APPEAL COURT, HIGH COURT OF JUSTICIARY

HCA/2023/00024/XM AND HCA/2023/00025/XM:

LORD ADVOCATE'S REFERENCES NOS 2 AND 3 OF 2023

CROWN'S WRITTEN SUBMISSIONS

INTRODUCTION

1. The Court is invited to answer the questions posed in these References as follows:

> *(1) Is a* de recenti *statement on its own corroborative? That is, is a* de recenti *statement corroborative even in the absence of distress?*
>
> Yes, when it is either part of the *res gestae* (properly understood) or is a consequence and continuation of the *res gestae*.
>
> *Morton* erred in taking an unduly restrictive approach to the *res gestae*. This was at odds with the traditional and correct approach to the *res gestae*, which was to be regarded as wider in time and not limited to the end of the *actus reus*. *Morton* also erred in failing to recognise that, since the time of the Institutional Writers and before, *de recenti* statements which were a consequence and continuation of

the *res gestae* (referred to in *Lord Advocate's Reference No 1 of 2023* as 'true *de recenti* statements') were also corroborative.

In evaluating whether a *de recenti* statement was a consequence and continuation of the *res gestae,* there was also a particularly wide latitude in sexual offences cases and in cases involving child complainers. For all of these reasons, *Morton* should be overruled.

When a statement is either part of the *res gestae* (properly understood) or is a consequence and continuation of the *res gestae* it is corroborative. There is no need for it to be 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?*

Yes: *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 the truth of their contents, whether about the identity of an accused or the act alleged to have been committed.

(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 *de recenti* statement stops being corroborative when it is no longer the consequence and continuation of the *res gestae*. This falls to be determined on the

facts and circumstances of each case but generally, a *de recenti* statement will stop being the consequence and continuation of the *res gestae* when it 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), such as in a formal police statement.

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

Morton has had the consequence of incorrectly restricting the category of *de recenti* statements which could be admitted as proof of their facts. For the reasons given in respect of question 1 above, the answer to both these questions is 'yes'.

2. Before setting out the Crown's submissions on why these are the correct answers to the questions posed in these References, two preliminary remarks may be made. First, the Crown acknowledges that *Morton* is a decision of high authority and one that has been applied for nearly eight-six years. But Scots law is a system based upon principle and on the proper development and application of its core principles within the common law as developed by the Court. Both the *res gestae* and the associated concept of *de recenti* statements are common law concepts. If the Court is satisfied that the common law has taken a wrong turn, it is the responsibility of the Court to correct that error and, for the reasons which will be set out in these submissions, it is proper that it should do so now.

3. Second, the digitisation of the law reports in recent years, and the collation and organisation of historical sources, both here and across the Commonwealth, has enabled those responsible for preparing these submissions to have access to and to have been

able to survey comprehensively the authorities on *res gestae* and *de recenti* statements in a way that simply would not have been possible for the Full Bench in *Morton*.

4. The following submissions are the product of perhaps the first comprehensive survey of *de recenti* statements in Scots law. They are based on a consideration of over 2,000 reported cases (from the beginning of Shaw's Justiciary Cases in 1819 to the decision in *Lord Advocate's Reference No. 1 of 2023*); the successive editions of the Institutional Writers and other leading textbooks; and, in some cases, obtaining the original trial papers from the National Records of Scotland.

5. From that survey, these submissions are able to identify why the Court in *Morton* fell into error: it took an overly narrow view of the *res gestae* and it ignored the fact that *de recenti* statements by injured parties which were a consequence and continuation of the *res gestae* had always been corroborative in Scots law. The Institutional Writers regarded the practice of using such statements as corroboration as long settled, even before they came to write their works. After the Institutional Writers, such statements continued to be regarded by the courts as corroborative throughout the nineteenth century and right up to the time of *Morton*. *Morton* excised that category of corroborative statement from Scots law without any reference to that substantial and settled body of authority.

6. The submissions are also the product of a survey of the Irish and Commonwealth authorities on the *res gestae*. This shows that a return to the wider approach to the *res gestae* which applied before *Morton* would not place Scots law out of step with the Commonwealth and Ireland. There, it has long been recognised that the *res gestae* extends beyond statements made which are absolutely contemporaneous with the facts in issue.

7. In short, these submissions set out why it is appropriate for the Court:

(i) to overrule *Morton;*

(ii) to bring the law on the *res gestae* back to the wider approach that applied before *Morton* into line with how the law on *res gestae* is applied in the rest of the common law world; and

(iii) to reaffirm the existence and corroborative value of *de recenti* statements when those statements are a consequence and continuation of the *res gestae*.

8. The submissions are structured as follows. **Part 1** sets out the central ruling in *Morton*. **Part 2** returns to the law before *Morton*. It traces the application of the *res gestae* and *de recenti* statements from the time of the Institutional Writers through to the decision in *Morton* and shows why *Morton* is at odds with the traditional understanding of these concepts. **Part 3** sets out why, in light of that that analysis, *Morton* erred and should be overruled. **Part 4** is a comparative law analysis. It demonstrates that the Scots law on the *res gestae* before *Morton* was broadly consistent with the approach now taken in other jurisdictions, which is also at one with the approach set out in *O'Shea* and *Lord Advocate's Reference No 1 of 2023*. **Part 5** addresses briefly the specific question of identification (the second question posed in the References). **Part 6** makes brief submissions on the facts of the two cases from which these References arise. **Part 7** sets out the conclusions the Crown invites the Court to reach.

PART 1: MORTON v HM ADVOCATE

9. The facts of and evidence in *Morton* are considered later in these submissions. For present purposes, it suffices to draw immediate attention to the key passage which the Crown invites the court to overrule (at page 53, per LJC (Aitchison):

"In my opinion, this judgment proceeded upon a misconception as to the true character of corroboration. 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, but an exception is allowed in the case of sexual assaults upon women and children, including sexual offences against young boys. In cases of that kind the Court will allow the evidence of complaints or statements* de recenti *made by the injured party, for the limited purpose of showing that the conduct of the injured party has been consistent and that the story is not an afterthought, and, in the case of assaults upon women, to negative consent. A complaint* de recenti *increases the probability that the complaint is true and not concocted, and the absence of complaint where sexual offences are alleged is always a material point for the defence. But it must be clearly affirmed that the evidence is admissible as bearing upon credibility only, and the statements of an injured party, although made* de recenti *of the commission of a crime, do not in law amount to corroboration. ... A statement of the injured party* de recenti *is nothing but the statement of the injured party, and it is not evidence of the fact complained of."*

10. One immediate point will be noted from this passage in *Morton*: it is stated without any reference to authority. It is therefore necessary to examine whether *Morton* correctly reflected the law as it stood in 1937. It is necessary again, as was done in *Lord Advocate's Reference No 1 of 2023*, to return to the sources of Scots criminal law and to trace the development and application both of the *res gestae* from its earliest time in the Institutional Writers to the time of *Morton* and the use to which *de recenti* statements could be put. Doing so, shows that the above *dicta* in *Morton* was incorrect.

PART 2: THE *RES GESTAE/DE RECENTI* TRAIL

The first half of the nineteenth century: the Institutional Writers and the early case-law

11. It is appropriate to begin with the Institutional Writers. Before doing so, one preliminary observation is necessary: it is important, when considering what the Institutional Writers have to say on the *res gestae* and *de recenti* statements, also to consider their writings on the rules of evidence that applied to different crimes and different types of complainers. In recognition of the fact that certain crimes (not least sexual offences) took place in private or secluded areas, different rules applied to *de recenti* statements by injured parties (as opposed to other eyewitnesses), and a wider latitude in time was applied to the statements of complainers in sexual offences and to child complainers. When considering the *res gestae* and *de recenti* statements, each of the Institutional Writers thus starts with the general law of evidence and moves to the particulars of these cases and complainers. Both need to be considered to understand properly what the law was.

Burnett: A Treatise on Various Branches of the Criminal Law of Scotland

12. The first Institutional Writer to discuss the *res gestae* and *de recenti* statements was Burnett in 1811. His analysis begins in Chapter XIX (On Direct Evidence) with the general rule that two witnesses are required for corroboration, but that the eyewitness A telling B what happened 'will not make two concurring witnesses to the fact' (page 511). A similar passage appears in the following chapter (Chapter XX: On Direct and Circumstantial Evidence), where he says (at page 519):

> *"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 a witness, they still leave the fact, he speaks to, resting on his single testimony."*

This may, indirectly, have been one of the sources for what was later said in *Morton* but if it was, then *Morton* was wrong because Burnett does not leave matters there. The fact that he does not leave matters there is also a reason why it may not be entirely correct to say, as was said in *Lord Advocate's Reference No 1 of 2023* (at paragraph 226), that Burnett is contradicted by Alison and Dickson. Having set out these rules in his general chapters, Burnett then turns, in Chapter XXII, to the rules of evidence that apply to particular crimes. When Burnett comes to the crime of rape, he begins his discussion by quoting Sir Matthew Hale that rape *"is an accusation easy to be made, hard to be proven, but harder to be defended by the person accused, though innocent."* In rejecting Hale's premise as being applicable to Scotland, Burnett then observes (page 553):

> *"This may be true, as applied to the rules of proceeding and law of evidence in our neighbouring country; but it does not equally hold with reference to the practice of Scotland, where more is in every case required to warrant a conviction, than the evidence merely of the woman said to have been ravished. At the same time, as the woman's testimony must necessarily be the chief evidence in most cases of rape, and as many circumstances may concur to induce her to accuse another falsely, the law looks with jealousy to her testimony, and requires various corroborating circumstances in support of it. In particular, our ancient law* (Reg. Majest., cap 8 and 10) *required in every case, that the woman should not delay making her complaint…, and also that she should appear for that purpose before the nearest magistrate. Though this strictness have for a long time been departed from, and the want of it be not pleadable in bar of trial, the recency and manner of her complaining is still a circumstance of weight as a matter of evidence."*

13. There is nothing in that passage which suggests that the *'recency and manner'* of complaint are limited only to matters of consistency. They are not: they are part of the corroborating circumstances (that is, circumstantial corroborative evidence) of a complainer's account. Burnett immediately goes on, in the same section on rape cases, to discuss the position of child complainers in such cases, saying this (at 554):

> *"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."*

14. 'Assault' is used there to describe the rape of a young child, but the point is clear 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.

