

Res gestae statement

Law

Walkers on Evidence, 3rd ed, paragraphs 8.5.1 – 8.5.3, Davidson, *Evidence* paragraphs 12.20ff, Raitt, *Evidence* 4th ed, paragraphs 11.17 – 11.23

1. Traynor, *Latin Maxims* (4th ed, W Green 1894) 551 – 552 defines *res gestae* as “The thing done; the whole transaction or circumstance;” adopted in [Lord Advocate’s References Nos 2 & 3 of 2023 \[2024\] HCJAC 43, 2024 SLT 1207](#). It is not only the act constituting the crime, but everything said or done at the time bearing upon, or having reference to, it. It includes but extends beyond the *actus reus*; *Lord Advocate’s References Nos 2 & 3 of 2023* at paragraph [52]. Another contemporary explanation is found in [Bennett v HM Advocate \[2020\] HCJAC 12, 2020 JC 191](#) at paragraph [13]; the *res gestae* is, “the whole thing that happened.” [O’Shea v HM Advocate \[2014\] HCJAC 137, 2015 JC 201](#) illustrates how the *res gestae* can extend beyond the conclusion of the act constituting the crime. Statements made almost immediately afterwards in response to it constitute evidence admissible to prove fact.

2. An utterance forming part of the *res gestae* is proof of fact; *O’Shea* at paragraph [41]. The facts it can prove include both commission and identification; *Lord Advocate’s References Nos 2 & 3 of 2023*, at paragraphs [53], [106] to [109], [111], and [143]. Anything spoken or written by one accused (or indeed anybody) relevant to proof of the commission of the crime and/or its perpetrators and forming part of the *res gestae* is admissible in evidence against all of the accused ([McGaw and Reid v HM Advocate \[2019\] HCJAC 78](#) at paragraphs [36] to [37]; *Bennett* at paragraphs [12] to [14]; and [Representatives of Megrahi v HM Advocate \[2021\] HCJAC 3, 2021 SLT 73](#) at paragraph [72]).

3. Where there is evidence of written communications such as text, Facebook or WhatsApp messages which were part of the commission of the offence and form part of the *res gestae*, the contents are capable of incriminating all the accused, whether or not a particular accused sent or received the communication, since they are pieces of evidence capable of showing what was going on and who was involved. There is no need for the crown to prove concert in advance or that the accused whose case is under consideration was at that time acting in concert. The content of, for example, messages may themselves ultimately prove that the accused were

acting in concert and so guilty of the crime. (See *McGaw and Reid* paragraphs [36] to [37], and [Bennett v HM Advocate \[2020\] HCJAC 12, 2020 JC 191](#) paragraphs [12] to [14]).

4. Unless forming part of the *res gestae*, a statement made after the commission of the crime by an accused is evidence only against the accused who made it. (Dickson, *The Law of Evidence in Scotland*, (3rd ed, 1887), Vol 1 paragraph 363.) If, after the crime has been committed, a statement which is not part of the *res gestae* is made to the police, or anyone else, outwith the presence of another accused, it is inadmissible against that other accused. ([Jones v HM Advocate 1981 SCCR 192](#)); This part of the *res gestae* exception is confined to evidence of things said in furtherance of the common purpose or spontaneous response to its occurrence and excludes a narrative of past occurrences (Dickson, 3rd ed Vol 1 at paragraph 254.) Broadly speaking, it does not apply to statements, claims, or allegations made after the common purpose has been achieved or failed ([Johnston v HM Advocate \[2011\] HCJAC 32, 2012 JC 49](#) where a statement by the co-accused implicating Mr Johnston was heard four days after the murder).

It is suggested that the distinction drawn in Dickson, *The Law of Evidence in Scotland* (at paragraphs 254 and 363) between utterances forming part of the *res gestae* and subsequent confessions or narratives of past conduct, may be a refinement of this broad principle.

Where dealing with a co-accused's utterance made after the *actus reus* but within *res gestae*, judges will need to consider its nature carefully. If it comes within Dickson's description of a confession or narrative of past conduct it is probably not admissible as *res gestae*.

