



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 43
HCA/2023/24/XM
HCA/2023/25/XM

Lord Justice General
Lord Justice Clerk
Lady Paton
Lord Pentland
Lord Matthews
Lord Boyd of Duncansby
Lady Wise
Lord Armstrong
Lord Beckett

OPINION OF LORD CARLOWAY,
the LORD JUSTICE GENERAL

in the References by

HIS MAJESTY'S ADVOCATE

Appellant

against

PG and JM

Respondents

Appellant: The Lord Advocate (Bain KC), Harvey AD, Scullion, D Blair; the Crown Agent

Respondent (PG): McCall KC, Crowe, Lawrie; Central Court Lawyers, Livingston

Respondent (JM): MD Anderson KC, Cloggie, Loosemore; PDSO

30 October 2024

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Introduction

[1] *Lord Advocate's Reference No 1 of 2023* 2024 JC 140 determined, first, that, contrary to earlier authorities, the *de recenti* distress of a complainer, which was spoken to by a third party, was capable of corroborating the complainer's testimony that she had been raped; ie including the fact of penetration. Secondly, a *de recenti* statement of a complainer, when coupled with distress, was, again if spoken to by a third party, capable of corroborating the complainer's testimony generally. The court was not asked to analyse the corroborative effect of a *de recenti* statement beyond that.

[2] The Lord Advocate has brought two further references posing four related questions, *viz*, in summary:

- (1) Is a *de recenti* statement on its own corroborative, in the absence of distress;
- (2) Can a *de recenti* statement corroborate a complainer's testimony both that the crime was committed and that the accused committed it?
- (3) At what point does a statement cease to be *de recenti*, and hence corroborative, and become instead inadmissible hearsay?
- (4) Should *Morton v HM Advocate* 1938 JC 50 be overruled?

The Trials

PG

[3] On 27 November 2023, PG went to trial at the High Court in Livingston on two charges of lewd, indecent and libidinous practices towards two brothers, namely CO and DO, for whom he had been babysitting in 1990. The brothers were adults when they gave evidence, but there was evidence of *de recenti* statements made by CO about the events in the libel when he was still a child of about 6 or 7 years old. He had told his step father and the police had been contacted. He had spoken to police officers in the presence of his mother. CO could not say how close his report to his step father had been to the events. The step father, and CO's mother, confirmed that CO had reported the allegations to them. They said that CO told them what had happened in a matter of fact manner. He had not been distressed or upset by the events. According to his father, after CO had made the allegations, he was "quite quiet", which was uncharacteristic for him. In his father's view, this was indicative of distress.

[4] DO spoke to a single incident of lewd behaviour when he was aged 10 or 11. He had been spoken to by the police as a child, but had told them that nothing had happened to him. He did not report it until years later.

[5] The trial judge directed the jury that CO's condition, as spoken to by his father, could amount to distress and could thus corroborate what he said had happened to him. In accordance with *Lord Advocate's Reference No 1 of 2023*, the judge declined to direct the jury that the *de recenti* statements of CO to his step father and mother, in the absence of distress, could *per se* provide corroboration of CO's account. No issue about the proximity in time between CO's report and the alleged behaviour had arisen. The charges were found not proven.

JM

[6] On 20 November 2023 JM went to trial at the High Court in Edinburgh on a charge of rape in Princes Street Gardens in June 2022. JM and the complainer had climbed into the Gardens after a night out. The complainer said that this was so that they could relieve themselves. The complainer was drunk and fell over. The accused removed her clothing. The complainer's face was pushed into the ground. She was in pain and crying. The accused raped her. After she had been raped, the accused left the Gardens, saying that he had to return to his friends. The complainer left the Gardens without either shoes or underwear. Two passers-by spoke to her sitting at a bus stop and crying hysterically. She looked very dirty with mud on her legs, no shoes and scraped knees. She was reluctant to speak at first, but then said "I've been raped". She did not provide any details. The police were called.

[7] The Advocate depute addressed the jury on the basis that what the complainer had said to the passers-by was so bound up with what had happened in the Gardens that they could use that as corroboration. The trial judge directed the jury that this was not correct.

Although the distress was corroborative, the *de recenti* statement was not. The charge was found not proven.

Submissions

Crown

[8] The Lord Advocate invited the court to disapprove the *dicta* in *Morton v HM Advocate* 1938 JC 50 (at 53) that evidence of a complaint *de recenti* was admissible only for the limited purpose of showing that the complainer had been consistent and that her account was not an afterthought. It did not constitute corroboration. This was not supported by authority. Tracing the development of the law on *res gestae* and *de recenti* statements demonstrated that it was not correct. The two new References had begun where *Lord Advocate's Reference No 1 of 2023* had ended. They followed the court's comment (at para [231]) on the illogicality of the *dicta* to the effect that evidence which could support or confirm a complainer's account could not corroborate it. *Morton* had erred in a more fundamental sense, in relation to *de recenti* statements and the *res gestae*. It failed to draw a distinction between statements which were a consequence and continuation of the *res gestae* and those which were not.

[9] Each of the Institutional Writers started with a general account of the law of evidence, before dealing with different rules for different crimes and separate categories of complainer. Burnett: *Criminal Law* (1811) stated (at 519) that evidence of what a witness had said to another person recently after the crime could not supply corroboration. He went on to state (at 553 - 554) that the "recency and manner" of a complaint was of evidential weight. In his treatment of *res gestae*, as an exception to the prohibition of hearsay, he explained (at 600) that a statement which was part of the *res gestae*, being expressive of feelings at the

time, was a material fact. Such a statement, when given *de recenti* by a complainer, was corroborative.

[10] Hume: *Commentaries* (4th ed, 1844, ii, 406 fn 1) referred to the admissibility of statements which are part of the *res gestae*, including what passed between witnesses, after the crime had been committed, in a search of the alleged perpetrator. He examined the situation of a rape complainer (*ibid* 407), whose account to her mother had resulted in certain actions being taken. The *res gestae* thus involved more than what had happened at the time of the crime (see *William Hardie* (1831) Shaw 237; *James Mills* (1844) 2 Broun 275).

[11] Alison: *Practice* (at 553), like Burnett, made a general statement that what a witness was reported to have said after the event was not corroborative, but he went on to refine his view under reference to specific crimes. On rape, he did not doubt (*Principles* 217, citing *James Burtney*, 18 November 1822 (unreported on this point) and *Thomas Mackenzie* (1828) Syme 323) that a complainer's *de recenti* statement was admissible given its "obvious importance". Alison did not specify any restriction on the use which could be made of such a statement. In *James Burtney* it was corroborative. Alison referred (*Principles* 219-220) to the importance of accounts given by a complainer and the support which they derived from other circumstances. The complainer's statement was "duly corroborated" by any physical evidence and then by her "subsequent disclosure" to her relatives or the authorities. A complainer was entitled to give her account and to "support" her testimony by the statements which she had previously given to others *de recenti* (*ibid* 224-225).

[12] When dealing with hearsay, Alison (*Practice* 510) referred to exceptions to the prohibition extending both to *de recenti* statements of injured persons and to exclamations by third parties which were part of the *res gestae*. The former could be led to "confirm", ie corroborate, the testimony of the complainer (*ibid* 513). In rape cases in particular, the

prosecutor was afforded the privilege of “confirming” the testimony of a complainer by witnesses to whom she had *de recenti* spoken (*ibid* 214). The privilege extended only to accounts which were “connected” with the *res gestae* or so recent to them that they formed “a sequel to the actual violence” (*ibid*). This could apply to accounts given to friends on the day, or on the following day, but not to strangers some days later. An account given *ex intervallo* (at a distance) would not be allowed. On *res gestae*, Alison included statements made so recently after the fact as to preclude “practising upon” the complainer (*ibid* 520). Statements made *de recenti* by a complainer and statements which formed part of the *res gestae* could both be proved to “confirm” a complainer’s testimony (*ibid* 526).

[13] The cases between Alison (1833) and Dickson: *Evidence* (1st ed: 1855) (*Duncan McMillan* (1833) Bell’s Notes (to Hume) 288; *William Grieve* (*ibid*); *James Gibbs* (1836) 1 Swin 263; *Robert Henderson* (1836) 1 Swin 316) confirmed Alison’s view. In *Henderson*, the jury were instructed that the complainer’s testimony was corroborated by, *inter alia*, the account which she had given to witnesses. What was *de recenti* was illustrated in a number of cases (*Neil Moran* (1836) 1 Swin 231; *Robert Tweedie* (1836) 1 Swin 22; *David Alexander* (1838) 2 Swin 110; *Donald Kennedy* (1838) 2 Swin 213; *Robert Fulton* (1841) 2 Swin 564; *John Barr* (1850) Shaw (J) 362; *John Stewart* (1855) 2 Irv 166). Evidence of exclamations by persons at the scene of an assault were admitted as part of the *res gestae*, when one was dead and the other untraced (*Ewing v Earl of Mar* (1851) 14 D 314). All these cases illustrated that: (i) the *res gestae* did not end with the commission of the crime, but extended to a short time afterwards; and (ii) *de recenti* statements were admissible and corroborative when given by a complainer after the crime, with a particular latitude being given in the case of sexual offences against women and the evidence of children. Statements were not admissible if the witness was not

competent (*Hill v Fletcher* (1847) 10 D 7; *AB v CD* (1848) 11 D 289; *Hugh McNamara* (1848) Ark 521).

[14] Dickson: *Evidence* (1st to 3rd eds: 1855, 1864; and 1887) was consistent with Alison. Dickson referred to statements being part of the *res gestae* when they accompanied acts, or were so connected with them as to arise from coexisting motives, which could not rightly be understood unless the words as well as the acts were proved (1st and 2nd eds Vol I, at para 92; 3rd ed at para 254). The statement and the acts had to occur *unico contextu*, but they did not have to be contemporaneous. The admissibility of *de recenti* statements from complainers was akin to *res gestae*. Such statements were a “consequence and continuation of the *res gestae*”. They were “the natural outpourings of feelings aroused by the recent injury, and still unsubsidied”. These could corroborate the complainer’s evidence (1st and 2nd eds at para 95; 3rd ed para 258). Although *de recenti* statements would normally be confined to ones made within hours, greater latitude was permitted in sexual offence cases where statements made at intervals of two days and almost a month had been permitted (Dickson, 1st and 2nd eds at para 98; 3rd ed para 261).

[15] Trayner: *Latin Maxims* (4th ed, 551 – 552) defined *res gestae* as not only the relevant act but everything said or done at the time bearing upon, or having reference to, it. It included all statements made immediately after the event if they were “so nearly connected with it in point of time as to be inseparable” from it in the sense that the act could not be understood without reference to them. The cases which followed the principle set out by Dickson (*John Thomson* (1857) 2 Irv 747; *James Reid* (1861) 4 Irv 124; *John Murray* (1866) 5 Irv 232; *James Simpson* (1870) 1 Coup 437; *Greer v Stirlingshire Road Trs* (1882) 9 R 1069; *Anderson v McFarlane* (1899) 1 F (J) 36) reflected his approach. In *Anderson*, the *de recenti* statement was the only corroboration.

[16] In the early part of the 20th Century, Dickson’s approach continued to be followed (*Gilmour v Hansen* 1920 SC 598 at 603; *Ovenstone v Ovenstone* 1920 2 SLT 83, overruled in *Barr v Barr* 1939 SC 696; *Livingstone v Strachan, Crerar & Jones* 1923 SC 794). *McLennan v HM Advocate* 1928 JC 39 and *McCrinkle v MacMillan* 1930 JC 56 were extensively analysed in *Lord Advocate’s Reference No 1 of 2023*. In *McLennan*, evidence of what a child complainer had said to his parents was regarded (at 41-42) as corroboration because it was a *de recenti* statement which was a “consequence and continuation of the *res gestae*”. In *McCrinkle*, the *de recenti* statement was corroborative of the accused’s identity. Thus, on the eve of *Morton v HM Advocate*: (i) *res gestae* included anything said or done at the time of the event or immediately thereafter, if it was an inseparable part of the event; (ii) words said as part of the *res gestae* were admitted as proof of fact, with no requirement for the maker of the statement to be a witness; (iii) in sexual offence cases, an account given by a complainer was admissible as proof of fact, if it was made *de recenti*; that is as a consequence and continuation of the *res gestae*, being an outpouring of feelings, and made so close to the crime that risks of self-reflection could be discounted; (iv) for a *de recenti* statement to be admissible, the complainer had to give evidence; and (v) these statements were corroborative; and (vi) they could be corroborative both of the commission of the crime and the identity of its perpetrator.

[17] In *Morton*, the Justiciary Papers revealed that the evidence from the complainer was that, after the assault, she had gone straight home and told a close relative¹ what had happened. She had not immediately called the police because of her extreme upset. The relative spoke to the complainer being in a state of excitement and telling them what had happened. There was evidence from a neighbour, who had heard the complainer screaming

¹ The Justiciary Cases report and the Justiciary Papers are inconsistent on precisely which relative (brother or mother) she spoke to.

at the scene, holding onto a railing with the assailant trying to pull her away. The complainer could identify the accused, but the neighbour could not. The appeal focused on the lack of corroboration of identification, but the court held that the complainer's *de recenti* statement could not corroborate the commission of the crime. Although the result in *Morton* was correct, as there was no corroboration of identity, the *dicta* on *de recenti* statements were wrong. They failed to take account of a well settled line of authority. It was difficult to find an explanation for *Morton* doing this. The *dicta*, to the effect that the statement could negative consent yet not be corroborative, were unsupported by authority and should be overruled. If a statement can negative consent, it must be evidence of fact (*Lord Advocate's Reference No 1 of 2023* at para [223]).