15. The next passages which bear this out appear in Burnett's treatment of hearsay (Chapter XXV). Having set the principle that evidence of hearsay is generally inadmissible because it is not best evidence (page 600), he then records the exceptions to that principle. The fourth exception is the *res gestae*, which he summarises thus (at pages 601-602):

> *"It [the rule against hearsay] does not exclude that which is evidence of the* res gesta *at the time, and which, though resolving into a statement of what another may have said, is not hearsay in the sense of law. It is a fact, and often a material one in the case. In homicides on provocation, what the parties said at the time; in riots, what any of the mob was heard to say, as shewing the general tendency of the riot; or, in other acts of violence, what even third parties, bystanders, were heard to say, as expressive of their feelings at the time, and of the effect which the circumstances had upon their minds, are all facts which it may often be material to establish, and what are not objectionable as being hearsay merely."*

16. Significant for present purposes is what Burnett goes on immediately to say (also at page 602):

> *"Least of all is evidence of what the injured party may have been heard to say recently after the fact, objectionable as hearsay, as in the case particularly of a woman who has been ravished, though she cannot be herself a witness. Nay, it is competent, and may be a material fact, in corroboration of any witness's testimony, to prove what he said* de recenti, *regarding what he may have heard or seen, in other words, regarding the fact, as to which he is afterwards called on to give evidence; as it may be material, and competent also, to prove what a third party said in presence of the accused, and not contradicted by him, this circumstance being an important fact in the conduct of the party accused."* (emphasis added)

17. That is the first mention of a category that Alison, Dickson and the nineteenth-century authorities all recognise: an exception to the rule against hearsay for statements made by the injured party; that once the injured party has given his evidence, evidence of any *de recenti* statement he has made is admissible as corroborating his account.

***Mackenzie* (1828) Syme 323**

18. Breaking off momentarily from the Institutional Writers, the 1828 case of *Mackenzie* (1828) Syme 323 confirms the law as Burnett had stated it twelve years earlier. The complainer alleged that she had been raped on the Sunday/Monday. She told her story to several people on the Tuesday and those people gave evidence at trial as to what the complainer told them. The complainer did not give evidence herself: medical practitioners certified on soul and conscience that she was not fit for trial. The report of the Lord Justice Clerk's charge notes that after his Lordship:

> *"went through the evidence, and having pointed out all the circumstances that tended to corroborate or discredit the principal witness, directed the jury to decide whether her statement was or was not entitled to belief."*

The jury returned a verdict of not proven. It is not said in the law report to what use the evidence from the people the complainer had spoken to was put, but some assistance can be taken from Alison's later discussion of it. This is the same *Mackenzie* case which Alison refers to (*Principles* at page 217) in the passage commencing:

> *"Whatever doubt may exist as to the competency of admitting evidence of the account which the woman has given of injury recently after its reception to others in the general case, there can be none as to its admissibility in cases of rape."*

Alison was well placed to know: he was the Advocate Depute in the case. As will be seen later, Alison considered *Mackenzie* an authority for the proposition that the *de recenti* statements of the complainer were admissible as corroboration of her account.

Hume: Commentaries on the Law of Scotland respecting the Description and Punishment of Crime

19. Hume first analyses the *res gestae* in the 1829, third edition of his work, with the same passage appearing in the 1844, posthumous fourth edition. His is a shorter analysis. Having set out the general principle on the exclusion of hearsay evidence (as he had done in the previous two editions), he then adds this passage in the third edition (page 406 at footnote 1):

> *"It is necessary, however, to distinguish in this matter: For very often words uttered to a witness are a substantial part of the* res gesta, *told by such witnesses; are the cause and motive why the witness himself has proceeded to do a certain thing; and he cannot relate*

truly and intelligently what he did, without mentioning why and how he came to conduct himself in that way…"

20. There then follows the example, taken up later by Alison, of a highway robbery, where John finds James wounded on the highway. James tells John what has happened and on that account John finds the perpetrator. What James has told John is admissible under the res gestae as a *'link and circumstance of the fact… and equally admissible in evidence as the rest of the story'*. What is significant is that Hume goes on immediately to say:

> *"In like manner, in a case of rape, it is admissible in evidence, that, recently after the fact, the woman complained of the injury to her mother, who, in consequence, had her visited and attended by a medical person. Nay, further, put the case, that the young woman produced to her mother, some article of the assailant's dress…and that by this clew her mother detects the guilty person: What passes between her and her mother is necessary portion of the thread of the mother's story, and serves to connect and expound the facts she swears to."* (Third edition, vol ii, page 407)

21. It is not apparent why Hume sought fit to add that passage to the third edition, but it is apparent that, to him, the concept of *res gestae* was wider than just the event itself. It did not end when the *actus reus* ended. It included events soon after. It was admissible, corroborative evidence.

***Hardie* (1831) Shaw 237**

22. Breaking off again from the Institutional Writers, the 1831 case of *Hardie* ((1831) Shaw 237) is an early authority for the proposition that the *res gestae* is not confined just to the crime, but rather encompasses events shortly thereafter. It was a firearms case which saw an attempt by the defence to call a witness to prove that the complainer had given a different account of what had happened from the account he had given in

evidence. The statement in question was said to have been made two days after the event. The court refused to allow the question to be put on the basis that it was not part of the *res gestae*. But the court's decision is summarised by Alison (*Practice* at page 525) as being that:

> *"it is [only] 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 it, such matter being in fact part of the* res gesta" (emphasis added).

Similarly, the law reporter in the case of *Mills* (1844) 2 Broun 275 notes that from *Hardie*:

> *"it may be gathered, that the Scots law is much more jealous than the English in allowing proof of previous contradictory statements, and only does so when from their occurrence at the time libelled, or* de recenti, *they must necessarily be received as part of the* res gesta."

The point to be taken from this is that the concept of *de recenti* statements being admitted as a consequence and continuation of the *res gestate* was, by the time of *Hardie* in 1831, already well developed in Scots law.

Alison: Principles of the Criminal Law of Scotland (vol 1: 1832) and Practice of the Criminal Law of Scotland (vol 2: 1833)

23. Alison in his two-volume work has a similar but much fuller treatment than Burnett or Hume. It is worth considering his analysis in full. It is important at the outset to note that when Alison uses the word 'confirm' (and elsewhere 'support'), he is using it in the sense of corroboration: see *Fox v HM Advocate* 1998 JC 94 per LJG (Rodger) at 100B-C.

24. Alison, like Burnett before him, has to be read in context because he too states a general principle on *de recenti* statements but does not leave matters there. (Indeed, the court in *Morton* may have erred by failing to appreciate that both Alison and Burnett state the general principle before providing commentary that qualifies substantially the general principle.) The general principle is stated by Alison in Volume 2, Chapter XIII: Of Parole Proof at page 553, where he says that confirmation (that is, corroboration) of a principal witness's account need not come from a second witness but from circumstantial evidence. However:

> *'[T]he confirmation must be* extrinsic *to the witness, and therefore if the only confirmatory evidence is that of persons to whom the person injured has told the same story as he has now done on oath, that still leaves the case resting on the oath of a single witness, and, if there is nothing else in the case, is insufficient to warrant a conviction.'*

25. Alison then cites Burnett (at page 519) for this proposition. Two points need to be made about this general principle. First, it is not apparent that this is *ex facie* to the exclusion of *de recenti* statements that are a consequence and continuation of the *res gestae*. Second, as with Burnett, this passage has to be read in light of the exceptions Alison then goes on to recognise for rape complainers and other injured parties.

Alison Volume 1, Chapter VII: Rape

26. The convenient starting point in examining those exceptions is Alison's chapter in volume 1 on rape (Chapter VII). In this part of his work, as with the work generally, Alison's style was to set out general principles in a series of headnotes and then develop what was said. The sixth headnote in this chapter on rape reads (volume i, at page 217):

> *"The account which the principal witness has given of the transaction,* de recenti *after the injury, to others, is competent to be given in evidence on the prisoner's part."*

In this statement, the 'principal witness' refers to a complainer and 'the transaction' is the *actus reus*.

