is therefore of no weight and

hence adds nothing to the cogency of the complainant's complaint." (*R v WL* [2017] NICA 36 at para. 25 per McBride J for the Court.)

Conclusion

[126] The conclusions set out above in relation to England and Wales are equally applicable to Northern Ireland.

Ireland

Res Gestae

[127] Courts in Ireland have adopted the approach set out in *Ratten* and *Andrews*. See *DPP v Lonergan* [2009] IECCA 52, a decision of the Irish Court of Appeal. The statements at issue in that case were made within approximately 10 minutes of the event. Having reviewed the English authorities, the Irish Court concluded:

> "The composite approach adopted by the trial judge, which gave due weight to both the requirement of contemporaneity and the possibility of concoction or fabrication, appear to this court to represent the correct approach to this issue. It would be quite wrong to hold that admissibility should be determined by reference solely to a given time period as to do so would lead to arbitrary and unfair results. Time in this context is an important factor but not a determinant. The true importance of the requirement of contemporaneity is to eliminate the possibility of concoction. Where it is clear that no such opportunity existed on the facts of a given case it would be quite wrong to exclude statements on some arbitrary time basis. It is more a matter of factoring in both components when deciding whether or not to admit such statements as part of the *res gestae*. In every case the trial judge will have to exercise his discretion having regard to the particular circumstances of the case." (para 22)

[128] This approach has been applied by the Irish courts in cases including *DPP v Connorton* [2023] IESC 19 (999 call made in the immediate aftermath of the event). The other Irish cases cited by the Lord Advocate, are of no assistance to the Court. The case of *DPP v Foley* [2013] IECCA 90 involves a complainer in an ambulance in a state of semi-conscious distress accompanied by the complainer mumbling and at times shouting "get off me" and "no" and "I won't let you". This is not a case of a *de recenti* statement in the sense of any account or description of what had happened. (paras 34, 36-37.) It is really a case about distress, expressed in part by words, being corroborative. It is not authority that a statement, *de recenti*, absent distress is corroborative. The expressions of distress were inextricably mingled with her words.

[129] *Walsh v Walsh* [2017] IEHC 181 is a trial level decision from a civil case involving disputed lottery winnings and is therefore not authoritative, and is factually and legally removed from the issues in these References. In any event the judge stated that the hearsay evidence was unnecessary to his decision.

Prior Consistent Statements

[130] At common law prior consistent statements in the form of recent complaints are admissible in a trial of a sexual offence for the purpose of showing consistency of the complainer but do not corroborate the evidence of the complainer (*DPP v MA* [2002] 2 IR 601 (CCA), at page 609 per Murray J for the Court). The complaint must have been made voluntarily and at the first reasonable opportunity after the commission of the offence (*DPP v Brophy* [1992] ILRM 709).

[131] The Court in *MA* emphasised the risk that the admission of such evidence could result in an unfair trial for the accused (p609). It is therefore mandatory that the judge direct the jury with respect to the limited permitted use of such statements and failure to do so is a reversible error (*MA*, p611)

Conclusion

[132] Under Irish common law, there is a category of statements which fall into the *res gestae,* defined essentially as per *Ratten,* that are admissible for the truth of their contents. Any other prior consistent statement is admissible only in relation to the credibility of the complainer and must meet a set of conditions even to be admissible for that purpose. There is no category of *de recenti* statements, falling outside of the *res gestae,* that can be admitted for its truth. There has been no broad statutory reform regarding the admissibility of hearsay in Ireland and there are no statutory provisions which make prior consistent statements admissible for their truth.

Canada:

Res Gestae

[133] The common law approach to hearsay evidence in Canada has shifted dramatically over the past several decades. In a series of cases, the Supreme Court developed a principled approach to exceptions to the hearsay rule which does away with the previous categorical approach. That approach requires that any hearsay which the Crown wishes to rely on for the truth of its contents must meet the two-part test of necessity and reliability. However, in *R v Starr* [2000] 2 SCR 144, the Supreme Court held that hearsay which falls into one of the historically recognised categorical exceptions would presumptively meet the requirements of necessity and reliability and it would be for the party challenging its admissibility to show that it should nevertheless be inadmissible with reference to the principled approach. Any cases predating *Starr* do not reflect the current approach to the admissibility of hearsay evidence in Canada.