[18] An extended approach to the *res gestae* and a recognition of the corroborative value of *de recenti* statements would not be out of step with the approach in the Commonwealth and Ireland. The restrictive approach to *res gestae* (eg *Cinci v HM Advocate* 2004 JC 103) was changed by *Ratten v The Queen* [1972] AC 378 at 391 and developed in *R v Andrews* [1987] AC 281 (at 300). The test became one of whether the time lapse between event and report was such that concoction or distortion could be discounted; time itself not being determinative. This had been followed in: Northern Ireland (*McGuinness v Public Prosecution Service* [2017] NICA 30), Ireland (*Lonergan v DPP* [2009] IECCA 52); Australia (*Walton v The Queen* (1989) 84 ALR 59; New Zealand (*R v Olamoe* [2005] 3 NZLR 80); and Canada (*The Queen v Deelespp* [2002] ABPC 85). The *Ratten/Andrews* approach had been codified in England and Wales, Northern Ireland and New Zealand (Criminal Justice Act 2003, s 118(4)(a); Criminal Justice (Evidence) (Northern Ireland) Order 2004, art 22(4)(a) and the Evidence Act 2006, s 35(2)(b)).

[19] The following have been accepted as falling within the *res gestae*: (i) calls by complainers to the emergency services (*Barnaby v DPP* [2015] 2 Cr App R 4; *R v S* [2018] 4 WLR 24; *Ibrahim v Crown Prosecution Service* [2016] EWHC 1750 (Admin) (all 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); *The Queen v Badger* 2019 SKPC 43 (Canada)); (ii) statements to the police on arrival at the scene (*Barnaby v DPP*; *Higgins v CPS* [2015] EWHC 4129 (Admin) (both England); *McGuinness v DPP* [2017] NICA 30; *R v Edwards* [2003] NICA 11 (both Northern Ireland); *R v Olamoe*; *R v Wilson* CA429/03 (both New Zealand); *Simpson v The Queen* 1999 CanLII 6780; *R v Johnston* 2016 MBQB 167; *R v Sparks MacKinnon* 2019 ONSC 730 (all Canada)); (iii) statements to those providing medical care (*DPP v Foley* [2013] IECCA 90 (Ireland); *Simpson v The Queen*; *R v Praljak* 2012 ONSC 5262 (both Canada)); (iv) statements made to neighbours after domestic assaults (*Janif v New Zealand Police*; *R v Wright* CA43/06 (both New Zealand); *R v Degale*, 2023 ONCJ 152 (Canada)); (v) statements made by complainers some little time after the incident and when they had left the *locus* (*R v Kadibil* [1999] WASC 67 (Australia); *R v Lugela* 2020 ABCA 348 (Canada)); (vi) a statement made to a police officer on being woken some time afterwards (*R v Singleton* [2003] NICA 29 (Northern Ireland)); (vii) a statement that a person had won the lottery some twelve hours after the draw (*Walsh v Walsh* [2017] IEHC 181) (Ireland)); and (viii) statements made at various times after the incident, depending upon the circumstances (*R v Oliver* 1996 CanLII 3626 (NWT SC) at para 19) (Canada). Some jurisdictions had gone further in legislating to permit hearsay as proof of fact (2003 Act, s 120(7), (England); 2004 Order Art 24(7) (Northern Ireland); Evidence Act 1995, s 65(2)(b) (Australia), see *Conway v The Queen* [2000] FCA 461 at para 133; and Law of Evidence Amendment Act 45 of 1988, s 3(1)(c) (South Africa)).

[20] *O'Hara v Central SMT* 1941 SC 363 contained the correct approach on the termination of the *res gestae*. The key questions were whether the statement was made at the *locus*, immediately beside the *locus*, or just after the cessation of the *actus reus*. A statement which met one or more of these criteria formed part of the *res gestae*. A statement made at a later point would not form part of the *res gestae*, but, if made by the complainer, it could be admissible as *de recenti*. The starting point was the subjective perspective of the complainer, tempered by an objective assessment of whether the *res gestae* was finished.

[21] A *de recenti* statement should be available as corroboration of identity for three reasons. First, if there had been a positive identification, very little else was required (*Ralston v HM Advocate* 1987 SCCR 467 at 472; *Ready v HM Advocate* 2009 SCCR 380 at para [13]). Secondly, if a *de recenti* statement were capable of corroborating the commission of the crime, there was no reason in principle why it could not corroborate the identity of the perpetrator (*McCrinkle*; cf *Cinci*). Thirdly, this was the law pre *Morton* (see *James Gibbs*; *David Alexander*; *John Barr*). In the trials from which the new References emerged, the statement by CO in *HM Advocate v PG* was *de recenti* and thus corroborative. In *HM Advocate v SL*, the complainer's statements to the passers-by, but not later to the police, were similarly *de recenti* and corroborative. No other jurisdiction drew a distinction between corroboration of identification and corroboration of the crime. Such a dividing line was unknown in Scots law. It would complicate the law of evidence in the manner described in *Lord Advocate's Reference No 1 of 2023* (at para [234]). The accused had the safeguards of disclosure and legal representation.

[22] As was said in *Lord Advocate's Reference No 1 of 2023* (*ibid*), there had been a tendency to categorise, sub-categorise, over analyse and generally to complicate what use could be made of certain types of evidence. Instead, the rules of evidence should be clear and simple

and capable of being applied to a myriad different situations. As a consequence of the new References being answered as the Crown submitted, combined with the earlier Reference, matters would be simplified whereby: (i) what required to be proved by corroborated evidence was the case against the accused; that is, that the crime was committed and that it was the accused who committed it (*Lord Advocate's Reference No 1 of 2023* at para [235]); (ii) there was no requirement to prove the separate elements of a crime by corroborated evidence (*ibid*); (iii) distress which was observed by a third party *de recenti* could corroborate a complainer's account that she had been raped (or otherwise subjected to a sexual crime) (*ibid* at para [236]). There was no fixed time within which the distress must have been observed for it to be categorised as *de recenti* (*Moore v HM Advocate* 1990 JC 371 at 376-377; *Hogg v HM Advocate* 2024 JC 54 at 63-64); (iv) the words spoken by a complainer while in a state of distress could 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 was corroborative when it was part of the *res gestae* or a consequence and continuation of the *res gestae*, whether or not it was accompanied by distress; (vi) such statements were admissible as proof of their contents, whether about the identity of an accused or the act alleged to have been committed; and (vii) generally, a *de recenti* statement will stop being the consequence and continuation of the *res gestae* when it was made at a time and in a manner which allowed for concoction; including in a formal police statement.

[23] The questions posed in the References should be answered as follows: (i) a *de recenti* statement was corroborative when it was part of the *res gestae* or a consequence and continuation of the *res gestae*. It did not need to be accompanied by distress; (ii) if a *de recenti* statement referred to the accused as responsible for the crime, it could corroborate the complainer's subsequent evidence both that the crime libelled was committed and that it

was the accused who had committed it; (iii) a *de recenti* statement ceased to be corroborative when it was no longer the consequence and continuation of the *res gestae*; and (iv) *Morton v HM Advocate* was wrong in holding that a *de recenti* statement was admissible as bearing only upon credibility. It should therefore be overruled.

Respondents

[24] The Institutional Writers and the cases which followed vouched five broad propositions: (i) the *res gestae* was not limited to the duration of the event; (ii) statements which were within the *res gestae* were real evidence and could corroborate a complainer's testimony; (iii) the test for *res gestae* had two components; temporal proximity and spontaneity of expression; (iv) statements made when aroused feelings had subsided were not part of the *res gestae*; and (v) statements which were not part of the *res gestae* could not be used as proof of fact and hence could not be corroborative.

[25] Hearsay was generally inadmissible. An exception was where a statement formed part of the *res gestae* (Hume: (4th ed) ii, 406 fn 1; Burnett: 601-602; Alison: *Practice* 510, 517-518; Dickson: (3rd ed Vol 1, para 254). This was because things said as part of the *res gestae* were real evidence (eg *Teper v R* [1952] AC 480, at 487; *O'Hara v Central SMT Co* at 389 – 390). Prior to *Morton*, a "*de recenti* statement" had not been a term of art. Historically, the Court used the expression as a descriptive term (see *Hugh McNamara* at 522: "*recenti facto*"). Since *Morton*, a "*de recenti* statement" had come to have a particular meaning which was consistent with that case; a statement by a complainer given to the first natural confidante. In looking at the Institutional Writers and the cases prior to *Morton*, it was important not to transpose this ingrained modern understanding of "*de recenti* statement" onto material from a different era.

[26] It was not the definition of the *res gestae* which had proved problematic. It meant “the thing done; the whole transaction or circumstance” (Trayner: *Latin Maxims* 551). The debate was about its scope. The narrow view in *Cinci v HM Advocate*, notably that of Lord McCluskey, could be described as extraordinary. *Lord Advocate’s Reference No 1 of 2023* overruled *Cinci*; preferring a wider scope in accordance with *O’Hara*. The Court concluded (at paras [19] and [225]) that the statements made after the complainer in *Lord Advocate’s Reference* had exited the flat, and while in a state of distress, were part of the *res gestae*. The respondents agreed. Where the *res gestae* started and ended could not be set out in a rule applicable to all cases. There would be different start and end points depending on the nature of the event and the role of the complainer (*O’Hara* at 389-390).

[27] The statement in *O’Hara v Central SMT*, that it was only under the category of *res gestae* that hearsay evidence could be regarded as real evidence, was reflected in the approach of the courts throughout the 19th and into the early 20th Century. When considering the admissibility of a statement made *de recenti* (that is shortly after the event, as opposed to being contemporaneous), the courts asked whether the statement could be brought within the *res gestae* (see eg *Livingstone v Strachan, Crerar and Jones* at 809; *Neil Moran; David Alexander* at 111; *William Hardie; John Stewart*). These cases showed that, prior to *Morton*, the focus was on whether a statement could be brought within the *res gestae* (which could continue after the event itself was complete). There was no separate category of statements that were *de recenti* (but which did not form part of this wider *res gestae*) and which could be used as proof of fact. In *Hill v Fletcher*, the exclusion of the pursuer’s statement was because it did not form part of the *res gestae* (had it done so, it would have been admissible regardless of her competence as a witness). It was made some time after the event and “after the girl had time to concoct her story” (at 8). A statement made *de*

recenti could only be proof of fact if it were made during the *res gestae*. In many of the cases which were relied upon by the Lord Advocate, the circumstances in which a statement was made were not specified and the purpose for which the statement was admitted was unclear.

[28] This approach in the cases was consistent with that of the Institutional Writers. They did not identify a separate category of evidence beyond the *res gestae*, but being a consequence or continuation thereof, capable of proving fact. Burnett (at 519) set out the basic rule that statements, even those that might be described as *de recenti*, were admissible, not as corroboration, but only to enhance credibility because they emanated from the same original source. This was not, as was suggested in *Lord Advocate's Reference No 1 of 2023*, at odds with Alison and Dickson. All the writers agreed that this was correct as a general proposition. The contention that Burnett's statement (at 553), that the "recency" of complaining was a matter of weight, contained nothing to suggest that it was limited to consistency. It failed to recognise that, in the 19th Century, any delay in reporting weighed heavily against the truthfulness of the allegation. By the time of Burnett, a plea in bar of trial could no longer be based on a failure to report promptly, although such a failure was likely to be highly damaging to a complainer's credibility (MacKenzie: *Matters Criminal*, 1, 16, 4; Hume: i, 308). Burnett's reference (601-602) to what a witness had said *de recenti* being proof of fact was within a section on the *res gestae*. Both Burnett (*ibid*) and Hume (ii, 407) were clear that the *res gestae* was not confined to the event itself.

[29] Alison made the same point as Burnett on the need for corroborative evidence to be extrinsic to the witness (*Practice*, 553). *James Burtney* involved statements which were admitted, not for corroboration but to assist with credibility. Alison's references (*Principles* 224-225) to *de recenti* statements as supportive, and thus corroborative, occurred when he

was dealing with challenges to a complainer's credibility by the use of prior inconsistent statements. Alison stated (*Practice*, 514) that the admissibility of recent statements as proof of fact was restricted within narrow limits. Only those which were connected with the *res gestae*, or which were so recently given after it as to be a sequel to the actual violence, could be used in this way (at 515). Accounts after an interval, with no connection to the *res gestae*, would not be admitted (at 515).

[30] Alison and Burnett were at one. They were both describing the admissibility, as corroboration, of statements by injured parties falling within the (wider) *res gestae*. Once the *res gestae* had ended, the statement was not allowed as proof of fact. Alison, like Burnett before him, was not suggesting that there was an additional category of statements *de recenti* which could be used as proof of fact. The phrase "consequence and continuation of the *res gestae*" originated in Dickson. Dickson described the statements of an injured party, which were made shortly after the crime, as "the natural outpourings of feelings aroused by the recent injury, and still unsubsidied, [which] are a consequence and continuation of the *res gestae*" (3rd ed, Vol 1, para 258). Two things were clear. First, in order to be admissible as proof of fact, the utterance must have been the "consequence of" what had happened to cause the injury. This simply meant "caused by" or "the result of" the crime. That was a familiar concept, for example in cases of distress, where the question was whether the distress was genuine and attributable to the crime. Secondly, the *res gestae* had to be ongoing in that it must not have ended by the time the statement was made. It was the fact that the feelings generated by the injury were unsubsidied that indicated that the *res gestae* was not yet over. The statement must be proximate in time to the event (*de recenti*) and while the feelings aroused were unsubsidied.