27. Alison develops this principle by saying (volume i, at page 217):

> *"Whatever doubt may exist as to competency of admitting evidence of the account which the woman has given of her injury recently after its reception to others in the general case, there can be none as to its admissibility in cases of rape. The obvious importance of such an inquiry in a case where so much depends on her testimony, has long fixed the principle, that evidence of this account is admissible in this particular case."*

He then gives examples from the cases of the day. These include one of child rape, *James Burtnay*, in 1822, where the declaration of an eight-year-old girl was admitted and was corroborated by the *de recenti* statements she made to her relations and friends (volume i, page 217 with the same case discussed more fully at page 224). It also includes the *Thomas Mackenzie* case, in 1828 (referred to at paragraph 18 above), where evidence was admitted of the story told by the principal witness to different persons the day after the 'injury' (at page 217).

28. Again, nothing of this is said by Alison with any qualification on the use to which the *de recenti* statement, once admitted, could be put, and the *James Burtnay* case makes clear that the *de recenti* statements were corroborative. This is the injured party /*de recenti*-statement rule which Burnett identified and upon which there is no difference between Alison and Burnett.

29. The tenth headnote in this chapter on rape reads (volume i, at pages 219-220):

> *"In cases of rape, perhaps more than any other crime, it is indispensable to look minutely into the accounts told by the woman, and the <u>support</u> which they receive from the other circumstances of the case..."* (emphasis added)

30. Alison develops this headnote with an extended analysis of the different forms of corroborative evidence in rape cases, which it is unnecessary to summarise. As Alison himself says in this section (at page 220):

> *"The principal point to attend to is, whether her statement, in regard to the violence used, is duly corroborated; and this is done in the most unexceptional way by such physical appearances as afford real evidence of the truth of her story, and after that by the evidence in regard to her subsequent disclosure of the crime to her relations, or the public authorities..."*

31. Alison returns to the subject later in the same chapter (volume i, at pages 224-225), where he observes again that a woman (and also, it appears, a child complainer) in a rape case is:

> *"permitted to give an account of the injury she has received, and to support that testimony by the accounts she has previously given to others* de recenti *after the outrage."*

Again, it is worth remembering that 'support' in Alison means 'corroborate'.

Alison Volume 2, Chapter XIII: Of Parole Proof

32. Alison takes up his analysis again in Chapter XIII of his second volume, Of Parole Proof, when he turns to the subject of hearsay. Again, his style is to state the general principle and move to the particular. The general principle is stated as (volume ii, page 510, headnote 3):

> *"Hearsay is in the general case inadmissible evidence; but it is admissible where the wounded person, who is since dead, has deliberately recounted the injury he has sustained; where an injured party has,* de recenti, *narrated to others the violence he has undergone; or where an exclamation, by third parties, took place as part of the* res gesta *of the transaction which the witness describes"*

33. Alison develops this principle as follows. He starts by stating the best-evidence rule and finds as its corollary the principle or rule that witnesses should ordinarily give evidence under oath in court (volume ii, at pages 510-511). But to this, he then states that several exceptions are 'firmly established', both in Scots and English law. Several, such as the first exception, dying declarations of victims in murder cases, are unquestioned, and most of the others are technical in nature. The two that are germane to the present References are the second and fourth exceptions: *de recenti* statements by those injured but not fatally and the *res gestae*.

Alison's second exception: de recenti statements by injured parties

34. For the second exception, Alison says this (volume ii, at page 513)

> *"The account given of the injury he has sustained, by a person assaulted, to a third party, though he is not dead, is competent evidence if done shortly after the injury was received, and it may be adduced to confirm what he has previously sworn to before the jury."*

35. Alison goes on to note that this rule appears to have been settled so far back as the middle of the last century (so circa 1750) and that the rule has '*completely taken root in our practice*', not only in cases where the party injured had died before trial but in cases where he is alive and has '*been examined at full length on the subject before the jury*' (volume ii, at page 513). Keeping in mind that when Alison uses, the word 'confirm' he means 'corroborate', the principle is clear and, if Alison is correct, settled: statements made shortly after the event by an injured party are admissible and corroborative of the same party's own account as given in court.

36. Having given examples, Alison then turns to the application of this second exception in cases of rape. He states (volume ii, at page 514):

"In cases of rape, this privilege on the prosecutor's part, of confirming the testimony of the sufferer by the witnesses to whom she has, de recenti, *narrated the transaction, has, in an especial manner, been established."*

37. This passage is accompanied by a footnote citing both Hume and Burnett, in the case of the latter, to the passage quoted at paragraph 15 above (page 602 of Burnett). Alison then gives examples of three cases where this practice was followed. The third of them is *Thomas Mackenzie* (1828) Syme 323, in which he observes that the account which the complainer gave to different witnesses the next day was laid *'without reserve'* before the jury (in the sense being fully available to the jury as corroborative evidence, rather than for some limited or restricted purpose). As has already been observed, Alison would have been in a position to know: he prosecuted the case himself.

38. The principle that *de recenti* statements made up to a day later were corroborative is also evident from the next passage where Alison sets out the limits on the principle. He states (at page 514):

"This privilege, on the prosecutor's part, of confirming the testimony of the principal witness in cases of personal injury, by the account, de recenti, *given by him of her to others, is, however, to be restricted within narrow limits. It applies only to the actual sufferer by the wrong which is the subject of investigation; and is not to be extended to any other witness... Farther, even in the case of the actual sufferer, it is not every account which he has given to others, which will be allowed to be repeated in evidence. It is those accounts only to which this privilege is extended, which are connected, more or less directly, with the* res gesta *of the injury, or which were so recently given after it, as to form, in some sort, a sequel to the actual violence."*

39. In that we arrive at the principle: (i) *de recenti* statements of injured parties are corroborative; (ii) that applies to statements which are connected, more or less directly, with the *res gestae*, or which were recently given after it as a sequel to the incident. That is an early formulation of what Dickson would come to call '*statements made as consequence and continuation of the* res gestae' and what the Court in *Lord Advocate's Reference No 1 of 2023* termed '*true* de recenti *statements*' (at paragraph 226).

40. The examples which Alison then gives make this clear. This is because he then states (at page 515):

> *"Upon this principle, the account which the injured party has given of the assault to his family, or those with whom he lodged, when he returned home, and exhibited his wounds, is clearly admissible, or which fell from him on that or the following day, when recounting the transaction, or showing his wounds to his friends; but a different decision would be given if an attempt were made to prop up his evidence by the account which he gave of it to strangers some days or weeks afterwards and without the intervention of any thing which connected it with, and rendered it in some degree, the natural sequel of the violence. Accordingly, in a case where the extrajudicial account attempted to be proved by the person assaulted, had occurred* ex intervallo, *and without any connexion with the* res gesta *of the injury, it was stopped by the Court."* [The case, cited in the accompanying footnote is John Anderson, Dumfries, April 1826, unreported.]

Thus statements made by an injured party upon returning home or made the following day were admissible because they were concerned with or were the natural sequel of the crime; later statements were not.

Alison's fourth exception: the res gestae

41. Alison's treatment of the *res gestae* is again slightly fuller than Burnett or Hume, but may be shortly summarised. He too provides the justification for admitting anything said during the *res gestae* as the need for the witness to be able to give his account of the crime properly (see volume ii, at page 517). That applies, as it did in Burnett and Hume, to things said shortly after the crime has been committed. He cites English authorities with approval, including one in a case of rape where what the child complainer said *'so recently after the fact as to preclude the possibility of practising upon her, is held to be admissible as part of the transaction* [i.e., the crime]' (volume ii, at page 520). The only limit that Alison places on the admission of post-incident statements is that only *res gestae* statements of an incompetent witness will be admitted and not later statements, lest that allow in testimony that which would otherwise be incompetent (see volume ii, at page 520). But even that limit allows of an exception. In an earlier part of this chapter, the categories of incompetent witness, Alison states the general principle of the time that pupil children could not give evidence for or against their parents, save when the crime of the parent is against the child himself. When that is so, Alison states that, on the same principle, the evidence of the child (at page 466):

> *"[M]ay be supported by the account which the suffering child gave* de recenti *of the injury to others; a mode of getting at the truth, which, in the case of very young children, is generally more satisfactory than what they give at the distance often of months at a public trial."*

42. Yet again, Alison is setting out the principle that *de recenti* statements by injured parties are corroborative. The point is repeated in his treatment of the rule that it was not competent (at that time) to contradict what a witness had sworn to on oath by leading any extrajudicial statements the witness had made. Alison points to an exception for *res gestae* and *de recenti* statements (at page 523). There then follows in this section an extended discussion of the cases in which this exception had applied (including of its particular importance in rape cases), from which Alison concludes (page 526):

"Thus it appears that the rule in our practice is firmly fixed; the general principle between that what a witness says on oath is neither to be bolstered up nor invalidated by extrajudicial statements; and an exception to this rule being established in the special case of the injured case having de recenti, *or as parts of the* res gesta, *given an account of the transactions to others, which on the one hand may be proved by the prosecutor to confirm, and on the other by the pannel to invalidate his testimony."* (emphases added)

43. *'Confirm... his testimony'* is again the language of corroboration.