"Even in cases of conspiracy any statement by one prisoner, which is either a narrative of measures already taken, or a confession of the crime charged, cannot be used against a co-conspirator. On the other hand, all words uttered, or documents issued by one conspirator in furtherance of the common design, and those which accompany acts of that description, and so form part of the *res gestae*, may be used against all the other prisoners, provided there be *prima facie* proof that they engaged in the plot."

Where what an accused was heard to say was really conduct, such as giving an instruction, it may well be admissible against others. Dickson vol 1 at paragraph 254:

"Statements, which would otherwise be excluded as hearsay, may be proved when they form part of the *res gestae* of acts given in evidence. The reason is that words which accompany acts, or which are so connected with them as to arise from co-existing motives, form part of the conduct of the individual, which cannot be right understood, unless his words as well as his acts are proved."

Dickson continues in paragraph 254 to examine *res gestae* utterances, explaining:

"Yet it is not necessary that they may 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 this 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 scope of the *res gestae*

5. In *Lord Advocate's References Nos 2 & 3 of 2023*, the Lord Justice General examined the scope of the *res gestae* at paragraphs [89] to [92], encapsulating at [102]:

"The scope of what will constitute *res gestae* is relatively clear from *O'Hara v Central SMT*. What is needed is a close association between the words, or activity, and the event (crime)."

In *O'Shea*, a case of murder by stabbing of one man and attempted murder of another, the court concluded that the *res gestae* commenced when the appellant ran out of the pathway of a house and chased the deceased even though that chase with a knife was not libelled in a charge. The jury would have been entitled to conclude that it ended when he returned to that house.

An object had been thrown through the window of the house the appellant shared with a witness, Ms Rooney. Another witness, Ms Gribben, met Ms Rooney outside the house shortly afterwards, observed that Ms Rooney was frantic, screaming and crying, and heard her say: "They bastards smashed my window" and "My man's down there." The witness said Ms Rooney was looking towards where the two assaults occurred. All of this was admissible as part of the *res gestae*, even though Ms Rooney denied making the comments about "her man".

The court explained at paragraph [40]:

"It is also reasonable to hold that the jury would have been entitled to conclude that the incident only ended when the appellant returned to the house from which he had emerged in the first place. Competent evidence could therefore be led about what had happened before then in order to explain both the circumstances of the murder, and the attempted murder, and to identify the perpetrator. This would include the fact that Mrs Rooney, the appellant's partner, had emerged from her house at or about the same time as the appellant and was in a frantic or hysterical state. That state, and indeed her presence on the road, could only be explained by hearing evidence of what she was complaining about. That evidence in turn revealed that she was frantic because she thought that her partner, the appellant, had chased the deceased and the complainer into Bridge Street. Her state, coupled with her explanation to Miss Gribben, pointed towards the reason for, and the appellant's involvement in, the incident. All of this was capable of being used as proof of those facts and thus of being corroborative of the complainer's identification of the appellant."

6. In [*Lord Advocate's Reference No 1 of 2023* \[2023\] HCJAC 40, 2024 JC 140](#), a full bench of seven judges endorsed *O'Shea* and overruled [*Cinci v HM Advocate* 2004 JC 103](#) in which the court suggested that the *res gestae* for a rape charge had ended as soon as sexual intercourse concluded. The full bench in the reference affirmed the correctness of the trial judge's directions in *Cinci* and the opinion of Lord President Normand in [*O'Hara v Central SMT Co Ltd* 1941 SC 363](#) at page 381 from which they derived.

The relevant circumstances in *Cinci* are summarised at paragraph [131] of the reference:

"Concerned staff appeared and heard mumbling sounds; prompting them to ask if everything was alright. The appellant said, 'Yes', but the complainer said, 'No', and then, 'No – help me!' The cubicle was opened. The appellant and the complainer were both naked. The complainer immediately said, 'He raped me'. She was 'scrunched up' in a corner of the shower 'very upset and crying'...."

The full bench concluded that a staff member speaking to the complainer saying "he raped me" was admissible evidence to prove fact and that the trial judge was correct in so directing the jury. She had done so on the basis that they were said during an extension of the *res gestae*.

7. In many cases, it will be clear that a statement or message does or does not form part of the *res gestae*. It will be a matter of law for the judge to determine. There may be other situations where it may be a question of fact for the jury to resolve under direction. That possibility appears to have been contemplated in the opinion of the court in *O'Shea*; see paragraph [40] quoted above.