[31] Dickson did not mean that the point at which a statement became inadmissible hearsay was when it resolved into a narrative of a past occurrence. What he meant was that, while an utterance that was part of the *res gestae* may be admissible, where it turned into a statement by way of exposition or qualification it would be excluded (*Mary Smith* (1827) Syme 92; *John Murray*). The proper interpretation of the point at which a statement would no longer be admissible as part of the (wider) *res gestae* was clear from Dickson (3rd ed, Vol 1, para 258) when he cited, *inter alia*, *Neil Moran* in which a statement made by the victim of a robbery five or six hours later was not admitted “because the party’s feelings have had time to subside during the interval”. Dickson expanded on this “cut-off” point (*ibid* at para 260) in stating that regard must not only be had to the time interval but to the whole circumstances, such as the extent and nature of the injury and the opportunities which the sufferer had of expressing his feelings. The critical question was whether the feelings had subsided.

[32] Drawing all of this together, the Institutional Writers demonstrated that: (i) the *res gestae* was not confined to a strict coincidence with the duration of the crime; (ii) statements falling within the *res gestae* were admissible as proof of fact and could be corroborative; (iii) statements made after the end of the *res gestae* were not in that category; (iv) statements were deemed to be after the *res gestae* if they occurred at a time, or in circumstances, when the feelings aroused had subsided or there had been an opportunity for that to have occurred; and (v) statements after the end of the *res gestae* were not corroborative because they were not extrinsic to the witness. They came from the same source.

[33] Statements which were part of the *res gestae* had a measure of assurance about their accuracy. They were forced from the individual as a result of the pressure of the incident. They were spontaneous utterances. What was said was not the product of reflection (see

Gilmour v Hansen at 603; *Robert Tweedie*). The test for *res gestae* had two elements: a temporal proximity; and the statement being made when the complainant was in an emotional state. Authority for the proposition, that there was a particular latitude in sexual offences and the evidence of children, was not strong (*Thomas Mackenzie; John Murray; James Simpson*). In *Anderson v McFarlane*, a statement, which had been made 3 days after the incident, was admitted but there were circumstances that explained the unusual passage of time, including the remoteness of the *locus* and the complainant telling her parents on the first occasion upon which she saw them. It illustrated not a particular latitude, but a proper examination of the *res gestae* (see also *John Stewart*). Dickson noted examples of statements that had been admitted for the prosecution after certain periods of time, but he did not confirm that any of them was admitted as proof of fact. While the context was about establishing whether something was part of the *res gestae*, Dickson was discussing how the courts dealt with issues around credibility relating to delayed disclosure.

[34] In *Duncan McMillan* credibility, rather than sufficiency, was the focus (see also *William Grieve*). *Robert Henderson* was a good illustration of how the Court should consider whether the *res gestae* had come to an end prior to the making of the statement; bearing in mind the particular nature of rape and the “delicacy” around disclosure (see 327). *Henderson* illustrated the correct approach to statements as proof of fact by looking at the temporal proximity, the distressed condition of the complainant and what had happened between the incident and the report (cf *John Thomson*). While there may be some degree of flexibility in temporal proximity and spontaneity, admissibility was still determined by recency and whether or not there had been an opportunity for reflection.

[35] In *Lord Advocate’s Reference No 1 of 2023*, the Court stated (at para [224]) that it was tolerably clear that the bright line distinction in *Morton* between a statement which was

deemed to be part of the *res gestae* and one which was *de recenti* was a departure from the previous understanding that the latter was, contrary to *Morton*, normally part of the *res gestae*. *Morton* was correct that a statement which was not part of the *res gestae* was not available as proof of fact. Where *Morton* erred was in defining the scope of the *res gestae* too narrowly; strictly coincidental with the duration of the event. This was a departure from the previous approach. In *Morton* the complainer's statement to her brother (*sic*) was capable of being part of the *res gestae*.

[36] The *dicta* in *Morton* about negating consent and proof of fact were not anomalous. In order to provide support for the complainer's credibility, any *de recenti* statement had to be consistent with the allegation made. It had to include some indication that would counter any suggestion of consensual sex. *Morton* was correct that statements which were not part of the *res gestae* were only admissible to demonstrate consistency and not as corroboration. *De recenti* statements, that is statements made shortly after the event, but which failed the test of "unintermitted excitement" (*Dickson* at para 260) and therefore could not be brought within the *res gestae*, should continue to be available only for credibility purposes.

[37] The Court should be cautious when comparing Scots law to the judicial or legislative approaches to prior consistent statements that had been adopted in other jurisdictions. Those approaches did not exist in isolation. They were always part of a complex and comprehensive modern legal approach to the law of evidence. The ways in which the law of evidence had evolved were unique to each jurisdiction. The safeguards varied from jurisdiction to jurisdiction. No other jurisdiction than Scotland had chosen a requirement of corroboration as a fundamental element. However, each jurisdiction did have other safeguards that were not present in Scotland, for example: jury unanimity or super majority;

a stricter approach to mutual corroboration; and a pre-jury qualitative assessment of sufficiency.

[38] A broad brush comparison with other jurisdictions could be a useful cross-check. This produced the following propositions: (i) common law jurisdictions had generally adopted an expansive *res gestae* which was based on a looser contemporaneity requirement and an additional spontaneity requirement. Temporal proximity remained an important consideration; (ii) no jurisdiction had a separate category of prior consistent statements, such as *de recenti* statements or statements which were “a consequence and continuation of the *res gestae*”; (iii) where prior consistent statements, that did not form part of the *res gestae*, had become admissible for the truth of their contents, those changes had been made legislatively. Such statements were not considered to be evidence that was independent of the complainer; (iv) these general principles were consistent with *Morton*.

[39] These principles were borne out in England and Wales by *Ratten v The Queen* (at 389 and 391) and *R v Andrews* (at 300-301). The law on hearsay had been codified by the Criminal Justice Act 2003 (s 118(4)) which preserved the common law exception of *res gestae*. *Ratten* and *Andrews* had been applied in *Ibrahim v Crown Prosecution Service*, *Higgins v Crown Prosecution Service*, *Barnaby v DPP* and *R v S*. The 2003 Act (s 120) overruled the common law prohibition on using prior consistent statements. Such evidence was not independent confirmation of the witness’s evidence (*R v Ashraf A* [2011] EWCA Crim 1517, at para 20 and (at 24) endorsing *R v AA* [2007] EWCA (Crim) 1779). The *res gestae* exception was defined under reference to a lack of opportunity for concoction rather than a strict requirement of contemporaneity. No support could be found in England and Wales for the proposition that *de recenti* statements (separate from the *res gestae*), unaccompanied by distress, were admissible to corroborate a complainer’s evidence.

[40] Northern Ireland had codified hearsay in virtually identical terms to that in England and Wales (2004 Order s 22(1)(4)). *McGuinness v DPP* adopted the approach in *R v Andrews* (see also *R v Singleton*, *R v Edwards* and *DPP's Ref No 6 of 2019*). A jury must be told that a recent complaint was not independent evidence of the truth of the allegation (*R v Chakwane* [2013] NICA 24 at para 17 and *R v WL* [2017] NICA 36 at para 25). Courts in Ireland had adopted the approach set out in *Ratten* and *Andrews*. Thus in *DPP v Lonergan* due weight was given to both contemporaneity and the possibility of concoction or fabrication. Prior consistent statements were admissible only for the purpose of showing consistency (*DPP v MA* [2002] 2 IR 601 (CCA), at 609; see also *DPP v Brophy* [1992] ILRM 709).

[41] The Supreme Court of Canada had developed a principled approach. Recognised exceptions to the prohibition of hearsay would presumptively meet the requirement of reliability (*R v Starr* [2000] 2 SCR 144). Provincial appellate courts in Canada had endorsed an approach that did not require strict contemporaneity (*R v Lugela*; *R v MacKinnon* at 40-51). *Queen v Deespp* was from an inferior court and was not an authoritative statement. There was no separate category of admissibility for *de recenti* statements or statements that were the "consequence and continuation" of the *res gestae*. Any statements which fell outwith the *res gestae* were presumptively inadmissible (*R v Dinardo* [2008] 1 SCR 788).

[42] The *Ratten/Andrews* approach had been applied in Australia (*R v Kadibil*). The federal law of evidence, including the admissibility of hearsay, was now codified. The Evidence Act 1995 *ibid* defined *res gestae* as a statement "made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication" (see also *Conway v The Queen*). The common law approach to prior consistent statements had been statutorily overruled (Evidence Act 1995, s 66; see *Graham v The Queen* (1998) 195 CLR 606).

[43] The *Ratten/Andrews* approach had been followed in New Zealand (*R v Olamoe*; *R v Wright*; *Janif v New Zealand Police*). *R v Wilson* proceeded based on a concession by the appellant and there was no consideration of the scope of *res gestae*. The law of evidence had now been codified in the Evidence Act 2006 (s 35). There were a series of decisions commenting on the scope of the *res gestae* (*Rongonui v The Queen* [2010] NZSC 92). Under the 2006 Act, prior consistent statements could be admitted if the complainer's credibility had been challenged (see *R v Hart* [2010] NZSC 91). The law relating to hearsay in South Africa had been on a statutory footing since 1988. The Law of Evidence Amendment Act 45 of 1988 did away with the categorical approach to hearsay exceptions altogether and replaced it with a single test that referred to various factors. The differences between the South African and Scottish systems were significant.

[44] The authorities cited by the Lord Advocate, namely *James Gibbs*, *David Alexander*, *John Barr* and *McCrindle*, did not provide strong support for the proposition that a *de recenti* statement could be used as proof of identification. In *Gibbs*, there was a circumstantial case of identification. The complainer's *de recenti* accounts were not critical. Identification was not the issue in *Alexander*. It was not clear from *Barr* whether the complainer identified the accused in court. There was also circumstantial evidence of identity. The only pre-*Morton* case in which it was clear that the court had found corroboration of identity in a *res gestae* statement was *McCrindle*. *McCrindle* did not represent the authentic pre-*Morton* position. It was an outlier. *McCrindle* relied upon *McLennan*. In *McLennan* the *res gestae* statement was used to corroborate the *actus reus*, not identification. The basis in *McLennan* was that the complainer's statement could not provide corroboration because it was not part of the *res gestae*. Nothing in *McLennan* suggested that the complainer's statement referred to identification. If decided today, *McCrindle* could have proved without recourse to the *res*

gestae statement following *Fulton v HM Advocate* 2000 JC 62 and *Muldoon v Herron* 1970 JC 30.

[45] The reason why a *res gestae* statement was admissible as proof of fact was because it was given in circumstances which provided a measure of reassurance against mistake or fabrication. While it may seem logical that there should be no difference in the purpose for which such a statement could be admitted, the risks attendant upon proof of the crime, and proof that the accused committed it, were different. “Eyewitness identification evidence is fraught with difficulties, and the potential for wrongful convictions is high” (Ferguson; *Post Corroboration Safeguards Review: Report of the Academic Expert Group* at para 5.1). The risk of a miscarriage of justice was “notorious” (*Gage v HM Advocate* 2012 SCCR 161, at para [29]). There were some safeguards available, such as cross examination and the judge’s directions, but the Court should treat this type of evidence differently from evidence that went to proof of the crime. This was likely to be a live issue in only a very small number of cases given that “very little else” was required to corroborate identification (*Ralston v HM Advocate* at 472).

[46] It would not be difficult for judges to direct juries that a *de recenti* identification was not available as corroboration. Judges could explain the different approach by telling the jury, for example, that identification (particularly of strangers) was difficult and, for that reason, there needed to be evidence extrinsic of the complainer to corroborate the accused as the perpetrator. The lack of safeguards was accentuated by the inability of a trial judge to direct an acquittal on the basis that a guilty verdict would be unreasonable (Criminal Procedure (Scotland) Act 1995, s 97D).

[47] The court should approach the prohibition of hearsay, and its limited exceptions, from the perspective of how it operated to protect the accused from wrongful conviction.

Evidence must be capable of being regarded as reliable. That was what temporal proximity and spontaneity delivered. It was why these elements were the basis of the common law both in Scotland and in other jurisdictions. The words “*unintermitted excitement*” in *Dickson* were important. It was an important and integral part of the court’s assessment. The alternative approach would result in the *de facto* abolition of the prohibition of hearsay. The critical distinction in the relaxation of the prohibition in England and Wales was that there was a sufficiency test containing a qualitative element.

[48] In relation to the four questions posed: (1) a statement which formed part of the *res gestae* (which was wider than the duration of the criminal act) was admissible as proof of the fact of the commission of the crime and could be corroborative of the witness’s testimony. The test for a statement being part of the *res gestae* was that it was made either at the time, or shortly after the end, of the criminal act in circumstances in which it was spontaneous and not made after an opportunity for reflection. The test should be in two parts: temporal proximity; and spontaneity of the expression. Distress may assist but it was not essential. Where time had elapsed, and an opportunity to disclose had not been taken, or there had been a subsidence of emotions, it would be harder to satisfy the test if the statement was not accompanied by distress; (2) any part of the *res gestae* statement which identified the perpetrator should not be admitted as proof of fact because of the inherent and well-recognised risks attached to identification evidence; (3) a statement would not be admissible as proof of fact when it was made after the *res gestae* had ended. A statement which could not be brought within the *res gestae*, but which was nonetheless recent, should continue to be available to support credibility. A statement, which was not made shortly after the event, was inadmissible hearsay; and (4) *Morton* was wrong in defining the scope of the *res gestae* as

strictly contemporaneous with the crime. It was correct that statements not falling within the *res gestae* (however defined) could not be corroborative.