The cases between Alison (1833) and Dickson (1855)

44. There are a series of cases between Alison's work in 1833 and Dickson's in 1855 which confirm both Alison's view of the *res gestae* and the admissibility of *de recenti* statements, apparently in corroboration of a complainer's account and certainly with no record that the statements were admitted only to bolster the complainer's credibility.

45. In *M'Millan*, 9 January 1833 (Bell's Notes at page 288), an assault with intent to ravish case, evidence of *de recenti* statements made by a child complainer within a week of the incident were admitted.

46. In *Grieve* 14 March 1833 (Bell's Notes at page 288), a rape case, it was permitted to ask a husband what his wife, the complainer, had told him two days after the incident.

47. *Gibbs* (1836) 1 Swin 263 was a case of rape of a twelve-year-old girl. She gave her account of being taken by the accused and raped, and the accused making off when disturbed. One witness, Ms Lawson, gave evidence of finding the complainer, hearing her account and, on the back of it, tracing the accused to his lodgings. That account was said to be corroborated by an account of another woman, a Mrs Grahame, who gave

evidence that the complainer, soon after the event, identified the accused as the man who had assaulted her. The jury also heard from the complainer's mother who spoke of the account her daughter had given her. The jury convicted of assault with intent to ravish. It is not stated in the law report that the evidence of the three women of what the complainer had told them was admissible as corroboration of her account. But it is not stated that they were admitted for any other purpose. Had they not been admitted as corroboration of the complainer's account of the crime, then it is not apparent where corroboration of the complainer's account of the crime could have come from.

48. In *Henderson* (1836) 1 Swin 316, the accused was charged with the rape of Isabel Ross who was aged 18. The defence was consent. The assault occurred on a Thursday night and the complainer first disclosed what had happened to her the next evening, which was significant because she had an opportunity to disclose it to her cousin and to her aunt earlier. She subsequently told others and reported the rape to the authorities around a week later. The complainer gave evidence, as did several others who spoke to what the complainer told them. No mention is made of *res gestae* or *de recenti*, but the Lord Justice Clerk's charge to the jury is instructive:

> *"...as to the crime itself – in a case of this nature, the person injured is of course the principal witness. If her evidence is believed, there is no doubt that the capital crime was committed...There was nothing extraordinary in her not at first telling her bed-ridden aunt, or even her cousin...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 a full disclosure to a male relation. The pannel's defence now is, that it was a voluntary connection. If this had been the case, why the early communication to Mrs Turcan, and to Mrs Fotheringham? But the story which she now tells is corroborated by all the other evidence – by the state of agony in which she first communicated the outrage – by the account which she gave to all the witnesses – and by the marks of violence seen on her person."* (emphasis added)

49. That is again a case where the *de recenti* statements, though not the only source of corroboration in the case, were available to the jury to corroborate the complainer's account.

50. The following cases from this period also show both the application of that principle and its proper limits; that is to say a wide, but not unlimited, approach to the *res gestae*:

- In *Moran* (1836) 1 Swin 231 the court allowed statements made by the complainer shortly after the crime to the police as part of the *res gestae* but not statements made five or six hours later.

- In *Tweedie* (1836) 1 Swin 22, a rape trial, the complainer gave evidence as did another witness to whom she had disclosed the rape a few days later. The prosecution was abandoned at the close of the Crown case: this may have been because the complainer's evidence was that she told the supporting witness the same day as the crime, whereas the supporting witness did not speak to this, only disclosure later, and at that time a failure to disclose at the first opportunity was still considered fatal to a Crown case. But it does not appear that there was any difficulty with taking the evidence of the supporting witness as to the complainer's statements a few days after the crime.

- In *Alexander* (1838) 2 Swin 110 it was held to be competent to ask a witness whether the complainer had accused the pannel (in the witness's presence) of having assaulted him "*shortly after the affair took place*". The question was allowed on the basis that it was part of the *res gestae*.

- In *Kennedy* (1838) 2 Swin 213 (a shooting) statements three days after the event were (it is suggested properly) excluded as not forming part of the *res gestae*.

- In *Fulton* (1841) 2 Swin 564 a fourteen-year-old accused was charged with rape of a five-year-old girl. The report notes that:

> *"the completion of the principal crime charged was fully established by the evidence of the girl – by proof of the account which she had given of the matter* de recenti *– by medical testimony as to the injuries she had sustained, - and by the pannel's confession of guilt at the period of his apprehension."*

Again, there is nothing to suggest that the *de recenti* statement was in a different category of evidence from the medical evidence and the accused's confession or any less corroborative than those adminicles of evidence.

- In *Barr* (1850) J Shaw 362 the court admitted evidence from a messenger-at-arms who had visited the complainer a day or so after the alleged rape. The messenger-at-arms reported that the complainer did not know the person who had attacked her but that she had described him and mentioned that he had scratches on his face. The messenger-at-arms was thereafter present at the accused's apprehension and he *"answered the description"*.

- Evidence of exclamations made by two boys – one of whom was dead, the other unknown – at the scene of an assault was admitted into evidence in *Ewing v Earl of Mar* (1851) 14 D 314; both on account of their absence and on account of the exclamations being part of the *res gestae*.

- *Stewart* (1855) 2 Irvine 166 was a murder trial, in the course of which a seven-year-old boy who had witnessed the assault was examined. It was thereafter proposed to prove by other witnesses what the boy had said to them, either immediately after or within 48 hours of the occurrence. The Crown objected, submitting that:

> *"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, but 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 (Alison, vol ii, pp 511, 514)."* (emphasis added).

The case report notes that the objection was repelled and the evidence admitted.

51. These cases – from *Gibbs* to *Stewart* – form a clear line of authority between Alison and Dickson 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 offences cases and the evidence of children.

The 'incompetent witness' exception

52. Three cases fall outside this line of authority on the admission of *res gestae/de recenti* statements. However, once a peculiarity of the law of evidence from the time is understood, the reason why becomes clear, and thus nothing in them detracts from the principle identified by Burnett and Alison and applied throughout the rest of the nineteenth century. The cases are *Hill v Fletcher* (1847) 10 D 7, *M'Namara* (1848) Arkley 521 and *AB v CD* (1848) 11 D 289. The common feature of the cases is that all concerned injured parties who were not competent witnesses.

53. *Hill v Fletcher* (1847) 10 D 7 was an action for damages brought by a 14-year-old girl for an assault with intent to commit rape. The pursuer not being a competent witness, the action was brought with the concurrence of her father. On behalf of the pursuer it was proposed to lead evidence of the account she had given of what had happened to the third person she had met after the alleged assault. The court held the

evidence to be inadmissible on the basis that it did not form part of the *res gestae*: it had been given sometime after the crime and after the girl had had time to 'concoct her story'. Critically, the point was made that in criminal trials, *de recenti* declarations were only admissible when the complainer has given evidence on oath per LJC (Hope)'s opinion at page 9).

54. *AB v CD* (1848) 11 D 289 was an action of separation by a wife (who was not then a competent witness) on the ground of cruelty. A witness found the wife in a distressed state during which the wife uttered an exclamation and thereafter gave a statement to the witness. The Inner House was prepared to countenance the exclamation being admissible as part of the *res gestae* but not the statement. The decisive factor appears to have been that the wife was not a competent witness and thus admitting the statement would have been to admit her evidence by other means. The practice in criminal cases of allowing the *de recenti* evidence once the complainer had given evidence is commented on favourably: see Lord Mackenzie at 295. (The practice of allowing the limited admission of a *res gestae* statement was followed in the later case of *Longworth v Yelverton* (1862) 24 D 696, with similar reasoning).

55. *M'Namara* (1848) Arkley 521 was another rape case. The complainer was a fourteen-year-old girl who was described as being of "*weak or imbecile intellect*" who was incapable of giving evidence. The Crown sought to lead evidence from a neighbour into whose house the complainer came running after the assault as to what the complainer had said to the neighbour, on the basis that, in cases of children too young for examination, evidence of what they said to third parties is admitted as being part of the *res gestae*. That too was found to be inadmissible on the ground only that the child was herself incapable of being examined. The comparison was drawn between that scenario and cases of competent complainers, where it was regarded as essential to allow the jury to hear the complainer's previous, *de recenti* account, so that the jury could compare that evidence with the evidence given in court.

56. It is submitted, however, that this case was wrongly decided. The evidence ought to have been admitted as part of the *res gestae*. Once it was accepted that it was part of the r*es gestae*, it should not have mattered whether the complainer was a competent witness. It would have been different if the statement had not been part of the *res gestae* but only a *de recenti* statement; in that case, following the distinction drawn in *Hill v Fletcher* and *AB v CD*, the statement could have been excluded on the basis that the complainer had not first given evidence on oath.

Dickson, A Treatise on the Law of Evidence in Scotland (1855)

57. The next stage in the *res gestae/de recenti* trail is Dickson's *Evidence*. This was first published in 1855 with two further editions under the superintendence of others in 1864 and 1887. In these three editions the treatment of the *res gestae* and *de recenti* statements is unchanged and at one with Alison's. This is important because it establishes a settled practice from 1833 to 1887. It is also a landmark stage in the trail because it is in Dickson that the previous writings on *de recenti* statements crystalise into the test "*consequence and continuation of the* res gestae", which *Morton* overlooked and which is the test that the Crown submits should be applied today.