[134] *Res gestae* statements (or 'spontaneous utterances') remain one of the categories of evidence that will be presumptively admissible. Provincial appellate courts in Canada have generally endorsed an approach to *res gestae* that does not require strict contemporaneity. See *R v Lugela* 2020 ABCA 348 (utterances both immediately after

and 40 minutes after the event) and *R v MacKinnon* 2022 ONCA 811 (utterance to attending officer within minutes of the shooting). In *MacKinnon* at paragraphs 40-51, Thorburn JA, writing for the Court, provides a comprehensive summary of the law governing the admissibility of *res gestae* and relies on *Andrews* among other cases. Thorburn JA notes that "spontaneity and contemporaneity of the utterance are the guarantors of reliability" (para. 41) and "exact contemporaneity is not required, as spontaneity depends on the circumstances, but the statement and the event must be reasonably contemporaneous such that the event would still be dominating the mind of the declarant when the statement is made." (para. 42)

[135] *Queen v Deelespp* 2002 ABPC 85, the case cited by the Lord Advocate in support of the proposition that the *Ratten* approach has been adopted in Canada, is a decision of the lowest trial court in Alberta and is therefore not an authoritative statement of the law.

[136] All the other cases referred to by the Lord Advocate are trial level decisions, except for the two decisions from the North West Territories which are summary appeals from the 1990s. It is noted that *R v Sparks MacKinnon* 2019 ONSC 730 is the trial decision that was under review in *R v MacKinnon* 2022 ONCA 811. It is also noted that *Queen v Badger* 2019 SKPC 43 was appealed to the Supreme Court (*R v Badger* 2022 SCC 20). This case, contrary to the submission of the Lord Advocate did not involve domestic violence. Beyond those observations, these cases do no more or less than provide some examples of how several judges have applied the law at low levels of court across Canada.

[137] In terms of the temporal connection in these cases, the following is noted:

- *R v Johnston* [2016] MBQB 167 – approximately 1 hour
- *R v Badger* [2019] SKPC 43 – within half an hour

- *R v Deagle* 2023 ONCJ 152 – utterances within a few minutes admissible, utterances to attending police officer approximately 15 minutes later were not *res gestae*

- *R v Deelespp* 2002 ABPC 85 – no timeframe specified

- *Simpson v The Queen* 1999 Can LII 780 – within 15 minutes of initial call to police

- *R v Praljak* [2012] OJ No 4430 – within an hour of the event while the witness was dying of the stab wounds inflicted

- *R v Oliver* [1996] NWTJ No 69 – exact timeframe not possible to ascertain but seems to be within 2 hours of the event

Prior Consistent Statements

[138] Similarly to the other jurisdictions surveyed, there is no separate category of admissibility for *de recenti* statements or statements that are the 'consequence and continuation' of the *res gestae*. Any statements which fall beyond the reach of the *res gestae* exception are presumptively inadmissible, though they may be admitted in certain circumstances for the limited purpose of evaluating credibility (*R v Dinardo* [2008] 1 SCR 788).

Conclusion

[139] The admissibility of evidence as part of the *res gestae* is not governed by strict contemporaneity. However, contemporaneity is still a significant factor and "reasonable contemporaneity" is required. There is no additional category of prior consistent statements that are admissible for the truth of their contents. If such statements are deemed to be admissible for some other purpose, they can only be relied on in relation to credibility. (Though this is all subject to the fact that under the modern approach any hearsay statement that meets the twin requirements of necessity and reliability can be admitted.)

Australia:

Res Gestae

[140] *Ratten* was itself an appeal from the Supreme Court of the State of Victoria to the Privy Council and so is authoritative in Australia. *Walton v R* [1989] HCA 9, relied upon by the Lord Advocate, is not a case dealing with *res gestae* in the sense of a spontaneous utterance. Rather it deals with statements that indicate the person's state of mind. The majority opinion was that the statements at issue were not admissible for their truth. The opinion that is highlighted by the Lord Advocate and which refers to *Ratten* and *Andrews* is from the opinion of Mason CJ, who dissented with respect to whether the evidence should be admissible for its truth.

[141] Having said that, at common law, the *Ratten/Andrews* approach was applied in cases such as *R v Kadibil* [1999] WASC 67 (precise timing difficult to ascertain but made within minutes of the injuries being inflicted).