Decision

Preface

[49] There is a general prohibition of hearsay; that is testimony of a witness who is speaking to a fact not from his or her own knowledge but from what someone else has reported to him or her. Dickson (3rd Grierson ed I, para 244) likens it to the examination of a copy document. The principle behind the prohibition is that, first, it is not the best evidence and, secondly, the account is not given by the person on oath (*ibid* 245). The latter was a very important factor in a God fearing society. The former may be of much less importance in the modern era, if whatever was said by the absent observer is digitally recorded in video and/or audio format. The prohibition is not particularly designed as a protection for an accused, but as a general mode of securing the best evidence, in whomsoever's favour it might be, at any proof or trial.

[50] At common law, so far as admissibility is concerned, the prohibition is subject to exceptions in the case of utterances which were part of the *res gestae* or where a statement was made *de recenti*. In principle these exceptions were because the admission of such evidence assisted in the truth finding process. Hence they too could fit into the best evidence profile. Over time, statutory exceptions have eaten into the prohibition; notably section 3 of the Evidence (Scotland) Act 1852, which permitted the leading of evidence of a prior inconsistent statement (see now 1995 Act, s 263(4)), and the statutory codification of the exceptions to the admission of hearsay generally in the 1995 Act (s 259).

[51] Before delving into the substantive issues, it is worth clarifying some of the concepts which have been expressed in Latin. These have to some extent already been translated when summarising the submissions. Trayner's *Latin Maxims* does not include *actus reus*, which suggests that it was not a term in common use in Scots law, at least in the early part of the last century. It just means the crime; literally the guilty act. In the context of a sexual assault or rape, it refers to the act of assault or rape and nothing more. The act ceases respectively after the blow has been struck or when penetration ceased.

[52] *Res gestae* is translated by Trayner as "The thing done, the whole transaction or circumstance"; literally the thing (*res*) accomplished or achieved (*gesta* or *gestae*). The important point is that, whatever its outer limits, it includes, but extends beyond, the *actus reus*. *De recenti* is not covered by Trayner, but it just means "recent"; literally, of recency.

[53] The first question in the References is whether a *de recenti* statement is corroborative in the absence of distress. *Lord Advocate's Reference No. 1 of 2023* 2024 JC 140 established that, contrary to *Morton*, such a statement is corroborative; that is capable of proving fact, if accompanied by recent distress. Subject to an analysis of the time at which a *de recenti* statement is made, it was not disputed by the respondents that it can be corroborative of evidence that a crime has been committed, even in the absence of visible distress. The concession extended only as far as a *de recenti* statement formed part of the *res gestae*. This prompts an obvious question of when a statement is part of the *res gestae* and when it is classified differently as *de recenti*. The answer in broad terms is, as will be explored in greater detail, that a reference to a statement being part of the *res gestae* is to any utterance by anyone, whether a complainer, witness or even someone who is never identified or traced, during the course of, as Trayner put it, "the whole transaction or circumstance". It is not disputed that it can be used as proof of fact, whether of the crime or its perpetrator.

[54] A *de recenti* statement is an account given by a complainer, that is the injured party, after, but as a reaction to, the event. It too, can provide the same corroboration, but care is required in defining when a post event statement ceases to be *de recenti* as a matter of law. A *de recenti* statement may be classified as part of the *res gestae*, but it need not form such a part in order to be capable of proving fact; that is to be corroborative. Greater latitude in terms of time and circumstance is allowed with the *de recenti* statements of complainers in sexual offence cases and with those of children.

The Institutional Writers

[55] Burnett: *Criminal Law* (at 519) states that a “recently after” the fact statement is not corroborative. In this he is referring to the statement of a witness, not specifically to a complainer, with whom he deals separately. When considering rape, he stresses (at 553) the importance of a recent complaint. Such a complaint is admissible, but it is not clear in this passage whether Burnett is saying that it is corroborative as distinct from being a weighty circumstance only bearing upon credibility. In his treatment of hearsay, Burnett excludes (at 601) evidence of the *res gesta* from the category of inadmissible evidence because it is proof of fact. He illustrates this by reference to what is said during a riot.

[56] Burnett goes on to talk about “what the injured party may have been heard to say recently after the fact”, specifically rape complainers. In a passage which reverts to dealing with witnesses in general, he continues (at 602):

“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 ...”.

This broad statement, which is referring to all witnesses, is not borne out by the subsequent cases.

[57] Hume: *Commentaries* (4th ed; ii, 406) states, in a footnote concerning hearsay, that words which are “a substantial part of the *res gesta*”, are admissible to explain why the witness took a particular step. He uses the tracing of a highwayman as an example. In this scenario, the crime has been committed some time previously, but the evidence proves a link between the crime and its perpetrator. In the same footnote, Hume refers to a rape complainer giving an account to her mother; this being admissible to explain how a doctor came to be called or how a button belonging to the accused came into the mother’s possession. In all of this, Hume is talking about admissibility of evidence. He places no restriction on the use to which the statement might be put. He does not state in terms that it can be used as proof of fact, but that may be a reasonable inference.

[58] Alison first refers (*Principles*: 217) to the *de recenti* statements of the injured party, but in the context of proof in favour of the accused (ie a prior inconsistent statement). He broadens that out into a more general proposition. There is no limitation expressed on the use of such statements. When considering rape, Alison (*ibid* 219 - 220) regards it as indispensable to look “minutely” into the complainer’s accounts. He then states that the question of what violence was used is corroborated:

“in the most unexceptionable way by ... evidence in regard to her subsequent disclosure of the crime to her relations, or the public authorities”.

He continues (*ibid* 224 citing *James Burtney*) by stating that an utterance of a young child *de recenti* can confirm her declaration. In essence, Alison is of the view that a *de recenti* statement is corroborative in a certain class of cases, including rape.

[59] The important feature of the Institutional Writers is that they refer to two different types of statement; those that are part of the *res gestae* and those that are *de recenti*.

Early Cases

[60] Care has to be taken when interpreting the cases which occurred before the first edition of Dickson's *Evidence* in 1855. Some contain specialities, such as: the civil cases in which a party was not permitted to testify; the criminal prosecutions in which the statement came from an incompetent witness; and statements made in the presence of the accused. Some relate to ordinary witnesses and others to complainers in non-sexual cases. In deference to the careful research of the parties, the cases may be summarised as follows.

[61] In *Thomas MacKenzie* (1828) Syme 323 evidence was admitted of what the complainer had said to a number of persons in the hours after a prolonged period of detention and repeated rape. It is not clear, from the detailed narrative of the testimony, that what the complainer was reported as having said was used as proof of fact, as distinct from either to bolster or, perhaps more likely, to contradict (see LJC (Boyle) at 332) the complainer's account. *William Hardie* (1831) Shaw (J) 237 was an unsuccessful attempt to introduce a previous unsworn inconsistent statement given by a witness (not a complainer) some days after the event.

[62] Two cases in Bell's Notes to Hume are said to be supportive of the *res gestae* exception to the prohibition on hearsay. The first, *Duncan McMillan* (1833) Bell's Notes 288, explores the need for immediacy in a complaint of rape; delay being regarded as creating a "strong suspicion". The complainer's partial disclosure, which was made about a week after the event, was admitted after inquiry about whether any earlier statements had been made to the first natural confidante; a relative or the authorities. In *William Grieve* (1833) (*ibid*), a statement made by the complainer to her husband several days after the event was admitted in the face of an objection that it was not *de recenti*. These cases reveal that evidence of relatively prolonged delayed disclosures will be admitted, depending on the circumstances.

[63] *Neil Moran*² (1836) 1 Swin 231 was about a robbery in which the Lord Justice Clerk (Boyle) allowed the defence to lead evidence of a statement by the person robbed. This had been made, in the accused's presence, 5 or 6 hours after the event. It was regarded as part of the *res gestae* and "totally different" from the account given "after an interval of some hours". A statement made by the same person to the police officer who had arrested the accused had already been proved.

[64] The complainer in *James Gibbs* (1836) 1 Swin 263 was aged 12. She spoke to being dragged off a road and assaulted in an attempt to rape her. She gave an immediate account of what had happened to a passer-by who saw the accused running away. She also told her mother. The complainer's *de recenti* statement, which would also be classified as within the *res gestae*, provided corroboration of the attack. The accused was convicted.

[65] *Robert Henderson* (1836) 1 Swin 316 is a more useful precedent for present purposes. It involved the alleged rape of a young woman who was due wages from the accused. When she returned home after the incident to her uncle's house, everyone, including her cousin, with whom she slept, was asleep. She put her dirty and bloodied clothes away. This had all happened on a Wednesday evening. It was only on the Friday night that she told a female friend, Mrs Turcan, before making later disclosures to others, including a Mrs Fotheringham. She explained why she had not told her uncle, bed-ridden aunt or somewhat unintelligent cousin. Mrs Turcan spoke to the complainer sitting down, bursting into tears and telling her story of abuse. The account given to Mrs Fotheringham on the following Wednesday was also admitted. The Lord Justice Clerk (Boyle) explained to the

² The outcome of this reported decision is contradicted by the account in Bell's Notes at 288.

jury (at 327 - 328) that there had been no undue or unreasonable delay in the complainer telling her friend because:

“great allowance must always be made in a case of this kind, for the delicacy which prevents a full disclosure to a male relative.”

He continued (at 328) by saying, in relation to the defence of consent:

“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 the agony in which she first communicated the outrage – by the account she gave to all the witnesses – and by the marks of violence seen on her person.”

What the complainer said to Mrs Turcan, some two days after the event, could not be classified as part of the *res gestae*, but it was a *de recenti* statement and regarded as corroborative. Mr Henderson was fortunate to have been acquitted by a majority not proven verdict “in opposition to the opinion of the Court” (rubric at 316).

[66] *Robert Tweedie* (1836) 1 Swin 22 was another accusation of an out of doors rape of a young girl (aged 15), this time by a ploughman. The complainer reported the rape to the accused’s sister either that night or on the following (Sunday) morning. She later reported it to her employer, who was the accused’s aunt, on the Tuesday. The aunt testified to the complainer appearing normal on the night of the incident, but that she had complained of rape on the Tuesday. The Advocate depute withdrew the libel.

[67] *David Alexander* (1838) 2 Swin 210 was an assault by stabbing; the victim being the accused’s uncle. At the trial, the uncle denied that a scratch on his throat had been caused by the accused. The Advocate depute was allowed to lead evidence from a second witness that, “very shortly” after the incident, the uncle had accused his nephew, in the witness’s presence, of the assault. Lord Meadowbank said (at 111) that the purpose of such a question was not with a view to contradicting the uncle’s testimony but to show that the accused had

allowed the uncle's accusation to go unchallenged. This was part of the *res gestae* and the equivalent of a confession. In both situations the evidence could be used as proof of fact.

[68] In *Donald Kennedy* (1838) Swin 213 the appellant was a landowner who had been convicted of shooting two poachers. Evidence of an account by one of the poachers, which had been given three days after the incident, was not allowed (at 219) under reference to *William Hardie* (*supra*). Lord Meadowbank, delivering the opinion of the trial court (at 225 – 226), said:

“What a witness has said not on oath, cannot unless it is part of the *res gestae*, be received, to contradict the evidence which he gives before us. No principle is better established in the law of Scotland than this; and accordingly ... we have found it our duty to reject as inadmissible the account ... which one of the parties injured gave to a companion three days afterwards...”

Lord Meadowbank repeated himself (at 229):

“If it is competent for the pannel to prove what one witness said to another, the same proceeding must in every case be competent on the part of the prosecution. If this conversation had been alleged to have been a part of the *res gesta*, the case would have been different.”

Robert Fulton (1841) 2 Swin 564 involved the conviction of a boy, who was under 14, of the rape of a 5 year old. The reporter recorded (at 567) that the crime 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... and the panel's confession ...”.

[69] There are civil damages claims for rape, or assault with intent to ravish, of which *Hill v Fletcher* (1847) 10 D 7 is one. In these cases, it was, at one time, not competent to lead evidence of the pursuer's declaration. The question was whether it was nevertheless competent to lead evidence of what a complainer had said to a friend, with whom she had been living, when she returned home in a state of “grief and disorder” (at 8). The pursuer's counsel (later Lord Justice General (Inglis)) argued that it was a declaration *de recenti* and

part of the *res gestae*. The Lord Justice Clerk (Hope) ruled (at 9 - 10) the statement inadmissible because it was not part of the *res gestae* and had been made “after the girl had had time to concoct her story”. The statement had been made after the complainer had encountered two passers-by and another friend on her way home to whom she had made no complaint and did not appear to be distressed.

[70] *AB v CD* (1848) 11 D 289 was a separation action based on cruelty. The pursuer’s niece had visited the pursuer and deponed to finding her in a “very much excited” state, almost convulsive. Questions to the niece about what the pursuer had told her were not admitted because of the “considerable interval” between the quarrel (at about 7.00pm), which had been spoken to by a maid, and the niece’s appearance (at about 9.00 or 10.00pm) (LP (Boyle) at 293). What passed between the pursuer and her niece was not part of the *res gestae*. The reasoning involved a consideration of what were perceived as the dangers of allowing a statement by a party to the cause. Returning to crime, *Hugh McNamara* (1848) Ark 521, was a rape case involving a 14 year old of “weak or imbecile intellect” (at 522). Evidence of what the complainer had said, possibly *de recenti*, was excluded on the basis that she was not a competent witness.

[71] With the exception of *Robert Henderson*, these cases are of limited value because of the various specialities already noted.