It may not be especially helpful to the jury to ask them only to determine whether a statement was "part of the whole circumstances" or "part of the whole thing that happened." The cases suggest that what is said by participants and bystanders at the time, and utterances made shortly afterwards which are spontaneously made and prompted by what has happened or is still happening, come within *res gestae* but a report made after time for reflection does not.

8. An utterance made *res gestae*, can corroborate another source of evidence. However, if there is only one witness identifying the accused and that witness is also speaking to the *res gestae* utterance, there is only one source. Corroboration would need to originate from a different source. *Lord Advocate's Reference Nos 2 & 3 of 2023* establishes that a witness hearing a complainer's *res gestae* or *de recenti* utterance is a second source of evidence available to corroborate the evidence of the complainer. The reporting witness's evidence of what was said is capable complainer's evidence of commission and identification.

9. An illustration of an accused person saying something being regarded as incriminating **conduct** rather than constituting a statement is seen in [*Campbell v HM Advocate* 1998 JC 130](#) in the leading opinion of Lord Justice Clerk Cullen at 232. As such, it was not from the same source as Campbell's admission to the police and could provide corroboration for it. The circumstances and conclusion are narrated in the case report. The advocate-depute was the now Lord Reed:

"...The advocate-depute submitted that it could reasonably be inferred from the evidence of Love that Campbell was a party to a plan to fire a shot-gun at the van and its occupants. His thanking Love implied that Love had done a job for him, and to his satisfaction, and that the 'message' was the attack on the van. The reference to squaring up with him once things quietened down suggested that the 'message' was of a criminal nature. The advocate-depute went on to submit that Love's evidence as to what Campbell said to him should not be categorised as an admission of guilt, and hence as a statement from the same source as his statement to the police. Love was giving evidence

as to a fact which formed part of the sequence of events by which a criminal purpose was worked out. Evidence of an accused giving an instruction, making a promise or expressing his thanks in circumstances which were directly related to the commission of a crime should be regarded as incriminating conduct rather than an admission of past conduct.

In my view the advocate-depute was well founded in his submission that the evidence of Love should be regarded as providing evidence of incriminating conduct on the part of Campbell. Accordingly, his evidence provided a separate source of evidence against Campbell in addition to the statement which the police witnesses attributed to him, and there was no misdirection by the trial judge in this respect...."

Possible form of direction on *res gestae* statement

NB, before directing on the effect of *res gestae* a judge should consider point 8 above on the corroborative effect of an utterance *res gestae*.

Different specimen directions follow from which judges can select and amend according to the circumstances of the case. There is some overlap between them, and it will be for trial judges to work out how to direct the jury appropriately in the particular circumstances of the case.

Communications in preparation for the commission of the crime and in its commission

There has been evidence from the witness [X] who heard / you have seen electronic messages which suggest [Y]...

What is said or written by an accused or anyone else which is part of the preparation for commission of the crime is available as evidence to implicate the accused in the commission of the crime [*where appropriate: itself or as acting in concert with others in its commission*]. If those statements/messages were made/sent prior to or at the time of the events giving rise to the charge, they are available as evidence against [*where appropriate: each of*] the accused. It is evidence in the case which can prove facts and from which you can draw inferences.

It is an independent piece of evidence. It can corroborate other evidence against the accused or be corroborated by other evidence.

Where it is clear that an utterance was made *res gestae* in the sense of occurring during the incident in which a crime was committed

There has been evidence from the witness [X] who heard [Y].

That was something said as part of the incident giving rise to the charge.

It is evidence in the case which can prove facts and from which you can draw inferences. It is an independent piece of evidence in the case. It can corroborate other evidence against the accused or be corroborated by other evidence.

Where it is a jury question whether an utterance was part of the *res gestae* for example when it occurred after the conclusion of the *actus reus* but could still be *res gestae* depending on what view the jury take of the evidence

There has been evidence from witness [X] who heard [Y] say...

That is something said which you could consider to be part of the incident giving rise to the charge.

If you conclude that these were spontaneous remarks prompted by the events unfolding and part of the whole thing that happened, it is evidence in the case which can prove facts and from which you can draw inferences. It is an independent piece of evidence. It can corroborate other evidence against the accused or be corroborated by other evidence.