[142] The federal law of evidence, including the admissibility of hearsay is now codified in Australia. Section 65 of the federal *Evidence Act 1995* defines *res gestae* (while not using that term) as a statement "made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication." This section has been interpreted and applied by Australian courts, including in *Conway v The Queen* [2000] FCA 461, where the Court noted that the section expanded the contemporaneity requirement compared to the common law, holding that "[t]he introduction of the expression "shortly after" is, however, a significant departure from the traditional doctrine" (para. 123). Even in this expanded form the statement must be made "shortly after" the event. The utterance in *Conway* itself was made in the afternoon in relation to events that had happened that morning.

Prior Consistent Statements

[143] At the federal level, the traditional common law approach to prior consistent statements (that they were inadmissible for the truth of their contents) has been statutorily overruled. Section 66 of the *Evidence Act 1995* provides for an exception to the hearsay rule in cases where the witness has been called to give evidence in relation to a statement "if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person". The interpretation of the word "fresh" has been the subject of some controversy. In *Graham v The Queen* (1998) 195 CLR 606, a majority of the High Court found that "fresh" meant "recent" or "immediate" (per Gaudron, Gummow and Hayne JJ at para. 4). This ruling overturned a state appeal decision that statements made 7 years after the event were "fresh".

[144] The legislative response was to include a new interpretive section in the Act:

> "(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including—
>
> (a) the nature of the event concerned, and
>
> (b) the age and health of the person, and
>
> (c) the period of time between the occurrence of the asserted fact and the making of the representation."

Note: Subsection (2A) was inserted as a response to the decision of the High Court of Australia in Graham v The Queen (1998) 195 CLR 606.

[145] This was done to counter the restrictive approach that had been taken in *Graham*.

Conclusion

[146] In line with the other jurisdictions that have been considered, Australia at common law, and now by statute, has adopted an approach to *res gestae* that does not require precise contemporaneity. However, their common law doctrine was not broad enough to encompass things that were said "shortly after" the event. The rules around admissibility of any statements for their truth going beyond that category have been legislative.

New Zealand:

Res Gestae

[147] At common law the *Ratten/Andrews* approach has been followed (*R v Olamoe* 2005 3 NZLR 80 (utterance within 15 minutes of event), *R v Wright* CA CA43/06 (no time frame specified, went to neighbour's in the immediate aftermath) and *Janif v New Zealand Police* [2014] NZHC 2753 (almost immediately). It should be noted that in *R v Wilson* CA429/03, relied upon by the Lord Advocate, the appellant conceded that the statements in issue would be admissible as *res gestae* and the question before the Court was the interaction of the *res gestae* exception with spousal immunity. There was therefore no judicial consideration of the scope of *res gestae*.

[148] Evidence law has now been codified in New Zealand in the *Evidence Act 2006*. The Act has separate sections for hearsay evidence and previous consistent statements because the definition of hearsay does not include statements made by a witness (section 4). Section 35 currently reads, in part, as follows:

> "35 **Previous consistent statements rule**
>
> (1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) applies to the statement.

(2) A previous statement of a witness that is consistent with the witness's evidence is admissible if the statement-

(b) forms an integral part of the events before the court..."

[149] This subsection specifically codifies the common law *res gestae* exception. In its original formulation section 35 omitted any reference to the *res gestae* which created confusion regarding the proper interpretation of the section. This was rectified by a statutory amendment in 2017 which added the above-noted subsection.

[150] As a result of the ambiguous status of *res gestae* under the original section 35 there were a series of Supreme Court decisions that interpreted the section and necessarily commented on the scope of the *res gestae* at common law in doing so. In *Rongonui v The Queen* [2010] NZSC 92 the Court considered a circumstance where the complainer had been sexually assaulted by a stranger who took her to secluded spot when she was on her way back to her accommodations. The complainer managed to get away from the attacker and called her friends on her mobile phone. They came to meet her immediately (no specific timeframe is set out in the decision). They found her in a state of extreme distress and she told them what had happened. The Court found that this was not part of the *res gestae* because "[t]here was a distinct, even if short, break between the assault on the complainant and her speaking to her friends." (para 47 per Tipping J for the majority) This demonstrates the relatively narrow scope of the common law *res gestae* exception in New Zealand.