Dickson

[72] Dickson’s two volume *Law of Evidence* is the most comprehensive treatment of its subject-matter in the 19th Century, even if it is not an Institutional Writing. In the first (1855) edition (at para 92), Dickson deals with *res gestae* as an exception to the prohibition on hearsay, under reference to Hume, Burnett and Alison, as follows:

“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 actions, 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 rightly understood, unless his words as well as his acts are proved ... The admissibility usually depends on whether the declarations were co-temporaneous 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 co-temporaneous, for the nature and strength of the connection are the material things to be looked at; 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.”

[73] The most authoritative edition of Dickson is the third (Grierson) version of 1887. It repeats (at para 254) this text and adds a reference to *Greer v Stirlingshire Road Trustees* (1882) 9 R 1069. Dickson deals with *de recenti* statements, again citing Burnett, Hume and Alison, in a separate part of his treatment of hearsay (1st and 2nd eds at para 95) as follows (at para 258):

“Akin to the principle thus noticed, 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 unsubsidied, 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.”

The contrast was with statements made hours later when the complainer’s feelings had time to subside (*ibid*). These passages are not confined to sexual offences or to children. No distinction is made between admitting these statements for the purpose of proving the crime or for proof of the identity of the perpetrator (1st and 2nd eds, para 96). Dickson continues (*ibid* at para 98, citing *inter alia* William Grieve and Duncan MacMillan) as follows:

“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.”

Allowance had to be made in such cases both for:

“the extreme excitement ... which so terrible an outrage causes in the sufferer’s mind, and for her natural reluctance to publish her disgrace” (*ibid*, para 98).

[74] These passages are repeated in the Grierson edition (paras 258, 259, 261). The ultimate conclusion is that there are two different exceptions to the hearsay rule: first, statements which are part of the *res gestae*, and, secondly, *de recenti* statements from complainers generally, where greater latitude is given to complainers in sexual offence cases because of their peculiar nature. As will be seen, that is broadly the same position as exists today.

Cases in the Dickson era

[75] In *John Thomson* (1857) 2 Irv 747 the trial judge would not allow hearsay of what a three year old, who was present when poison was administered to her aunt, had said to her mother some 16 days after the event. The statement was not part of the *res gestae*. The case is not very informative. *James Reid* (1861) 4 Irv 124 involved a charge of rape, but it concerned the admissibility of evidence of “acts of unchastity” occurring at or about the time of the incident libelled. *John Murray* (1866) 5 Irv 232 is more in point. The complainer was deemed incompetent to testify because of her inability to understand the oath. She had made a statement to her mother when she was crying and very much agitated and excited. What she had said to her mother “immediately after the ... outrage” was deemed admissible. Lord Ardmillan, departing (at 233) from *Hugh McNamara* (in which he had been the Advocate depute³), deemed the statement to be:

“really part of the *res gestae*, and might be laid before the jury as an incidental fact, like the cry of a child, or even the scream of an animal”.

What the complainer had said on the following day was not admissible.

³ Crawford AD.

[76] Lord Ardmillan had presided in the Outer House in *Longworth v Yelverton* (1862) 24 D 696. This was an action of declarator of marriage in which statements by the pursuer about the declaration of marriage to lodging-house keepers were deemed inadmissible unless they came within the *res gestae*. Lord Ardmillan said (at 697, footnote) that:

“Where ... any particular statements of the pursuer are so connected with acts or facts given in evidence, that the dissociation of the statements from the acts or facts to which they relate would frustrate the ends of justice, and impede the discovery of the truth, then that disassociation is prevented, the statements are treated as *partes rei gestae*, and, on that ground, are viewed as within the exception to the rule, and are admitted accordingly.”

[77] *James Simpson* (1870) 1 Coup 437 was a case of incest in which the Crown sought to adduce evidence from the accused’s sister-in-law about what the accused’s wife had said whilst in an excited state. This was deemed admissible if it formed part of the *res gestae*, but the witness testified that it had occurred four days afterwards. The Solicitor General did not press the line of examination.

[78] The civil case of *Greer v Stirlingshire Road Trs* concerned the death of a 22 month old child who had fallen through the railing of a bridge and drowned. Statements given by other very young children on returning home from the scene were deemed admissible as proof of fact (see Lord Craighill at 1074; cf Lord Young at 1076). The children were too young to testify.

[79] *Anderson v McFarlane* (1899) 1 F (J) 36 involved a husband and wife who had been convicted of assaulting their 13 year old domestic servant. The only corroboration of the girl’s account, which she had given but not on oath, came from statements made by her to her mother three days later, but on the first occasion on which she had seen her. The Lord Justice Clerk (Macdonald) did not (at 37) consider this to be a problem, although he commented that:

“it is not so much leading corroborative evidence as eliciting that the injured party made a complaint at the earliest opportunity, thus preventing the forcible objection that the witness had not made complaint after the assault to her own relations”.

Looked at broadly, the various cases in this section support the analysis in *Dickson* throughout the second half of the 19th Century.

20th Century cases

[80] *Gilmour v Hansen* (1920) SC 598 was a defamation action in which the pursuer maintained that the defender had falsely accused him of having had intercourse with her. The pursuer took exception to evidence of what the defender had said to her aunt on the night when she gave birth to, what she said was, the pursuer’s child. In determining that this was inadmissible, Lord President (Clyde) said (at 603):

“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. In the present case, the statement is made many months after the latest of the dates assigned to the alleged acts of intercourse, and in connexion with the new situation created, not merely by the established fact of pregnancy, but by the birth of illegitimate offspring. ... The *de quo quæritur* ... is not the paternity of the child, but the existence of improper relations between the parties on the occasions libelled. It is, accordingly, impossible to treat the defender’s statement to her aunt as part of the circumstances of the alleged improper relations between the parties and it does not come within the rule which admits such statements when forming part of the *res gestæ*.”

Although it is easy to follow the ratio, the references to both a *de recenti* statement and the *res gestæ* are confusing. As pointed out by *Dickson*, they are not, or at least not always, the same.

[81] *Ovenstone v Ovenstone* (1920) 2 SLT 83 was a divorce action in which the principal witness was a “tablemaid” who had, when calling persons to dinner, stumbled upon the wife and co-defender in a compromising position on the drawing-room sofa. The co-

defender's position was that the maid had misconstrued the activity on the sofa, but the wife's defence was she had not been on the sofa at all. The conclusive evidence, in the mind of the Lord Ordinary (Sands) was the maid's description of what had happened, which she had given after dinner. The co-defender begged the maid not to disclose what she had seen before dinner. The maid "at once" reported the incident and the conversation to her sister, who was the cook. Lord Sands admitted the evidence of the cook about the maid's "instant report" because it was part of the *res gestae* and hence corroborative of the maid's evidence. To have done otherwise would have been "to carry a somewhat artificial rule of evidence to a length which would outrage common sense" (at 84).

[82] It may indeed have defied common sense, but Lord Sands' *dictum* was disapproved in *Barr v Barr* (1939) SC 696 (LP (Normand) at 699). The pursuer in this undefended action of divorce told his brother of a conversation which he had had with his wife in England. His account to his brother had been given upon his return to Scotland. It would have been difficult to categorise the statement he made to his brother as *de recenti*. It was certainly not part of the *res gestae*. *Barr* was decided in the wake of *Morton v HM Advocate* and *Morton's* disapproval of *McLennan v HM Advocate* 1928 JC 39 and *McCrinkle v MacMillan* 1930 JC 56 (see in *Barr*, Lord Moncrieff at 700).

[83] *Livingstone v Strachan, Crerar & Jones* (1923) SC 794 was about a road traffic accident in October 1921 in which the pursuer blamed the defenders' van driver. A few days prior to the jury trial in November 1922, the pursuer had sent a surveyor to the *locus*. The surveyor spoke to the driver, who gave him an account of what had occurred. The pursuer attempted to lead this evidence, but it was held incompetent to do so. It was not a prior inconsistent statement, since the driver had not yet testified. It did not meet the criteria in section 3 of the Evidence Act 1852 (LJC (Alness) at 801). Lord Ormidale's reference (at 805) to a statement

being admissible, if it had been made *de recenti* and thus provable as part of the *res gestae*, is interesting (see also Lord Anderson at 809).

[84] *McLennan v HM Advocate* was an appeal from a conviction of lewd practices involving a 5 year old boy. The boy spoke to what had occurred. In advance of his evidence, both his mother and father testified to the boy's physical condition (disarranged clothing) and to what he had told them on his arrival home. It was argued (at 40) that his statement to them was not part of the *res gestae* and thus not corroborative. The Crown were not called upon to reply; the appeal being "without hope of success" (at 41). The Lord Justice General (Clyde), citing *Dickson* (at paras 254 and 258), said (at 41) that:

"it is a mistake to suppose that the evidence of the parents ... regarding the explanations given by the boy with regard to his condition when he returned home do not provide good corroboration."

The corroboration related to both what had happened and the identity of the perpetrator (*ibid* at 42). Lords Sands and Blackburn agreed.

[85] The same result followed in *McCrimdale v MacMillan*. This concerned an indecent assault on a 13 year old girl in which the only issue at trial was identity. The complainer identified the appellant, whom she knew. Within a few minutes, and "while still suffering from [the assault's] effects", she told her parents, and others, about what had happened and who had been responsible. Lord Morison, with whom the Lord Justice General (Clyde) and Lord Blackburn agreed, regarded (at 60) what the girl had said and done as part of the *res gestae* and thus corroborative.

[86] In the perjury case of *HM Advocate v Smith* 1934 JC 66, the question was whether the testimony under consideration was competent. Mr Smith was alleged to have lied when he had testified that certain persons (G, W and McL) had not called at his house and told him that two members of the local licensing court (later convicted after the trial) had solicited

bribes from one of them two days earlier at a hotel in Kilwinning. The Lord Justice Clerk (Aitchison), sitting as a single judge on an objection to the relevancy of the indictment, said (at 68):

“... statements made by complainers outwith the presence of the party accused are never evidence against that party, except in very exceptional cases. *A fortiori* statements made to complainers outwith the presence of the party accused can never be evidence. In cases of assault committed on women or on children, where the 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 [G, W and McL] had been made 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 ... But the statements here ... are ... on 11 of April 1933, whereas the crime libelled ... occurred ... on 9 April 1933.”

This is a very clear statement that there are two different types of exception to the prohibition on hearsay: first, *de recenti* statements in sexual offence cases; and, secondly, statements (of whomsoever) which are part of the *res gestae*.

[87] A *de recenti* statement may reasonably be described as a “natural outpouring of feelings aroused by the recent injury, and still unsubsidied” (Dickson 1st and 2nd eds at para 95, 3rd ed at para 258). It is a “consequence and continuation of the *res gestae*” (*ibid*) but it is not (or need not be) the same as, or part of, the *res gestae*. The view in *Lord Advocate’s Reference No. 1 of 2023* (at para [224]) that a *de recenti* statement was formerly regarded as part of the *res gestae* may not be accurate. The important matter is that both statements are treated in the same way for evidential purposes; both are proof of fact and corroborative.

[88] *Lord Advocate’s Reference No. 1 of 2023* explored the *dicta* in *Morton v HM Advocate* in some depth (at paras [69]-[71]). The complainer in *Morton* had maintained that the appellant, who was not known to her, had hustled her into a close and indecently assaulted her. She identified him at an identification parade. There was an eye witness to the event, but she was unable to identify the appellant. The only other evidence was from the

complainer's brother who spoke to his sister being in a distressed state when she returned home "immediately after" (at 51). *Quantum valeat*, according to the Justiciary Papers, it was actually the complainer's mother, not her brother, to whom she spoke. This was undoubtedly a *de recenti* statement, but there was nothing in it to assist with identification. There does not appear, for example, to have been a description of the assailant. Given that state of evidence, the decision of the Full Bench to quash the conviction was correct even if, as was held in *Lord Advocate's Reference* (at paras [223] – [230]), the *dicta* (at 53) about *de recenti* statements not being corroborative are wrong and ought to be formally disapproved. There is a question of whether the statement which was given by the complainer to her mother (described erroneously in the Justiciary Cases report of the case as her brother) "immediately after [the assault] was said to have been committed" and when the complainer was "in an excited condition", ought to be regarded as part of the *res gestae* too. On that issue, careful regard should be had to the seminal *O'Hara v Central SMT* 1941 SC 363.

[89] *O'Hara* was examined closely in *Lord Advocate's Reference No. 1 of 2023* (at paras [72]-[73]). It involved an injury to a bus passenger which had been caused by a sudden swerve of the bus. The defenders' driver contended that the swerve had been necessary to avoid hitting a pedestrian who had run out in front of the bus. The driver assisted the passenger, who had fallen off the bus, before confronting the pedestrian, in the vicinity of the bus, and in the presence of the conductress. The pedestrian, who could not be traced in order to give evidence at the proof, had admitted to the conductress that he had run out in front of the bus. He had given the conductress a note of his name (Charles Hyndman) and an address. This was handed over to a police officer who, ten minutes later, found a man of that name in a nearby cinema. This man denied that he had caused the bus to swerve. The onus of proof,

that the cause of the swerve was the pedestrian, lay on the defenders. The question was whether the driver's evidence was, as was required at that time, corroborated.

[90] According to the Lord President (Normand), the evidence of what had happened "very shortly" (at 382) after the accident, but after the driver had attended to the passenger, was admissible as part of the *res gestae* and hence, in so far as spoken to by the conductress, corroborative of the driver's account. The Lord President outlined (at 381) the general principle on which evidence of *res gestae*, including hearsay, is admitted as being that:

"... words and events may be so clearly inter-related that the truth can only be discovered when the words accompanying the events are disclosed. But it is not essential that the words should be absolutely contemporaneous with the events (see eg *AB v CD*). What is essential is that there should be close association, and that the words sought to be proved by hearsay should be at least *de recenti* and not after an interval which would allow time for reflection and for concocting a story. So a long narrative is never allowed to be proved as part of the *res gestae*".