58. Dickson's contribution is one of synthesis. His treatment of the subject is contained in Volume 1, Chapter V: Hearsay Evidence. There, he follows Alison in setting out the general rule against hearsay evidence and its justification. He then deals with the *res gestae* as follows, in Volume 1, Chapter II at pages 60-61, § 92:

> *"Statements, which would otherwise be excluded as hearsay, may be proved when they form part of the* res gestae *of acts given in evidence [citing inter alia Hume, ii, p 406; Burnett, p 602; Alison, Practice, 517]. The reason is, that words which accompany acts, or which are so connected with them as to arise from coexisting motives, form part of the conduct of the individual, which cannot be rightly understood, unless his words as well as his acts are proved.*

...

> *The admissibility usually depends on whether the declarations were contemporaneous with the facts, and so connected with them as to illustrate their character; or in legal language, whether the words and acts occurred* unico contextu. *Yet it is not necessary that they be contemporaneous,* "for the nature and strength of the connection are the material things to be looked to; and although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential. On the other hand, a statement which resolves into a narrative of a past occurrence will not be admitted to qualify or explain it."

The same passages appear in the second and third editions: volume i, page 80, § 92 (2nd) and volume i, page 189, § 254 (3rd).

59. The principle which Dickson takes from the authorities – that the admissibility of statements under the *res gestae* exception depends on the strength and nature of their connection with the relative act, not on their being contemporaneous – may go some way to explaining why it was not just *res gestae* statements but also *de recenti* statements which were admissible and corroborative. As can be seen, he goes on (at page 63, § 95):

> *"Akin to the principle thus noticed* [res gestae], *is that which in criminal cases admits proof of statements made by the injured party* de recenti *after the alleged crime. Such expressions, being the natural outpourings of feelings aroused by the recent injury, and still unsubsided, are a consequence and continuation of the* res gestae, *and corroborate the party's evidence for the Crown; while on the other hand a discrepancy between his sworn testimony and his statements recently after the alleged offence is a favourable circumstance for the prisoner. On these grounds, such evidence has for a long period been admitted both for the prosecution and defence, after the injured party has been examined."*

(Second edition: volume i, page 82, § 95; third edition: volume i, page 193, § 258.)

60. Dickson says a good deal more on this point which bears directly on the questions raised in these References, but before coming to those passages, it is convenient to pause and consider the import of this last passage:

(i) It is at one with the similar passages found in the Institutional Writers. The only addition is the phrase *'consequence and continuation'* which correctly synthesises the law from the time of the Institutional Writers (and before) and which remained unchanged from their time to Dickson's.

(ii) Dickson regards that principle as following from the *res gestae* (*'akin to this principle ...'*) and having the same justification. That fits with the traditional Scottish system of corroboration and the wide search it advocated for finding testimony that supported or confirmed an injured party's account.

61. In Dickson, the principle is so well settled that the argument is really over the extent and circumstances of its application. Two points may be observed. First – and this sounds on the question posed in the References on identification – Dickson notes that *de recenti* statements of injured parties which identify the perpetrator are as admissible as those which give details of the crime, Scotland not making the distinction that England appeared to make on this point (1st edition: vol i, page 64, § 96; 2nd edition: vol i, page 83, § 96; 3rd edition: vol i, page 194; § 259). Second, though having surveyed the authorities, Dickson restricts the timeframe which such statements are admissible to hours and not days, he records that it is different in sexual offences cases:

> *"When applying this principle to cases of rape, and assault with intent to ravish, the Court has admitted a very extensive investigation into the injured party's statements [citing Hume, i, at p 309; Hume, ii, at p 407; Burnett at pp 554, 602; Alison, Principles at pp 217 and 224; Alison, Practice at p 524; Stephens (1839) 2 Swin 438]. Complaints made by her at intervals of two days [citing Grieve, 1833, Bell's Notes, p 288], and of*

nearly a month [citing M'Millan, 1833, Bell's Notes, p 288] have been admitted for the prosecution…"

(1st edition: vol i, page 64, § 98; 2nd edition: vol i, page 83, § 98; 3rd edition: vol i, page 195; § 261.)

62. The points to take from Dickson are therefore:

(i) His treatment accords with the Institutional Writers. That is unchanged up to the 1887 edition.

(ii) *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.

(iii) Such *de recenti* statements are ordinarily measured in hours but a wider latitude is accorded in sexual offences cases.

(iv) The principle that *de recenti* statements are corroborative is appropriately circumscribed: as it is put in § 92 of the first edition, 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. The Crown takes no issue with that as an appropriate and principled limit on the rule.

Trayner on the res gestae

63. Staying with the authoritative writings of the mid-nineteenth century, Trayner's *Latin Maxims* was first published in 1861 with further editions in 1876, 1883 and 1894. It

is cited in *Lord Advocate's Reference No 1 of 2023* at paragraph 47. Insofar as relevant, it provides:

> *"This phrase … signifies not only an act performed, but everything said or done at the time bearing upon or having reference to it. Thus it includes all statements made immediately before or immediately after any particular act so nearly connected with it in point of time as to be inseparable parts of the whole transaction, and incapable of omission from any narrative or testimony professing to be an account of it. Statements offered in evidence, which would otherwise be excluded as hearsay, are received when they form part of the* res gesta."

64. This entry is unchanged throughout the four editions, which is again evidence of the consistency of the definition until *Morton*, not least because Trayner based his definition on Hume's.

The late nineteenth century cases

65. The same consistency in the trail can be found after Dickson in the late nineteenth century cases.

66. In *Thomson* (1857) 2 Irvine 747, a murder trial, the court refused to admit evidence of what a three-year-old girl (who it had been proved was alone in a room with the accused and the deceased) had said to her mother some sixteen days after the poisoning on the basis that it was not part of the *res gestae*.

67. In *Reid* (1861) 4 Irvine 124, a rape case, the court considered that the *res gestae* could extend to events wholly separate from the *actus reus* so long as they occurred on the same evening.

68. In this period, the courts continued to countenance the admission of *res gestae* statements by incompetent witnesses, including after the event when the witness returned home. In *Murray* (1866) 5 Irvine 232, a rape case, the complainer was of low intellect. The court was prepared to allow the complainer's mother to give evidence of what her daughter had said on returning home, this falling within the *res gestae*. The same result was reached in *Simpson* (1870) 1 Couper 437, an incest case, where the Crown were allowed to lead evidence of *res gestae* statements by the wife of the accused (then of course an incompetent witness for the Crown) if they were from the same day as the alleged crimes.

69. Similarly, in *Greer v County Road Trustees of the County of Stirling* (1882) 9 R 1069, reports by children – who were not competent witnesses – to their parents of an accident were admitted as proof of fact by the sheriff, and by a majority of the Inner House, on the basis that they were part of the *res gestae*. The common point is again that the *res gestae* extended beyond merely what happened at the time of the crime/incident but encompassed statements afterwards, including upon returning home to relatives. By way of an aside it submitted that the proper focus in this case is on the result: that the statements made by the children to their parents when they came home were part of the *res gestae*. That is what should be taken from the case rather than (as noted by the Court in *O'Shea v HM Advocate* 2015 JC 201 at paragraph 22 and *Lord Advocate's Reference No 1 of 2023* at paragraph 46) the fact that Lord Young, dissenting, defined the *res gestae* as limited to exclamations uttered at the time of event and not including such statements.

70. Coming to the end of the century, *Anderson v McFarlane* (1899) 1 F (J) 36 is a good example of the latitude given to allowing, as corroboration, the *de recenti* statements of injured parties. It concerned a petition to suspend a summary conviction of an assault by the employers of a girl who was their domestic servant. One of the complaints was that there was no direct corroboration of the girl's evidence, except evidence that she had made statements to her mother, to the same effect as her evidence, three days after the assault, which were not *de recenti*. In rejecting that complaint, the Lord Justice Clerk (Lord Macdonald) said:

> *"Questions of* de recenti *communications always depend on circumstances, and I think it is a fact in the case that this girl spoke about the assault to her mother on the first occasion on which she saw her. It would have been a strong point against her evidence if it were proved that she had not done so. 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 complaint after the assault to her own relations."* (emphasis added)

The conviction stood. That is instructive because, despite the less than emphatic phrasing of the Lord Justice Clerk, the *de recenti* statement had to be corroborative because it was the only supporting evidence in the case.

The twentieth century

71. The same consistency in that line of authority continued into the twentieth century. In *Gilmour v Hansen* 1920 SC 598, a defamation action, statements nine months after the event were inadmissible, but the court confirmed (per Lord President Clyde) that:

> *"In cases of crime and of 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, if made* de recenti. *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."*

72. Similarly wide approaches to the *res gestae* can be found in *Ovenstone v Ovenstone* 1920 2 SLT 83 (though this subsequently came to be overruled as a result of *Morton* in *Barr v Barr* 1939 JSC 696) and in *Livingstone v Strachan, Crerar and Jones* 1923 SC 794.