Prior Consistent Statements

[151] At common law, the position in New Zealand was similar to other jurisdictions in that prior consistent statements were generally inadmissible. There was a recent complaint exception for sexual offences cases, but even then, the statement was admissible for credibility purposes only. The admissibility of prior consistent statements was put on statutory footing in the 2006 Act as noted above. Section

35(2)(b), set out above, deals with the *res gestae*. Section 35(2)(a) replaces the common law relating to recent complaint and reads:

"(2) A previous statement of a witness that is consistent with the witness's evidence

is admissible if the statement-

(a) responds to a challenge that will be or has been made to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness"

[152] The original version of this part of section 35 was considered by the Supreme Court in *R v Hart* [2010] NZSC 91. In the process of interpreting this section, Elias CJ made the following comments about the common law which it was replacing:

> "[7] It is clear from the Law Commission's commentary that s 35 was intended to replace common law and statutory exceptions to a similar common law rule of exclusion of repetition with a single principled rule, adapted to any case where repetition tends to prove veracity when it is put in issue. The Law Commission intended the new rule to extend to —recent complaints‖ in sexual cases and the former s 22A of the Evidence Act 1908 (which allowed the admission of evidence of an earlier description of the offender given by an identifying witness). The trigger for admissibility is the challenge to truthfulness or accuracy: —[i]f there is no such challenge, the evidence will not be necessary.
>
> [8] The general rule contained in s 35(1) is based on the experience that, in general, repetition does not add anything to the evidence given by a witness. It has long been treated as superfluous (although as Thayer points out, before the 19th century it had been usual to lead evidence of consistency of witnesses, an approach that may have lingered on in respect of —recent complaint in cases of sexual offending). This is the basis on which the Law Commission put the

purpose of s 35. Evidence of previous consistent statements is not however superfluous when it answers a challenge to evidence either as recent invention or as inconsistent with a previous statement, the two bases of the exception in s 35(2)." [footnotes omitted]

[153] The Court in *Hart* confirmed that the statute changes the common law rule that such prior consistent statements were admitted on a limited basis and were not available for the truth of their contents. (paras 54-55 per Tipping J.)

Conclusion

[154] In line with all the other jurisdictions surveyed, at common law New Zealand defined *res gestae* along the *Ratten/Andrews* line. It is interesting to note that the statutory definition which includes the words "or shortly after" is interpreted as expanding the common law definition. This is an indication of the relative narrowness of the common law rule.

[155] Though certain prior consistent statements falling outside the *res gestae* are now available for their truth, that was a statutory innovation.

[156] Again, no support can be found in the law of New Zealand for the admissibility of a category of *de recenti* statements or statements which are a continuation and consequence of the *res gestae*.

South Africa:

[157] A detailed examination of the law in South Africa has not been undertaken. The law relating to hearsay there has been statutory since 1988 and the jury trial was abolished in 1969. The 1988 Act does away with the categorical approach to hearsay exceptions altogether and replaces it with a single test that refers to various factors. It

is considered by the Respondents that the differences between the South African system and the Scottish system are significant and there is nothing to be gained by a detailed comparison. As noted by the Lord Advocate, the common law regarding *res gestae* appears to have been similar to that in England and Wales.

PART EIGHT: IDENTIFICATION

[158] The Lord Advocate submits that, provided the *'de recenti'* statement is admissible as corroboration of the complainer's account of the crime, there is no reason in principle why what is said about identification should not also be admissible as proof of fact (para 100, Crown Written Submissions). The Lord Advocate relies on three cases as being illustrative of this approach having been taken historically – *Gibbs*, *Alexander* and *Barr*. Once again, these cases do not provide strong support for the Crown's position.

[159] *Gibbs* (1836) 1 Swin 263 is a first instance decision. Contrary to the Lord Advocate's submission, in relation to identification there was corroboration of the complainer's evidence in surrounding facts and circumstances. It was not periled on the *de recenti* statements of the complainer. The circumstances included the accused's sudden flight from the spot – he was seen running away by the witness Lawson. Having received an account from the complainer, Lawson followed the man to him, traced him to his lodgings, and then took the police there. The complainer's account was primary hearsay evidence to explain Lawson's actions. When the accused was apprehended, he had a penny in his possession which the complainer said she had given him to get him to let her go. The complainer gave a description of her attacker's clothing. Lawson saw a man dressed that way running off and when she attended with the police, the accused was wearing the same outfit but with shoes and a bonnet.

The accused's landlady confirmed that when he had left the house earlier (prior to the assault) he was not wearing shoes and a bonnet. Thus, it can be seen that there was a circumstantial case of identification and it cannot be safely concluded that the complainer's *de recenti* accounts were critical to sufficiency.