The Lord President cited Lord Ardmillan in *Longworth v Yelverton* with approval, commenting (at 382) that it is often:

"a matter of nice discrimination and of sound discretion whether in particular circumstances this exception from the general rule that the best evidence must be brought should be allowed, for it is extremely difficult, if not impossible, to formulate a general rule for its application (Dickson: *Evidence* Grierson ed para 254)".

[91] The Lord President accepted the Lord Ordinary's analysis that what had been said at the scene was "so closely bound up with the happening of the accident that without it the history of the accident ... would not be complete" (at 382). That permitted the evidence to be considered as part of the *res gestae*. The Lord President thought that what had been said by Mr Hyndman in the cinema would have been in a different category, but for it being a recent (10 minute) qualification of what had been said by Mr Hyndman as part of the *res gestae* (see Lord Fleming at 386).

[92] If it requires emphasis, the Lord President in *O'Hara* determined that the statements by persons, including Mr Hyndman, in the vicinity of the bus but after the event (ie the swerve), were admissible as part of the *res gestae*. He was not talking about *de recenti* utterances which are made by injured parties either during or after the *res gestae*. He was not referring to statements made by a complainer in a sexual offences case. Lord Moncrieff considered (at 389 - 390) that the *res gestae*, which he described as "the event" would vary in scope with the degree of participation in the event of the maker of the statement, but it is not entirely clear how that would operate in practice.

Commonwealth and Irish cases

[93] The court should be cautious before grafting concepts from other jurisdictions onto the Scots law of evidence. Scots law has its unique concepts, not least the requirement for corroboration, and different trial procedures. Nevertheless, the Institutional Writers and Dickson relied on reported cases from England in framing their works. Looking at other systems, especially those which have developed and refined the prohibition of hearsay, can operate as an important check on whether Scots law is keeping up with modern thinking and societal norms and expectations. Hearsay is a concept which may, in due course, again require a degree of re-thinking in light of the development of digital video and audio recordings and the benefits and pitfalls of new technology.

[94] Lord Normand followed his *dicta* in *O'Hara v Central SMT* in *Teper v The Queen* [1952] AC 480; an appeal to the Privy Council from British Guiana (Guyana). He said (at 486) that the law on *res gestae* was the same in that country as in both Scotland and England. This was that (487):

“it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so closely associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item of real evidence and not merely a reported statement”.

The Scots law influence in this phraseology is evident, yet the court did not admit evidence from a police constable about an unidentified woman shouting out words, at the scene of an allegedly deliberate fire-raising, which might have led to the identification of the perpetrator.

[95] Twenty years later, in an appeal from Victoria (*Ratten v The Queen* [1972] AC 378), the Privy Council admitted evidence of a telephone call from an hysterical woman to the telephone exchange seeking help from the police shortly before she was shot dead. Lord Wilberforce described (at 389 - 390) the prohibition against hearsay as stemming not only from the possibility of words being lost in transmission but also because of the risk of concoction or fabrication. It was the latter test of admissibility that judges ought to apply.

With statements “after the event” the judge had to be satisfied that:

“the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded”.

Lord Wilberforce cited both *O’Hara* and *Teper*.

[96] Another 15 years passed before *R v Andrews* [1987] AC 281 examined the admissibility of a statement to police made by the victim of a stabbing within minutes of the event. The victim died. The House of Lords (Lord Ackner at 300) affirmed the decisions of the Privy Council as applicable in English law, thus ridding it of the controversial *R v Bedingfield* (1879) 14 Cox CC 341. The primary question was whether the possibility of concoction or distortion could be disregarded (*R v Andrews* at 301; for Northern Ireland see *McGuinness v Public Prosecution Service* [2017] NICA 30, Weatherup LJ at para [11]; and for Ireland *DPP v Lonergan* [2009] IECC 52, Kearns J at paras [13] *et seq*).

[97] These cases concern the *res gestae* in non-sexual offence cases. They have been followed repeatedly throughout the Commonwealth and Ireland (see the parties' detailed submissions *supra*). The *ratios* are now encapsulated in statute in England, Northern Ireland and elsewhere. In particular the Criminal Justice Act 2003 (s 118(4)) preserves the importance of the possibility of concoction or distortion being disregarded by virtue of the person being "emotionally overpowered". In sexual offence cases, there is no separate concept of a *de recenti* statement which is different from the *res gestae*. Rather the approach has been to stretch the ambit of the *res gestae* beyond what might be accepted in Scotland.

[98] Thus in *Ibrahim v Crown Prosecution Service* [2016] EWHC 1750 the complainant in a domestic abuse case had spoken to the police in her flat about 1 hour and 45 minutes after the accused had left, yet "the possibility of concoction was negated" (Cranston J at para 27). Distress can be an important element (see also *Higgins v Crown Prosecution Service* [2015] EWHC 4129 (Admin), Hickinbottom J at para 9; *R v S* [2018] 4 WLR 24, Fulford LJ at para 30). If a complainant makes statements outwith the *res gestae*, these are not regarded as independent of her testimony (eg *R v Ashraf A* [2011] EWCA Crim 1517, Pill LJ at para 20).

[99] In Australia, the *Ratten/Andrews* approach was adopted (*Walton v R* (1989) 166 CLR 283, Mason CJ at 67; *R v Kadibil* [1999] WASC 67, White J at para 18 *et seq*); with the law now codified (Evidence Act 1995, ss 65 and 66). The same applies in New Zealand (eg *Janif v New Zealand Police* [2014] NZHC 2753, Woolford J at para [19]; Evidence Act 2006, s 35). Canada has introduced presumptively admissible and non-admissible statements.

[100] Returning closer to home, the Supreme Court of Ireland addressed the *res gestae* in some detail in *DPP v Connorton* [2023] IESC 19 in which Murray J described it as (at para 1):

"a complex proposition which ... can best be understood as including a principle that allows the admission of an otherwise inadmissible hearsay statement to prove the

truth of its contents because it presents a reliable and spontaneous account of an event given contemporaneously with, or shortly after, the incident in question”.

Murray J went on to explain this (at para 55); describing the rule as one of common sense.

The primary question concerns the possibility of concoction and distortion.

[101] Thus the Commonwealth and Irish jurisdictions have developed a system whereby statements which form part *res gestae* constitute proof of fact. What would fall to be regarded as a *de recenti* statement in Scotland is not a separate category from other prior consistent statements elsewhere. The latter may bolster credibility and reliability, but they are not proof of fact independent of the testimony of their maker. That is an understandable approach in systems in which there is no formal requirement for corroboration.

Res Gestae and De Recenti

[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). The court in *O’Hara* regarded what had happened in and around the bus as part of the *res gestae*, but would not normally have regarded the interview of the pedestrian in the cinema, 10 minutes or more later, as being in the same category but for exceptional circumstances. This may not be too important when what is under consideration is an utterance of a complainer in a sexual offence case. In that situation, if the statement is *de recenti*, it will be corroborative even if it falls outside the boundaries of the *res gestae*. What then is meant by *de recenti*? This opinion is not intended to narrow the scope of the test for *de recenti* statements as described in relatively recent cases.

[103] In relation to *de recenti* distress, the relevance of time was considered in *Wilson v HM Advocate* 2017 JC 135 (LJG (Carloway) at para [24] *et seq*). Following *Moore v HM Advocate* 1990 JC 371 (LJG (Hope) at 376) and *Cannon v HM Advocate* 1992 JC 138 (LJG (Hope) at 143),

it was said (*Wilson* at para [30]) that, although the interval between the event and the observed distress was a factor, the important point was whether the distress was caused by the offence. Intervening occasions on which the complainer had exhibited distress may be of some significance, but there was no fixed interval after which distress could not constitute corroboration.

[104] There are undoubted parallels between the admissibility of *de recenti* distress and a *de recenti* statement. The two will often go together, as in *Wilson* (see para [35]). Where they do not, the rule of thumb, which has been applied over the years, is whether the statement or, better still, utterance has occurred on the first reasonable opportunity to speak to a natural confidante (*Wilson* at para [34], following *Anderson v McFarlane* (1899) 1 F (J) 36, LJC (Macdonald) at 37; see Walker & Walker: *Evidence* (1st ed) at para 376). Just what the outer limits of this may be will depend on the facts and circumstances of each case, but a considerable latitude is allowed in cases of sexual offending (*Wilson* at para [34] under reference to Dickson at para 261).

[105] *Robert Henderson* (1836) 1 Swin 316 is a useful illustration of the correct approach. Dickson's reference (at para 95) to a *de recenti* statement being "the natural outpouring of feelings aroused by the recent injury and still unsubsidied" is a helpful general description of what will be regarded as admissible. Where there has been a lapse of time, which has raised a substantial risk of concoction, the statement may be regarded as inadmissible (*Gilmour v Hanson* 1920 SC 598, LP (Clyde) at 603). Despite its later overruling in the wake of *Morton v HM Advocate*, *Ovenstone v Ovenstone* 1920 2 SLT 83 was correctly decided, at least if the maid's instant report after dinner were classified as *de recenti* rather than *res gestae*.

Proof of Identification

[106] There is no hint in the Institutional Writers, Dickson or the authorities that, if a statement is corroborative, whether as part of the *res gestae* or as *de recenti*, it can only corroborate the commission of the crime and not the identity of the perpetrator. It is not easy to find a case in which a *de recenti* statement was the only corroboration of identification. Those earlier ones founded upon by the Crown (*James Gibbs*, *David Alexander* and *John Barr*) are not sufficient for this purpose, but the re-instated *McCrimmon v MacMillan* is. The principle must be that, if the *res gestae* or a *de recenti* statement is to be treated as if it were real evidence, it is impossible to see why it should not provide, for example, the “very little else” (*Ralston v HM Advocate* 1987 SCCR 467, LJG (Emslie) at 472) required when a positive identification has already been made.

[107] It was not disputed that an utterance which is part of the *res gestae* can provide corroboration of evidence of identity (*O’Shea v HM Advocate* 2015 JC 201, LJG (Carloway), delivering the Opinion of the Court, at para [21]). The argument in favour of distinguishing between the corroborative effects of the two categories of statement is unconvincing. The admission of both presupposes that neither has been the product of fabrication, or at least that the risk of concoction is minimal.

[108] Proof of identity by corroborated evidence is an important element in the criminal justice system. The courts must be careful to guard against erroneous identification. Scots law does this, first, not only by retaining the unique requirement for corroboration but also in requiring judges to direct juries to take care in cases where the only evidence is eye-witness identification and there is an objective reason to question its reliability (*Finnegan v HM Advocate* 2024 SCCR 318, LJG (Carloway), delivering the Opinion of the Court, at para [15] *et seq*). Secondly, the principal guard against miscarriages of justice remains, as it does

in most other jurisdictions in the Commonwealth and Ireland, not in a quantitative assessment of the sources of evidence but in the need for the factfinder to be satisfied of the guilt of the accused beyond reasonable doubt.

[109] At the heart of the issue is the need for the law of evidence to be as clear and straightforward as is consistent with the interests of justice, including fairness to the accused. As the Scottish Law Commission have said (100th Report at para 1.3), albeit in relation to the reform of the law of evidence:

- “(1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence;
- (2) As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible.”

Having to apply rules, which prohibit a judge or jury from reaching a just conclusion based upon a liberal consideration of all relevant testimony, hinders the justice system. As a generality, if evidence is regarded as admissible, it should be so for all purposes; that is as proof at large. A judge could direct a jury that a *de recenti* statement is admissible as proof only of the commission of the crime but not identity, but this is likely to create perplexity in the minds of the jury. In short if, as has been determined, a *de recenti* statement is admissible, it can provide corroboration of both the commission of the crime and the identity of the perpetrator.

Answers to the Four Questions

[110] (1) It is not now disputed in the wake of *Lord Advocate's Reference No. 1 of 2023* that a *de recenti* statement is corroborative on its own, that is, in the absence of distress.

(2) If a *de recenti* statement is corroborative, it is capable of proving the occurrence of the crime and the identity of the perpetrator.

(3) A statement ceases to be *de recenti* when it ceases to be “recent” following upon the commission of the crime, or is not provided to the first natural confidante as described in this opinion.

(4) The decision in *Morton v HM Advocate* was correct and should not be overruled but the *dicta* on the corroborative effect of a *de recenti* statement is disapproved.



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2024] HCJAC 43
HCA/2023/24/XM
HCA/2023/25/XM**

Lord Justice General
Lord Justice Clerk
Lady Paton
Lord Pentland
Lord Matthews
Lord Boyd of Duncansby
Lady Wise
Lord Armstrong
Lord Beckett

**OPINION OF LADY DORRIAN,
the LORD JUSTICE CLERK**

in the References by

HIS MAJESTY'S ADVOCATE

Appellant

against

PG and JM

Respondents

**Appellant: The Lord Advocate (Bain KC), Harvey AD, Scullion, D Blair; the Crown Agent
Respondent (PG): McCall KC, Crowe, Lawrie; Central Court Lawyers, Livingston
Respondent (JM): MD Anderson KC, Cloggie, Loosemore; PDSO**

30 October 2024

[111] I have had the advantage of reading in draft the opinion of your Lordship in the chair, with which I am in complete agreement. I agree with your Lordship that a statement forming part of the *res gestae* can be used as proof of fact, whether the statement relates to the commission of the crime, the identity of the perpetrator, or both. A statement made in the context of the *res gestae* thus has corroborative effect. I did not understand this to have been substantially disputed during the course of the hearing.