M'Lennan* and *M'Crindle

73. Coming into the era of *Morton, M'Lennan v HM Advocate* 1928 JC 39 and *M'Crindle v MacMillan* 1930 JC 5 were the subject of submissions by parties and extended analysis by the court in *Lord Advocate's Reference No 1 of 2023* (see paragraphs 65-66, 166, and 228 of the opinion of the court) and it is unnecessary therefore to say too much about them. Suffice it to say that in *M'Lennan*, the complainer was a young boy who had been the victim of lewd practices. He told his parents what had happened to him when he returned home, soon after the incident, and his parents gave evidence of the boy's account and spoke to his appearance, *"which indicated interference"*, and the disarrangement of his clothing. The Lord Justice General (Clyde), with whom Lords Sands and Blackburn agreed, said that *"it is a mistake to suppose that the evidence of the parents...do not provide good corroboration"*, citing Dickson that the *de recenti* statements were a *"consequence and continuation of the* res gestae" and thus corroborative. *M'Crindle* concerned identity, and the court followed *M'Lennan* in holding the complainer's parents' evidence of her *de recenti* statement – in which she disclosed the identity of the perpetrator, who was known to her – to be corroborative.

74. The final case before *Morton* is *Smith v HM Advocate* 1934 JC 66, a perjury case. The facts are immaterial but the Lord Justice Clerk (Aitchison) made the following observations:

> *"It is so well settled that no authority is required to vouch it, that statements made by complainers outwith the presence of the party accused are never evidence against that party, except in certain very exceptional cases. ... In cases of assault committed on women or on children, where complaint is made* de recenti, *the Court will allow such complaint to be received in evidence, but that is the exception to the rule. So also if the statements made by [the witnesses] at the time of the alleged offence, so as to form part of the* res gestae *of the crime alleged, it may be that they would have been admissible in evidence..."*

75. The curiosity of this *dicta* is that it is the same Lord Justice Clerk (Lord Aitchison), who would, of course, later come to deliver the opinion in *Morton*, recognising that the *de recenti* statements of women and children (presumably in allusion to sexual offences cases) may be admitted in evidence, in recognition of the long-standing practice of admitting such statements from injured parties, without any qualification that the statements could only be used for the purposes of consistency.

The position on the eve of *Morton*

76. Drawing all of this together, on the eve of *Morton*, the position in Scots law was as it had been since the time of the Institutional Writers, and it was as follows:

(i) The *res gestae* included anything said or done at the time of the event itself or immediately after it in point of time such as to be an inseparable part of the event.

(ii) Words said as part of the *res gestae* were normally witnessed or overheard rather than received as a statement. They were admitted into evidence as proof as their facts. There was no requirement for the maker of the statement or utterance also to give evidence and it was competent to lead evidence of what was said as part of the *res gestae* even where it would have been incompetent to lead evidence from the person who said it him or herself (as in the case of a spouse, or a very young child, or a party to a civil cause).

(iii) In criminal cases of personal injury, and especially in cases of sexual offending, an account given by the complainer as to what happened was admissible in evidence as proof of its contents, so long as it was an account given or statement made *de recenti* of the commission of the crime; was connected more or less directly with the *res gestae* such as to be a consequence and continuation thereof; was an outpouring of feelings and thus the natural

sequel to the assault; and was made so close in time to the commission of the crime that risks attendant upon reflection could be discounted. A long narrative or statements made in response to questions would militate against admissibility.

(iv) For evidence of such a *de recenti* statement to be admissible, the injured person had to give evidence on oath; and so if that was not possible, for whatever reason, the evidence could not normally be led, unless it could be brought within the *res gestae*.

(v) Where these requirements were met, the statement was corroborative. There is nothing to indicate that they were admitted for any other purpose and certainly not for consistency only.

(vi) The statement could be admitted to corroborate both the *actus reus* and the identity of the person responsible.

77. Indeed, the position before the Full Bench decision in *Morton* may be neatly summed up by an objection taken on behalf of Morton at his trial to evidence that the Crown sought to elicit from a doctor whom the complainer (a different complainer to that considered by the Full Bench on appeal) had visited two days after the assault. The agent for Morton said:

> *"If the doctor is giving any details of the conversation I must object to the line of evidence in respect that is not part of the* res gestae *or statements made* de recenti, *which can be accepted by the court as evidence."* (Justiciary papers, page 39)

There is nothing in that objection to suggest any probative difference in evidence of the *res gestae* or evidence of statements *de recenti*.

PART 3: WHY MORTON SHOULD BE OVERRULED

78. That summary of the position on the eve of *Morton* and the sources in Scots law thus far considered allow an examination of where *Morton* went wrong.

79. In *Morton,* the alleged indecent assault took place during the complainer's lunch break. Morton was charged with pulling the complainer into a close and indecently assaulting her. After the attack, the complainer went straight home by tram and told her brother about what had happened. The complainer thereafter returned to work and her employer called the police on her behalf.

80. Morton was a stranger to the complainer. At an identification parade some two months after the incident, the complainer picked out Morton as the man who had assaulted her. She identified him again in the dock.

81. At trial, the complainer gave evidence that upon getting home to her brother, she was in an "*excited condition*". She "*told him so much of the story…I was in such a state of nerves that I did not continue my story, but I told him the main thing*". On being asked why she did not call for a policeman at the time of the assault, she said that she was "*too upset. I was weeping and I wanted to explain it first of all at home*". (Complainer's evidence at pages 51-64 of the Justiciary Papers.)

82. The brother's evidence was that the complainer came home for lunch as usual but that she was "*very excited*" and was crying. She gave him a "*rough idea*" of what had happened, including that the accused had "*forced her into a close*", "*attempted to assault her*" and that he had "*tried to interfere with her*". (Brother's evidence at pages 64-66 of the Justiciary papers.) There was also evidence from a neighbour who heard the complainer screaming and saw her holding a railing, and a man trying to pull her away. The neighbour was unable to identify the accused. The jury convicted.

83. It bears remembering that the point taken in the appeal was lack of corroboration of identity. No other appeal point was advanced. Specifically, there was no ground of appeal based on the evidence given by the brother of the complainer's *de recenti* statement; indeed, that evidence was taken by the Crown without objection and the sheriff-substitute directed the jury that they could have regard to that evidence, without qualification, in reaching their verdict.

84. When the appeal first called before the court, the court dismissed the appeal against conviction in respect of the charge concerning the first complainer and then remitted the appeal on the charge concerning the second complainer to a Full Bench. The point that had arisen was:

> *"whether identification of the accused person by the [second] complainer alone without identification by any other witness is sufficient identification upon which a jury might proceed when it pronounced a guilty verdict"* (per Lord Justice General (Normand)). (See Justiciary Papers)

The arguments before the Full Bench were thus focussed entirely on the corroboration of identity.

85. The Lord Justice Clerk (Aitchison) delivered the opinion of the court. His focus was on whether there was any corroboration of the direct testimony of the complainer that she had been assaulted by the appellant. Having stated the uncontroversial proposition from Hume that a person cannot be convicted of a crime on the uncorroborated testimony of one witness, however credible, the Lord Justice Clerk went on (at page 53) as follows:

> *"In my opinion, this judgment proceeded upon a misconception as to the true character of corroboration. 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,*

but an exception is allowed in the case of sexual assaults upon women and children, including sexual offences against young boys. In cases of that kind the Court will allow the evidence of complaints or statements de recenti *made by the injured party, for the limited purpose of showing that the conduct of the injured party has been consistent and that the story is not an afterthought, and, in the case of assaults upon women, to negative consent. A complaint* de recenti *increases the probability that the complaint is true and not concocted, and the absence of complaint where sexual offences are alleged is always a material point for the defence. But it must be clearly affirmed that the evidence is admissible as bearing upon credibility only, and the statements of an injured party, although made* de recenti *of the commission of a crime, do not in law amount to corroboration. ... A statement of the injured party de* recenti *is nothing but the statement of the injured party, and it is not evidence of the fact complained of."*

It followed that *M'Crindle* and *M'Lennan* had proceeded upon (or had purported to proceed upon) a misconception of the true character of corroboration.

86. Against that procedural and factual background of the case, the striking aspects of the discussion in *Morton* on *de recenti* statements are that: (i) it was irrelevant to the point of law to be decided; and (ii) there was in any event no attack by counsel on the probative value of the *de recenti* statement spoken to by the brother. When the evidence is actually considered, this lack of attack is hardly surprising: the brother did not give evidence about the identity of the man who had attacked his sister and the Crown did not seek to corroborate identity by way of that *de recenti* statement. Indeed, the Crown's express position was that the complainer's evidence alone, on the question of identification, was sufficient. That was an incorrect submission at the time and remains an incorrect submission today. It is accepted by the Crown that the identity of the perpetrator of a crime requires corroborated evidence. There having been no other source of evidence identifying the accused as the perpetrator, the court in *Morton* was correct to quash the conviction.