[160] The case of *Alexander* (discussed above in Part Three above) is of limited assistance. Identification was not the issue. Rather, it was whether there was an assault (the complainer having effectively denied that in his evidence). As noted above, evidence of what the complainer said in the accused's presence at a time shortly after he was injured was admitted as part of the *res gestae*. What was said amounted to a direct accusation of assault – that the complainer's throat had been cut with a razor. The remark was directed at the accused. The Court held that the fact the accused allowed it to pass without challenge was in effect an implied admission of assault.

[161] The case of *Barr* (1850) J Shaw 362 involved an objection taken to evidence of statements by others from a messenger at arms who had precognosced certain witnesses on grounds that there was a conflict of interest due to "agency and partial counsel". The objection was repelled. The evidence admitted was that the day after the alleged rape, he had attended at the complainer's house and she provided a description of her attacker. The messenger at arms was then present when the accused was apprehended and said that he matched the description given. If that were the only evidence, the Lord Advocate's submission may be stronger. But it is not known whether the complainer later identified the accused in court or not. Further, there was circumstantial evidence of his identity. First, the complainer said that she had scratched her attacker. The accused had scratches on his face when arrested. Second, at the locus, which was a field, there was a good deal of blood at a place where the ground was torn (suggesting that was the locus). There was cow dung present too. When he was apprehended, the accused was only wearing a shirt. The messenger at arms searched the accused's dwelling and found his outer clothes with blood and cow

dung. (p364) Thus again, it is not immediately obvious that the complainer's original description was corroborative, rather than being primary hearsay.

[162] None of these cases were clear examples of a *de recenti* statement being the only source of corroboration of identification.

Should identification be different?

[163] The reason why a *res gestae* statement is admissible as proof of fact is because it is given in circumstances which provide a measure of reassurance against mistake or fabrication.

[164] While it may seem logical that there should be no difference in the purpose for which such a statement can be admitted as between corroboration of the *actus reus* and corroboration of identification, the risks attending to those two factors (proof of the crime and proof the accused committed it) are markedly different.

[165] The Court will be aware that eyewitness evidence relating to identification has been found to be the "focus of concern in many jurisdictions." Mistaken and perjured identifications were the most common cause of wrongful convictions (regarded as a specific type of 'miscarriage of justice') in the American studies referred to in Chapter 4 of the Academic Report prepared for the Post Corroboration Safeguards Review, Chaired by Lord Bonomy. As the author of Chapter 5 of the Review notes "eyewitness identification evidence is fraught with difficulties, and, as chapter 4 demonstrated, the potential for wrongful convictions is high." (Chapter 5.1, p44)

[166] The Court is also aware that "In a prosecution that rests on eyewitness identification the risk of a miscarriage of justice is notorious." (Gage v HMA [2011] HCJAC 40, para 29 per Lord Justice Clerk (Gill))

[167] It is accepted that there are some safeguards available to the accused such as cross examination and the ability of the judge to tailor his or her directions specifically to address the risks of a wrongful conviction associated with identification evidence when identification of the alleged perpetrator of a crime is the disputed issue during a trial.

[168] Nonetheless, it is submitted that because of the specific risks of wrongful conviction associated with identification evidence, the Court, when dealing with what is reported to have been said as part of the *res gestae*, should treat this type of evidence differently from evidence that goes to the *actus reus* of the crime.

[169] In practical terms, it is anticipated that this is likely to be a live issue in only a very small number of cases standing the likelihood of positive identification by other means and that "very little else" is required to corroborate identification (*Ralston v HMA* 1987 SCCR 467 at 472). Even in a case involving an accused unknown to the complainer, it would be rare in the modern era for there to be no evidence of identification beyond his or her *res gestae* description, such as CCTV, an eye-witness, digital evidence, DNA or other forensic evidence etc.

[170] The Lord Advocate's position at paragraph 100 of the Crown Written Submission that it would be "impossible" for judges to direct juries that a *de recenti* identification (express or implied) is not available as corroboration of other identification evidence (including that of the complainer herself is she makes an ID later at a VIPER or in court) is not accepted. Judges can explain the different approach by telling the jury, for example, that identification (particularly of strangers) is difficult and for that reason there needs to be evidence extrinsic of the complainer to corroborate that the accused is the perpetrator.