[112] Corroboration may also be found, whether in relation to the commission of the crime, the identity of the perpetrator, or both, in a *de recenti* statement. In my view, a *de recenti* statement, whether accompanied by distress or not, constitutes evidence separate from that of the maker of the statement. In *Lord Advocate's Reference No 1 of 2023* the court referred (para 227) to the fallacy which lay in "the legal construct whereby what a complainer says shortly after the event is treated in exactly the same way as her later testimony because it comes from the same "source". On the contrary, "the person who speaks to a *de recenti* statement is not the same as the maker of the statement but an independent reporter of what was said in extremis after the event" (para 229). Although the issue was not a live one in *Lord Advocate's Reference No 1 of 2023*, these observations apply equally to any *de recenti* statement made by a complainer. Such a statement constitutes independent evidence capable of providing corroboration.

[113] It would be utterly illogical to treat some of what a complainer said as corroborative (as to the commission of the crime) but some as lacking that quality (anything said in respect of the identity of the perpetrator). If the statement has the necessary quality to be accepted as a *de recenti* statement, as opposed to a subsequent narrative account of facts remote from the events and after time for reflection, then it has corroborative value, in its entirety. To

hold otherwise would be to err in the way described in *Lord Advocate's Reference No 1 of 2023*, para 234 which noted:

“The common thread running through the authorities and writings which have been disapproved in this Opinion is the tendency to categorise, sub-categorise, over-analyse, and generally complicate the issue of the use to which evidence may be put. The admissibility of evidence should be a relatively simple concept, rather than something which is overtechnical and theoretical. The court is not dealing with theory, abstraction or hypothesis. The law of evidence is a highly practical matter. It is a tool designed to set the parameters within which evidence may be led to ensure that the court focuses on the issues truly in dispute, and to achieve a fair trial, not only for the accused but also in the public interest. The rules must be clear and simple and capable of being applied in a myriad of different factual situations. The more that complexity is built into the rules, or the more layers added, the more perplexing matters will be for jurors. An overly technical approach: makes it difficult for the judge adequately to direct the jury; increases the risk of confusion in the jury; and raises the prospect of a miscarriage of justice. It may make it more difficult to recognise a jury’s verdict as a properly reasoned one.”

[114] The qualities which make one part of the statement corroborative apply equally to the whole statement: to suggest otherwise is illogical and impractical. To direct the jury that evidence of what was said in respect of identification could not be treated as corroborative, but the rest of the statement could be so treated is likely to lead to grave confusion and indeed, miscarriages of justice.

[115] The underlying rationale for treating *res gestae* statements as corroborative is one which has a parallel in the making of a *de recenti* statement. Statements made in the course of the *res gestae*, in circumstances of involvement in events, are likely to shed light on the nature and true character of the events in question. Being relatively contemporaneous, the risk of concoction, distortion, influence from extraneous factors and the like, is minimised. The jury would be entitled to assess the whole circumstances of the making of the statement, and if they considered it justified, to accept it for whatever corroborative value it had. The statement is capable of being considered the product of the emotion generated by

association with the events. It is, to paraphrase Lord Fleming in *O'Hara v Western SMT*, a statement made when the connection between the speaker and the incident was unbroken.

[116] The connection between an incident and the complainer is likely to persist beyond the termination of the *res gestae*. A statement made in circumstances of recency, and which may reasonably be considered the “natural outpourings of feelings aroused by the recent injury, **and still unsubsidied**” (Dickson, 3rd edition, para 258, emphasis added). A statement which does not have the quality of recency, and where that lack is not explained by the prior absence of a reasonable confidante, will not have corroborative value, since it would constitute a statement remote in time from the events in question, and made following time for reflection, distortion, and the like.

[117] Once it is accepted that remarks have the quality of a *de recenti* statement, their content is to be considered corroborative, with no distinction as to whether the import bears on the crime, the identity of the perpetrator or both. As with the *res gestae*, the jury would be entitled to assess the whole circumstances of the making of the statement, and if they considered it justified, to accept it for whatever corroborative value it had, in light of the directions given by the trial judge.



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 43
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Lord Justice General
Lord Justice Clerk
Lady Paton
Lord Pentland
Lord Matthews
Lord Boyd
Lady Wise
Lord Armstrong
Lord Beckett

OPINION OF LADY PATON

in the References by

HIS MAJESTY'S ADVOCATE

Appellant

against

PG and JM

Respondents

Appellant: The Lord Advocate (Bain KC), Harvey AD, Scullion, D Blair; the Crown Agent

Respondent (PG): McCall KC, Crowe, Lawrie; Central Court Lawyers, Livingston

Respondent (JM): MD Anderson KC, Cloggie, Loosemore; PDSO

30 October 2024

[118] The risk of mistaken identity is a major concern in most criminal legal systems.

Scotland is no exception. The current Jury Manual advises a judge presiding over a criminal trial involving disputed identification evidence to warn the jury as follows:

“Our powers of observation can be fallible. Errors can occur in identification. Sometimes we think we recognise somebody we have seen before. Sometimes we are right, sometimes we are wrong. Some people are better at it than others. Mistakes about identification have been made in court cases in the past. These have to be guarded against ...

You will need to take particular care in assessing the quality of this evidence. You may want to consider:

1. What opportunity did the witnesses have to see the person concerned? Was it a fleeting glimpse, or a longer look? Was there time for reliable observations to be made? Was the person clearly visible, or was the sighting obscured in some way?
2. What was the state of the lighting?
3. Was the person previously known to the witness and recognised as such, or a total stranger?
4. Was the person someone with some easily distinguishable feature or not?
5. How positive have the identifications been, both in court and at the [video] identification parade? What were the reasons why the accused was picked out?
6. Have the memories of the witnesses been affected in any way?”

[119] The risks of mistaken identity have been emphasised by criminal appeal courts (*Gage v HM Advocate* 2012 SCCR 161 at paragraph [29]; *Finnegan v HM Advocate* [2024] HCJAC 33 at paragraph [15]); and by an Academic Research Group conducting an extensive comparative survey of Scotland and other jurisdictions in the context of sufficiency of evidence (*Post-Corroboration Safeguards Review: Report of the Academic Expert Group* August 2014 chapters 4 and 5), where it is noted in paragraph 5.1:

“... eyewitness identification evidence is fraught with difficulties, and ... the potential for wrongful convictions is high.”

[120] A major safeguard in the context of identification evidence is the unique Scots evidential requirement of corroboration. A jury is instructed as follows:

“ ... the law is that nobody can be convicted on the evidence of one witness alone, no matter how credible and reliable their evidence may be. The law requires a cross-check, corroboration.

There must be evidence you accept as credible and reliable coming from at least two separate sources, which, when taken together, implicate the accused in the commission of the crime. Evidence from one witness is not enough ... there are two essential facts that must be proved by corroborated evidence.

These are:

- that the crime charged was committed; and
- *that the accused committed it* [emphasis added].”

[121] The current Jury Manual gives further important guidance to a trial judge: at page 9.12/133, a judge is warned:

“Care has to be taken to ensure that evidence proceeding from the same source spoken to by more than one witness is not misconstrued as corroboration. This could arise where two witnesses speak to hearing the accused admit the crime in simple terms (*Callan v HM Advocate* 1999 SCCR 57).”

[122] The unique doctrine of corroboration provides a major safeguard at two stages in a trial: not only is the jury alerted to the particular dangers of identification evidence by directions from the judge, but also section 97 of the Criminal Procedure (Scotland) Act 1995 permits a legal defence team to make a “no case to answer” submission at the close of the Crown case, such that an important quantitative “sifting” procedure is carried out before the case is allowed to go to the jury for their verdict. Thus where a legal team are of the view that there is in law insufficient corroborated evidence of the identity of the perpetrator, a submission in terms of section 97 of the 1995 Act is made outwith the presence of the jury. If the submission is successful, the case does not even reach the jury for their deliberation: the

submission may be sustained as a matter of law based on the evidence taken at its highest, and the accused acquitted.

[123] Should this major safeguard requiring two independent sources in the context of identification evidence be removed? Depending on the evidence available in any particular case, answering Question 2 with confirmation that a *de recenti* statement made by the complainer can provide corroboration for the complainer's identification evidence would, in my view, result in such a removal, for the following reasons.

[124] The recent decision *Lord Advocate's Reference No 1 of 2023* 2024 JC 140 recognised that the requirement of corroboration of the complainer's evidence concerning the *commission of the crime* may be satisfied by the evidence of the complainer taken with the evidence of others who speak to words uttered by the complainer forming part of the *res gestae* or a *de recenti* statement. However the reasoning underlying *Lord Advocate's Reference No 1 of 2023* is not, in my view, easily transferable to a situation where the complainer makes an assertion – either as part of the *res gestae*, or in the form of a *de recenti* statement, or both – about the *identity* of the perpetrator. The only true “source” of identification in such circumstances is the complainer. That is one single source. The requirement of corroborative evidence from a second, entirely independent, source (such as another eyewitness, or circumstantial evidence, or DNA, or fingerprints) means that there must be a crucial cross-check or safeguard which provides some protection against the risks of fallible observation on the part of the complainer, which might lead – possibly entirely inadvertently – to a case of mistaken identity and to a miscarriage of justice. With the requirement of corroborative evidence from a second entirely independent source remaining unsatisfied, either a “no case to answer” submission would prevent the case ever reaching the jury, or at the very least the jury would be suitably warned about the need for a suitable cross-check or support for the

complainer's identification evidence, and the need to find supporting evidence which they accept which is extrinsic to the complainer's evidence.

[125] Other jurisdictions may have different rules. But other jurisdictions have different legal structures (not involving corroboration) and different safeguards. As the Lord Justice General points out at paragraphs [93] and [37] above:

“The court should be cautious before grafting concepts from other jurisdictions into the Scots law of evidence. Scots law has its unique concepts, not least the requirement for corroboration, and different trial procedures. ... [In] England and Wales ... there [is] a sufficiency test containing a qualitative element ...”

Other systems do not have the unique Scots law safeguard of corroboration. What they do have are numerous other checks and counterbalances which our criminal legal system does not have: for example, a requirement of jury unanimity or super majority; or a pre-jury qualitative assessment of sufficiency.

[126] The Lord Advocate invited this court to hold that a *de recenti* statement can corroborate a complainer's testimony *both* (a) that the crime was committed; and (b) that the accused committed it. Three arguments were advanced.

[127] First, it was submitted that if there has been a positive identification by the complainer, very little else is required: *Ralston v HM Advocate* 1987 SCCR 467 at 472; *Ready v HM Advocate* 2009 SCCR 380 at para [13]. I accept that very little else is required: but as the law stands, that “very little else” has to come from a source independent of the complainer, and that, in my view, provides a major safeguard. For example, in *Ralston*, the second witness who, at an identification parade, picked out someone as being “a man resembling the assailant”, was a second source entirely independent of the complainer.

[128] The second argument for the Crown was that if a *de recenti* statement can corroborate the *commission* of the crime (*Lord Advocate's Reference No 1 of 2023*) there is no reason in

principle why such a statement should not corroborate the identification evidence of the complainer. I do not agree. Witnesses who can speak to a *de recenti* statement emanating from the complainer, are themselves “sources” quite independent of the complainer. They are describing what they themselves saw and heard, and thus are contributing to a body of evidence pointing to the fact that a crime was committed. They are separate independent “sources”. By contrast, a *de recenti* statement naming or describing or indicating or identifying a perpetrator has only one source for that identification: the complainer. That is, in my view, the “reason in principle” underlying the difference between the law relating to evidence concerning the commission of a crime, and the law relating to evidence concerning the identification of a perpetrator. That “reason in principle” is all the more important when the well-founded concern about miscarriages of justice arising from mistaken identity is borne in mind.

[129] The third reason advanced by the Lord Advocate is that prior to the decision in *Morton v HM Advocate* 1938 JC 50, the cases of *James Gibbs* (1836) 1 Swin 263, *David Alexander* (1838) 2 Swin 210, and *John Barr* (1850) Shaw (J) 362 relied on *de recenti* statements to corroborate the complainer’s evidence of identification. In my view, these authorities do not provide strong support for the proposition that a *de recenti* statement can be used as corroboration of the complainer’s identification evidence. Arguably, in *Gibbs*, identification evidence was provided by the complainer’s evidence supported by circumstantial evidence; in *Alexander*, identification was not in issue; in *Barr*, there was circumstantial evidence of identity.

[130] *McCrinkle v MacMillan* 1930 JC 56 is a more recent decision involving *de recenti* statements being treated as corroborative of the complainer’s identification evidence. *McCrinkle* relied *inter alia* on a decision *McLennan v HM Advocate* 1928 JC 39 (where the

identity of the perpetrator was not in fact contested). In the later full bench decision *Morton v HM Advocate* 1938 JC 50, *McLennan* was disapproved, and *McCrindle* overruled. Thus there is no clear line of authority supporting the Lord Advocate's position. In any event, this 9-judge bench is entitled to overturn or disapprove any or all of these decisions. The question remains: what approach should this court adopt?

[131] In support of the Crown's contention that a *de recenti* statement by the complainer could and should corroborate the complainer's evidence concerning the identity of the perpetrator, the Crown suggested that any submission to the contrary based on a potential for a miscarriage of justice was in effect a submission based on "legal policy reasons". It was pointed out that no other jurisdiction draws a distinction between evidential rules for identification on the one hand, and for the commission of the crime on the other. Such a dividing line, it was submitted, would complicate the law of evidence. The accused already had the benefit of safeguards of disclosure and legal representation.