87. Where *Morton* went wrong was in its *dicta* on *de recenti* statements, which have been followed since and have been *"ingrained into the consciousness of every law student and practitioner in the second half of the 20th century"* (*Lord Advocate's Reference No 1 of 2023* at paragraph 227). But as can be seen from the pre-Morton cases, from the Institutional Writings – and indeed from the lack of objection from the defence to the eliciting of the evidence and from the sheriff's jury charge at Morton's trial – the settled position before *Morton* was that such statements, when a consequence and continuation of the *res gestae*, were capable of corroborating the complainer's account. There is nothing in *Morton* to suggest that the Full Bench was aware of that line of authority still less just how settled a line of authority it was. The failure to note it and instead to take the entirely different tack that such statements spoke to consistency only is entirely unexplained. There is simply nothing in *Morton* nor in the cases that immediately preceded it that would sanction or explain such a departure from the principles which had been settled since the time of the Institutional Writers and which had been applied consistently throughout the nineteenth and earlier twentieth centuries.

88. Proceeding, for sake of argument, as if the appeal had turned on the *de recenti* statement, the complainer's statement to her brother when she returned home should have been treated as a consequence and continuation of the *res gestae* and thus corroborative for the following reasons:

(i) It was made within the space of around an hour of the assault and was made just after escaping from her attacker;

(ii) It was an outpouring of what had happened rather than a narrative upon reflection, as evidenced by her having given an incomplete account to her brother owing to her still unsubsided feelings caused by the assault; and

(iii) It was made in her home, to where she was in any event going, and in which she was desperate to seek refuge: a particular type of *de recenti* statement that had always been admitted in Scottish criminal cases (see, e.g., Alison at vol

ii, page 515; *Murray* (1866) 5 Irvine 232; *Greer v County Road Trustees of the County of Stirling* (1882) 9 R 1069; *M'Lennan v HM Advocate* 1928 JC 39; *M'Crindle v MacMillan* 1930 JC 5).

The complainer's statement was thus intimately bound up with the events. Even had the complainer exhibited no distress, such a statement, in such circumstances, ought to have been treated as evidence of fact. It was, in the words of *Lord Advocate's Reference No 1 of 2023*, a true *de recenti* statement. It ought, applying the settled principles of the previous hundred and fifty or so years, to have been corroborative. There is no explanation in *Morton* as to why it was not and why the court in *Morton*, without recognising that it was doing so, chose to depart from those settled principles and to excise an entire category of corroborative statements from Scots law. For that reason, *Morton* erred and should be overruled. *M'Crindle* should not have been overruled and *M'Lennan* should not have been disapproved.

89. Finally, it is necessary to mention one final aspect of *Morton*, namely the "*slight anomaly*", as it was put in *Lord Advocate's Reference No 1 of 2023* at paragraph 223, that a *de recenti* statement, while not corroborative of a complainer's account, could "*negative consent*" in the cases of assaults on women. In the research for these References, the Crown was unable to identify any pre-*Morton* case to support that proposition and the *Morton* court itself cites no authority for it. The Crown's objection is to the fallacy that something can corroborate a lack of consent but not the event to which the complainer says she did not consent; it is precisely the same error of avoiding the logical consequence of a proposition which underpinned the holding *in Smith v Lees* 1997 JC 73 on distress. As was said in *Lord Advocate's Reference No 1 of 2023* (at paragraph 223), if a statement can negative consent, it must be evidence of that fact.

90. For all of these reasons, the obiter dicta on *de recenti* statements in Morton should be overruled by this court.

PART 4: THE RES GESTAE IN THE COMMONWEALTH AND IRELAND

91. The foregoing is sufficient basis for the Court to overrule *Morton* and as is clear from the above, the Crown's submission is made solely within the four corners of the existing Scots law authorities. However, it is important to note that an extended approach to the *res gestae* and a recognition of the corroborative value of statements made in consequence and continuation of the *res gestae* would not place Scots law out of step with the approach taken in the rest of the common law world. In the Commonwealth and Ireland it has long been recognised that the *res gestae* extends beyond statements made which are absolutely contemporaneous with the facts in issue and that statements made, in some cases hours after the event, are also admissible as evidence of fact, where they remain intimately bound up with the event itself and the possibility of concoction or distortion can be reasonably discounted. Further, in a number of jurisdictions, legislative reforms have further widened the scope of hearsay statements which can be admitted as proof of the facts stated therein.

92. Given the comments of this court in both *Cinci v HM Advocate* 2004 JC 103 and *O'Shea v HM Advocate* 2015 JC 201, in which the court referred to comparative developments in relation to the *res gestae,* the Crown has produced below a short survey of the position across the Commonwealth and Ireland. The Court is not asked to change Scots common law to adopt the approach in the Commonwealth, nor to import any foreign legal doctrines; rather these authorities are produced to demonstrate that the Scots law position pre-*Morton* was broadly consistent with the approach taken in other jurisdictions.

Common law

93. Whilst historically, the courts in other jurisdictions had historically taken a restrictive approach to the *res gestae* (akin to that of this court in *Cinci*), that approach

changed with the decision of the Privy Council in *Ratten v R* [1972] AC 378 at 391. In *Ratten,* Lord Wilberforce made clear that the relevant test is not whether a statement is directly part of the event or transaction but whether the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Of note, Lord Wilberforce relied on the opinion of the Lord President (Normand) in *O'Hara v Central SMT* 1941 SC 363 – analysed in *Lord Advocate's Reference No 1 of 2023* at paragraphs 72-73 and 227 – in reaching this conclusion. The approach in *Ratten* was developed by the House of Lords in *R v Andrews* [1987] AC 281. From 300H, Lord Ackner summarised the English common law's approach to the *res gestae*. The primary question is whether the possibility of concoction or distortion can be disregarded. That may be the case when the event in question was so unusual or startling or dramatic as to dominate the thoughts of the victim so that his or her utterance is instinctive, with no opportunity for reasoned reflection. On such an approach the time factor is relevant but not determinative as to whether a statement should be admitted as proof of its contents.

94. The approach set out in *Ratten* and *Andrews* has found favour in the rest of the Commonwealth and Ireland. In all of the jurisdictions surveyed (with the exception of South Africa, discussed below), the House of Lords' approach has been cited with approval and taken as the starting point for the modern approach to *res gestae*. See, in particular: *McGuinness v DPP* [2017] NICA 30 (Northern Ireland); *Lonergan v DPP* [2009] IECCA 52 (Ireland); *Walton v R* [1989] HCA 9 (Australia); *R v Olamoe* 2005 3 NZLR 80 (New Zealand); and *Queen v Deelespp* 2002 ABPC 85 (Canada). In South Africa, whilst no reference appears to have been made to *Ratten* or *Andrews*, the common law did admit *res gestae* statements on materially the same basis: in circumstances where there has been a stressful event and the stress of that event remains operative such that it can be assumed that the witness's reflective powers are in abeyance: *S v Tuge* 1966 (4) SA 565 at 569. In some jurisdictions, the approach in *Ratten* and *Andrews* has been codified by statute. See, in particular: section 118(4)(a) of the Criminal Justice Act 2003 (England and Wales); Article 22 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Northern Ireland); and section 35 of the Evidence Act 2006 (New Zealand).

95. The wider approach to the *res gestae* has allowed for the admission of various types of evidence across the common law jurisdictions which would have been excluded by the Scottish courts on the application of *Cinci*. By way of illustration, the following have all been accepted as falling within the *res gestae*:

(i) Calls by victims of domestic violence to the emergency services: *Barnaby v DPP* [2015] 2 Cr. App. R. 4 (England); *R v S* [2018] 4 WLR 24 (England); *Ibrahim v CPS* [2016] EWHC 1750 (Admin) (England); *DPP's Ref No 6 of 2019* [2020] NICA 8 (Northern Ireland); *DPP v Connorton* [2023] IESC 19 (Ireland); *Janif v New Zealand Police* [2014] NZHC 2753 (New Zealand); *Queen v Badger* 2019 SKPC 43 (Canada).

(ii) Statements made to the police after their arrival at the scene, including up to three hours after the incident in question: *Barnaby v DPP* [2015] 2 Cr. App. R. 4 (England); *Higgins v CPS* [2015] EWHC 4129 (Admin); *McGuinness v DPP* [2017] NICA 30 (Northern Ireland); *R v Edwards* [2003] NICA 11 (Northern Ireland); *R v Olamoe* 2005 3 NZLR 80 (New Zealand); *R v Wilson* CA429/03 (New Zealand); *Simpson v The Queen* 1999 CanLII 780 (Canada); *R v Johnston* 2016 MBQB 167 (Canada); *R v Sparks MacKinnon* 2019 ONSC 730 (Canada).

(iii) Statements made to those providing medical care to a complainer after the incident: *DPP v Foley* [2013] IECCA 90 (Ireland); *Simpson v The Queen* 1999 CanLII 780 (Canada); *R v Praljak* 2012 ONSC 5262 (Canada).

(iv) Statements made to neighbours after assaults which took place in the home: *Janif v New Zealand Police* [2014] NZHC 2753; *R v Wright* CA CA43/06 (New Zealand); *R v Degale*, 2023 ONCJ 152 (Canada).

(v) Statements made by complainers some time after the incident, after they had left the *locus*: *R v Kadbil* [1999] WASC 67 (Australia); *R v Lugela* 2020 ABCA 348 (Canada).

(vi) A statement made to a police officer after being woken up by that officer some time after the incident in question: *R v Singleton* [2003] NICA 29 (Northern Ireland).