[171] The risks attendant to the proposition that a complainer's *res gestae* identification of her attacker should be admitted as corroboration of her later identification of the accused (either at a VIPER or in court) are obvious. Consider the following example:

A racist person stops a police officer in the street to say they have just been assaulted. The police officer sees they have a mark on their face which looks recent and they appear to be out of breath - which may allow an inference that the event has happened very shortly before (meeting the *res gestae* test). They give a description of their attacker as a black man, medium build and roughly five feet ten in height. Some weeks or months later, the complainer sees a random black man near hotel that houses migrants and points him out to a passing police officer saying he was the attacker. The black man is arrested. The complainer then identifies him at a VIPER or in court. That identification would, under the Lord Advocate's proposition, be capable of being corroborated by the initial description given to the police officer at the time of reporting an assault.

[172] In this situation, there is no real protection for the unfortunate innocent black man. The lack of safeguards against a wrongful conviction in these circumstances is accentuated in light of section 97D of the Criminal Procedure (Scotland) Act 1995 namely "A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge." The situation is made worse because the jury will be succoured by the direction that there is sufficient corroborated evidence against the accused should they choose to accept it.

[173] For these reasons, and in light of the paucity of any caselaw suggesting a clear common law position on identification pre-*Morton*, the Court should differentiate as to the use for which evidence of a *res gestae* statement can be put depending on

whether it is evidence of the commission of the crime, or evidence of the identity of the perpetrator.

PART NINE: CONCLUSION

[174] The Respondents propose the following answers to the four questions posed by the Lord Advocate in the References:

(1) *Is a* de recenti *statement on its own corroborative? That is, is a* de recenti *statement corroborative even in the absence of distress?*

A statement which forms part of the *res gestae* (which is wider than strictly contemporaneous with the duration of the *actus reus*) is admissible as proof of the fact of the commission of the crime and can be corroborative of the witness's testimony on oath at trial.

The test for whether a statement forms part of the *res gestae* is that it is made either at the time of or shortly after the end of the *actus reus*, and in circumstances where it can be concluded that it is an expression of unintermitted excitement caused by the offence. That is to say it is spontaneous and not made after an opportunity for reflection.

The test, therefore, is in two parts: temporal proximity; and the spontaneity of the expression.

Distress may assist in satisfying the test but is not essential. For example, where a statement can be shown to have been made within moments of an offence

having been committed (such as in *Cinci* – 'he raped me'), even in the absence of distress, it would be open to the jury to conclude that it is made spontaneously, without reflection and is a 'natural outpouring'.

However, where a little more time has elapsed and there is evidence of an opportunity to have made a disclosure that was not taken, or there is evidence of a subsidence of the emotions aroused by the incident, it will be harder (absent explanation) to satisfy the *res gestae* test if the statement is not accompanied by distress.

(2) *If a* de recenti *statement refers (directly or by inference) to the accused as being responsible for the crime, can it corroborate the complainer's subsequent evidence both that the crime libelled was committed and that it was the accused who committed it?*

Any part of the *res gestae* statement which expressly or impliedly identifies the perpetrator should not be admitted as proof of fact because of the inherent and well-recognised risks attached to identification evidence.

(3) *If a* de recenti *statement on its own is corroborative, at what point in time or in what circumstances does that statement stop being corroborative and become inadmissible hearsay?*

A statement will no longer be admissible as corroboration of the complainer's testimony when it is made after the *res gestae* has ended. The *res gestae* cannot be revived at a later stage.

A statement which goes beyond being a 'spontaneous utterance' and resolves into a narrative of a past occurrence will not be admitted to qualify or explain the initial utterance.

A statement which cannot be brought within the *res gestae* but which is nonetheless recent, should continue to be available as evidence of consistency to support the credibility of the complainer (as in current practice).

A statement which is not made shortly after the event is inadmissible hearsay.

(4) *Was* Morton v HMA *1938 JC 50 wrong in holding (per LJC Aitchison at 53) that a* de recenti *statement is admissible as bearing on credibility only and that the statements of an injured party, although made* de recenti *of the commission of a crime, do not amount in law to corroboration? If so, should* Morton *be over-ruled?*

Morton was wrong in defining the scope of the *res gestae* as strictly contemporaneous with the duration of the *actus reus*. The Bench was, however, correct that statements not falling within the *res gestae* (however defined) could not be corroborative.

Shelagh M McCall KC Michael D Anderson KC

Edinburgh, 22 May 2024