(vii) A statement by an individual to a witness that he had won the lottery some twelve hours after the lotto draw: *Walsh v Walsh* [2017] IEHC 181 (Ireland).

(viii) Evidence has been admitted of statements made at a variety of times after the incident in question. As noted by the Supreme Court of the Northwest Territories in *R v Oliver* 1996 CanLII 3626 (NWT SC) at paragraph 19: *"in some circumstances, a few seconds will be more than enough time to permit concoction and in others, a period of hours will not be too long."* As noted above, it has extended as far as twelve hours after the incident in question.

Legislative reform

96. In a number of jurisdictions, the legislature has gone further than the common law in permitting hearsay statements to be admitted as proof of their facts. In particular:

(i) In England and Wales, a statement made voluntarily by an alleged victim of an offence to another party which amounts to a complaint of unlawful conduct is admissible for the proof of the facts contained therein (regardless of when it was made), provided the witness also gives oral evidence: section 120(7) of the Criminal Justice Act 2003.

(ii) Northern Ireland adopts materially the same position as England and Wales: Article 24 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004.

(iii) In Australia, if a witness is not available, a hearsay statement can be admitted as evidence of fact if the statement was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the statement is a fabrication: section 65(2)(b) of the Evidence Act 1995. The phrase "*shortly after*" within the statute has been interpreted as allowing for a longer gap between offence and statement than the common law would have otherwise allowed: *Conway v The Queen* [2000] FCA 461 at paragraph 133.

(iv) In South Africa, any hearsay statement may be admitted as evidence of fact, provided that the court is satisfied that it would be in the interests of justice to do so (having regard to various statutory considerations): section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

PART 5: IDENTIFICATION

97. Question 2 in each Reference asks:

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?*

98. As stated in the introduction, the answer to this question should be yes, if the statement is made as a consequence and continuation of the *res gestae*, for three reasons.

99. First, if there is an emphatic positive identification from a complainer very little else is required to corroborate this evidence, as long as that 'little else' is evidence which

is consistent in all respects with the positive identification evidence which has been given: *Ralston v HM Advocate* 1987 SCCR 467 at 472; *Ready v HM Advocate* 2009 SCCR 380 at para 13.

100. Secondly, if a *de recenti* statement is corroborative of a complainer's account of the commission of a crime, there is no principled reason why it should not be corroborative of the complainer's account of who committed it. If that were not so, then as a matter of practice it would be impossible for judges to direct juries that the statement 'John Smith raped me' is only corroborative of the fact that the complainer has been raped, not that John Smith was responsible. *M'Crindle* provides a good example of a case where the two go hand in hand: the complainer immediately upon returning home told her parents what had happened and who had done it. *Cinci* is another good example. As *Lord Advocate's Reference No 1 of 2023* succinctly summarised (at paragraph 203), in *Cinci* the complainer was "scrunched up" in the corner of a shower in which the appellant was still present and also naked, and said, "he raped me". If, as *Lord Advocate's Reference No 1 of 2023* properly observed, it defied common sense that the statement was not evidence of the fact of rape, it then it would equally defy common sense if the statement were not evidence that the accused was the person responsible.

101. Thirdly, this was the approach taken before *Morton*: see *Gibbs* (1836) 1 Swin 263 (at paragraph 47 above); *Alexander* (1838) 2 Swin 110 and *Barr* (1850) J Shaw 362 (both at paragraph 50 above).

PART 6: THE CASES FROM WHICH THESE REFERENCES ARISE

102. Accepting that a *de recenti* statement will be corroborative, in the absence of distress, when it is either part of the *res gestae* or a consequence and continuation of the *res gestae*, avoids the problem counselled against in *Lord Advocate's Reference No 1 of 2023*: the previous tendency in Scots criminal law to categorise, sub-categorise, over-analyse,

and generally complicate the issue of the use to which evidence may be put (para 234). It also avoids any need to determine, in advancing of directing a jury, whether a statement is part of the *res gestae* or one that is a consequence and continuation of the *res gestae*.

103. As such, it is unnecessary in the two cases from which these References arise for the Court to determine whether, in the first case, the complainer's statement to his stepfather was a *res gestae* statement or a statement which was a consequence and continuation of the *res gestae*; and whether, in the second case, which of the statements the complainer made to the passers-by and then police officers were *res gestae* statements and which were statements that were a consequence and continuation of the *res gestae*.

104. For the first case, the authorities set out in Part 2 of these submissions make clear that a wide latitude was to be accorded to child complainers and that statements made some days from the crime were admitted as corroboration of the child complainer's account. It is readily understandable that, at a distance of over thirty years, the complainer, CO, was not able to say precisely how soon after the alleged incident he spoke to his stepfather. But the evidence was that the boys visited their mother every other weekend and every Monday night so the timeframe in which the statement would have been made was necessarily a narrow one, and it was accepted by the trial judge that the complainer's statement to his stepfather was a *de recenti* statement: the only issue at trial was whether it was corroborative, the trial judge ruling that, on the basis of *Morton*, it was not. Having regard to the wide latitude accorded to child complainers and the fact that the complainer's statement was a spontaneous and unprompted statement to his stepfather, it may be reasonably said that it was a statement made at the very least in consequence and continuation of the *res gestae* by a child still processing what, it was alleged, had happened to him.

105. In the second case – where the complainer, SL, immediately told passers-by what she said happened and then, in the course of the night, repeated that account to the police – it is unnecessary to separate the statements into those that would be *res gestae*

statements and those that would be statements made in consequence and continuation of the *res gestae*. Both would have been corroborative even in the absence of distress.

106. The Crown does, however, accept that, as was the position before *Morton*, by the time the complainer came to be giving a full statement to the police (in the traditional question-and-answer way) her account had become a narrative and thus such a police statement could not fairly be said to be either a *res gestae* statement or a statement in consequence and continuation of the *res gestae*. Beyond that limit, it is the Crown's submission that every case of this kind falls to be considered on its own facts and, when it is accepted by the trial judge that the statement falls into one of the two categories, a jury need only be directed that a *de recenti* statement of this kind is corroborative of the complainer's later evidence given in court. That applies where the statement is about the commission of the crime, the identity of the perpetrator or both.

PART 7: CONCLUSION

107. It is appropriate in concluding these submissions to set out the Crown's understanding of what the combined effect of these References and *Lord Advocate's Reference No 1 of 2023* would be, if the court were to answer the questions posed in these Reference in the manner advocated by the Crown.

108. The Crown agrees with what the court said in *Lord Advocate's Reference No 1 of 2023* that hitherto there has been a tendence to categorise, sub-categorise, over-analyse and generally complicate the issue of the use to which evidence may be put. Instead, as the court went on to observe, the rules of evidence must be clear and simple, and capable of being applied in a myriad of different factual situations (paragraph 234).

109. In the Crown's submission, the combined effect of *Lord Advocate's Reference No 1 of 2023* and these Reference is straightforward and meets this aim:

i. What requires to be proved by corroborated evidence is the case against the accused. That is, first, that the crime, which is libelled, was committed and secondly, that it was the accused who committed it (*Lord Advocate's Reference No 1 of 2023* at paragraph 235).

ii. There is no requirement to prove the separate elements in a crime by corroborated evidence (*ibid*).

iii. Distress which is observed by a third party *de recenti* is capable of corroborating a complainer's account that she has been raped (or otherwise subjected to a sexual crime) (*ibid* at paragraph 236). There is, however, no fixed time period in which the distress must be seen (*Moore v HM Advocate* 1990 JC 371 at 376-377; *Hogg v HM Advocate* 2024 JC 54 at paragraphs 63-64).

iv. The words spoken by a complainer while in a state of distress can also be used to link the distress to the offence (*Wilson v HM Advocate* 2017 JC 135 at 142; *Hogg* at 65).

v. A *de recenti* statement is corroborative when it is part of the *res gestae* or a consequence and continuation of the *res gestae*. Although such statements may well be accompanied by distress, to be corroborative they do not need to be.

vi. Such statements are admissible for the truth of their contents, whether about the identity of an accused or the act alleged to have been committed.

vii. Generally, a *de recenti* statement will stop being the consequence and continuation of the *res gestae* when it 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), such as in a formal police statement.

110. For all of the foregoing reasons, the Crown respectfully invites the Court to answer the questions posed in the References as follows:

i. A *de recenti* statement is corroborative when it is part of the *res gestae* or a consequence and continuation of the *res gestae*. It does not need to be accompanied by distress.

ii. If a *de recenti* statement refers (directly or by inference) to the accused as being responsible for the crime, it can corroborate the complainer's subsequent evidence both that the crime libelled was committed and that it was the accused who committed it. This is subject to the same qualification that the statement in question must be part of the *res gestae* or a consequence and continuation of the *res gestae*.

iii. A *de recenti* statement stops being corroborative when it is no longer the consequence and continuation of the *res gestae*.

iv. *Morton v HM Advocate* 1938 JC 50 was wrong in holding that a *de recenti* statement is admissible as bearing upon credibility only. It should therefore be overruled.

The Lord Advocate (Dorothy R Bain KC)

Paul Harvey, AD

Dominic Scullion, Advocate

David Blair, Advocate

8 May 2024