[132] In my view, the "legal policy reasons" are well-founded. While the risk of concoction or fabrication may be minimised by the contemporaneous nature of the *res gestae* or the recency of a *de recenti* statement, the risks of mistaken identity (including mistakes occurring in good faith) remain. Corroboration of identification evidence in the sense of evidence from other independent sources – extrinsic to the complainer – provides a salutary safeguard. Other jurisdictions may not impose the same evidential rule, but they have different, complex, and comprehensive approaches to the law of evidence, often codified in modern statutes. The ways in which their laws of evidence have evolved have been shaped by their particular legal systems. The safeguards adopted vary from jurisdiction to jurisdiction, and may involve, for example, jury unanimity or super majority, or a pre-jury qualitative assessment of sufficiency. At present, the Scots legal system relies on

corroboration as a major safeguard against a miscarriage of justice through mistaken identity, and that safeguard should not in my opinion be removed or weakened, unless and until some appropriate evidential structure has been introduced. In the context of identifying who committed a crime, the benefits of disclosure and legal representation do not seem to me to be of an equivalent effectiveness as the requirement of corroboration.

[133] I am not persuaded that the law of evidence would become too complicated where a dividing line is drawn between the concept of the commission of the crime and the concept of the identification of the perpetrator. Not only would a jury understand the need for a cross-check in the context of identification of the perpetrator, but in many cases the exercise of section 97 of the 1995 Act (the “no case to answer” submission) would mean that a case without adequately corroborated identification evidence would not be permitted to go to a jury for their verdict – the accused would be acquitted if and when the section 97 submission was sustained.

[134] I respectfully move the court to answer Questions 2 and 4 as follows:

2. *A de recenti* statement made by a complainer can corroborate the complainer’s testimony that the crime was committed; but a *de recenti* statement made by the complainer cannot corroborate the complainer’s testimony that it was the accused who committed the crime.

4. *Morton v HM Advocate* 1938 JC 50 should not be overruled, but the *dicta* of Lord Justice Clerk Aitchison should be disapproved to the extent that those *dicta* (i) suggest that a *de recenti* statement made by the complainer cannot corroborate a complainer’s testimony that the crime was committed; (ii) appear to define the scope of the *res gestae* as strictly contemporaneous with the crime.

[135] *Quoad ultra* I gratefully adopt and agree with the Opinion of the Lord Justice General.

[136] I appreciate that I am in the minority. For that reason, I offer an example where corroboration might play an important role, illustrating the need for corroboration as outlined in the current Jury Manual (page 9.11/133) where it is stated:

“Corroboration needed for commission and identification

1 The requirement of corroboration is based on the rule that it is unsafe to rely on the evidence of a single witness. The basic rule is that no-one can be convicted on the testimony of one witness alone. There are two facts which must be proved by corroborated evidence: first, that the crime charged was committed, and secondly, that it was committed by the accused.”

[137] What follows is a hypothetical example. At a petrol station late at night, a sole employee (E) is in charge. He runs out of the building very distressed, shouting to someone filling their car in the forecourt that he has been held up at gunpoint, robbed, that all the till money had been taken, the gunman’s scarf had slipped, and (as E shouted to the witness in the forecourt) E had “recognised a local man, Peter Smith”. (In fact E was wrong, it was a case of *bona fide* mistaken identity, someone who looked similar to the individual named.)

[138] There was indeed a local man named Peter Smith, who, when investigated by the police, could not satisfactorily account for his whereabouts at the relevant time, or produce someone who could. On searching and investigating further, the police found nothing which might incriminate Peter Smith or link him to the *locus*.

[139] On assessing the evidence, there would be ample corroboration for the first fact, namely that a crime had been committed: E’s behaviour, his distress, his shouted *de recenti* statement, the till drawer lying open, the cash gone. However in relation to the second fact – who committed the crime – there were no fingerprints; no CCTV footage (the system had broken down); no item left behind such as the scarf or some other item dropped in haste which might have traces of DNA; no other eyewitnesses. When the police investigate Peter

Smith, nothing incriminating is found. E later identifies Peter Smith at an identification parade.

[140] If the view is taken that E's *de recenti* statement is corroboration, emanating from a second source, the case will proceed to court. But what is the corroboration of E's identification? Where is the "cross-check"? The only source who actually saw the robber's face was E. The person in the forecourt did not, and can only speak to what E said, and how he appeared and behaved, and what could be seen if the till and its surroundings were examined. If the view is taken that E's *de recenti* statement is sufficient corroboration of identification, the defence would be unable to argue a section 97 submission, and the evidence would go to the jury. The jury might find E entirely credible and reliable, and proceed to convict.

[141] Such a case may be rare. In most cases there is likely to be supporting forensic evidence, supporting circumstantial evidence, or some other sort of supporting evidence, all emanating from sources independent from E, thus providing a cross-check on his identification of the perpetrator. But in my view there is no principle or precedent which would justify deeming a *de recenti* statement such as that illustrated above to be corroboration of the complainer's evidence about the identity of the person who committed the crime. The identification (by someone who actually saw the perpetrator's face), and the statement (about who the perpetrator was), emanate from one and the same individual, from one and the same witness, from one and the same source.



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Lord Justice General
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Lady Paton
Lord Pentland
Lord Matthews
Lord Boyd of Duncansby
Lady Wise
Lord Armstrong
Lord Beckett

OPINION OF LORD PENTLAND

in the References by

HIS MAJESTY'S ADVOCATE

Appellant

against

PG and JM

Respondents

**Appellant: The Lord Advocate (Bain KC), Harvey AD, Scullion, D Blair; the Crown Agent
Respondent (PG): McCall KC, Crowe, Lawrie; Central Court Lawyers, Livingston
Respondent (JM): MD Anderson KC, Cloggie, Loosemore; PDSO**

30 October 2024

[142] I have had the advantage of considering in draft the Opinions of the Lord Justice General and the Lord Justice Clerk. I am in full agreement with them and would answer the questions asked in the references in the terms proposed by the Lord Justice General.

[143] I agree in particular with the approach taken to proof of identification in paras [106] to [109] of the Lord Justice General's Opinion. In my view, it would not be logical or sensible for the law to allow a *de recenti* statement to be available as a source of corroboration for some purposes but not for others. That is the very type of illogicality that has bedevilled the practical application of the law of evidence since the wrong turning taken in *Morton v HM Advocate* 1938 JC 50 limiting the evidential value of a *de recenti* statement to the issue of consistency alone. Correctly understood, evidence about the making of such a statement is a stand-alone and independent item of circumstantial evidence, the proper interpretation of which is a question of fact for the jury or other fact-finder. Evidence given by a witness as to a *de recenti* statement by the complainer identifying the perpetrator is real evidence in its own right. It is evidence that is separate and distinct from the complainer's evidence. It comes from a source which is not the same as the complainer, namely the witness who speaks to the statement. That being the case, there is no basis for holding that such a piece of circumstantial evidence is incapable of supplying the necessary independent support for a positive identification of the accused as the perpetrator of the crime charged.

[144] In her Opinion Lady Paton does not explicitly challenge or take issue with the agreed position of the parties to the references that an utterance which falls to be regarded as a component part of the *res gestae* is fully capable of supplying an independent source of corroboration of other evidence of identification, including the evidence of the complainer. Acceptance of that proposition would be inconsistent with the notion that an identifying statement made *de recenti* must be treated as emanating from the same source as the complainer's own evidence. If that is true then the same would apply in the case of the *res gestae* utterance. The correct analysis is that both the *res gestae* utterance identifying the accused and the *de recenti* statement doing the same thing are independent pieces of

circumstantial real evidence standing apart from the complainer's own testimony. In the case of each of these types of evidence it will be for the fact-finder to evaluate the evidence (in the context of the totality of the evidence in the case) and decide whether to accept it as supporting or confirming the complainer's account or to regard it as not being good enough for that purpose.

[145] A recognition of the potential corroborative effect of a *de recenti* statement insofar as it bears upon identification does not in my opinion water down to any meaningful extent the substantial safeguards for which Scots law provides (and will continue to provide) against the risk of mistaken identification. These are ample and robust. They include: the high standard of proof demanded of the Crown; the right to legal representation; the obligation of disclosure incumbent on the Crown; the warnings given where necessary by the trial judge about the inherent weaknesses of identification evidence and the consequent need to take care; the need for corroboration; the right to challenge the prosecution case by cross-examination of Crown witnesses and the leading of defence evidence; the right to make submissions to the judge on the sufficiency of the evidence and to the jury (or other fact finder) on the overall quality of the evidence; and the availability of substantial rights of appeal.

[146] The law of evidence must be straightforward and capable of easy explanation and application. It must avoid artificial concepts, such as admitting the same piece of evidence for one purpose but not for others. The latter approach reeks of contrivance and artificiality; it is liable to confuse juries, to bring the law into disrepute and to result in miscarriages of justice.

[147] For these reasons I find myself unable to agree with Lady Paton on the issue of identification by *de recenti* statement.



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Lord Justice General
Lord Justice Clerk
Lady Paton
Lord Pentland
Lord Matthews
Lord Boyd of Duncansby
Lady Wise
Lord Armstrong
Lord Beckett

OPINION OF LORD MATTHEWS

in the References by

HIS MAJESTY'S ADVOCATE

Appellant

against

PG and JM

Respondents

**Appellant: The Lord Advocate (Bain KC), Harvey AD, Scullion, D Blair; the Crown Agent
Respondent (PG): McCall KC, Crowe, Lawrie; Central Court Lawyers, Livingston
Respondent (JM): MD Anderson KC, Cloggie, Loosemore; PDSO**

30 October 2024

[148] I have had the advantage of reading in draft the opinion of your Lordship in the chair and the concurring opinions of the Lord Justice Clerk, Lord Pentland and Lord Boyd of Duncansby. I agree entirely. It follows that, for the reasons set out in the opinions I have

mentioned, I respectfully disagree with Lady Paton as to the corroborative effect of a *de recenti* statement in relation to the identification of the perpetrator. There is nothing which I can usefully add.



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Lord Armstrong
Lord Beckett

OPINION OF LORD BOYD OF DUNCANSBY

in the References by

HIS MAJESTY'S ADVOCATE

Appellant

against

PG and JM

Respondents

**Appellant: The Lord Advocate (Bain KC), Harvey AD, Scullion, D Blair; the Crown Agent
Respondent (PG): McCall KC, Crowe, Lawrie; Central Court Lawyers, Livingston
Respondent (JM): MD Anderson KC, Cloggie, Loosemore; PDSO**

30 October 2024

[149] I have read in draft the opinions of the Lord Justice General, the Lord Justice Clerk, and Lord Pentland. I agree with them and would answer the questions in the references as proposed by the Lord Justice General.

[150] I have also read in draft the opinion of Lady Paton. I regret that I disagree with her analysis that while a *de recenti* statement can provide corroboration of the fact of the crime as spoken to by the complainer, on which we are all agreed, it cannot provide corroboration of identification. At the risk of repetition of points made by others I wish to explain why I have reached that conclusion.

[151] First, I agree with Lord Pentland that it would not be logical or sensible for the law to allow a *de recenti* statement to be available as a source of corroboration for some purposes but not for others. At paragraph [124] Lady Paton seeks to draw a distinction between evidence from witnesses who can speak to a *de recenti* statement emanating from the complainer as to the fact of the crime as being separate independent “sources”. By contrast, she finds that a *de recenti* statement naming or identifying a perpetrator has only the complainer for as the source of evidence. In my opinion that is not a valid distinction. The reporting of what the complainer said *de recenti* comes from another source independent of the complainer whether it is on the facts of what occurred or the identification of who was responsible. It is not clear why there should be any distinction between an account given by the complainer of what happened to her and an identification of the perpetrator. In the circumstances we are faced with here the only person who gives direct evidence of what happened to her and who the perpetrator was is the complainer. The reason why in these circumstances a *de recenti* statement may be accepted as corroboration is to be found in Dickson, at para 95 as being “the natural outpouring of feelings aroused by the recent injury and still unsubsidised”. It is illogical to suggest that these feelings may only extend to the facts of the crime and not to the identity of who was responsible.

[152] Lady Paton is of course correct to remind the court of the dangers associated with identification evidence. She cites *Gage* and *Finnegan* as examples of cases where the court

has warned of the dangers of mistaken identity, though neither involved sexual offences.

These dangers were also highlighted in the *Post-Corroborator Safeguards Review: Report of the Academic Expert Group* August 2014 to which she makes reference. It is important however not to overstate these difficulties. Issues of mistaken identity most often arise with eyewitness evidence, that is evidence independent of the complainer. The passage cited by Lady Paton from the *Post Corroboration Review* also concerns eyewitness evidence and chapter 5 is directed to that issue not identification by the complainer.

[153] Of course problems of identification can arise from the evidence of a complainer, though as I suggest below these will be rare, particularly in the case of sexual offending. The question is whether as a matter of policy the potential for mistaken identity evidence means that a special rule needs to be created that holds that a *de recenti* statement is real evidence for one purpose but not for another. I do not believe that is the case.

[154] The issue of a *de recenti* statement as a source of corroboration will arise most often in sexual cases where the assailant was someone known to the complainer. Sometimes they will have been friends or acquaintances. Sometimes they will only have met them in the course of a night out. But even there they will most often have spent time in their company before any offence is committed. Often there will have been a prior and perhaps ongoing relationship. Sadly, particularly in the case of children, the perpetrator will be a member of the family or a close family friend. Cases of “stranger rape” or assault are rare. It is difficult to see the circumstances in which a complainer would be able to identify a stranger in a *de recenti* statement. Even in the non-sexual example cited by Lady Paton the accused, Peter Smith, was known to the complainer. Is the law really going to hold that the statement of a young child returning from a family visit who tells her mother that “Uncle Johnny did something bad to me” and then explains what that bad thing was, should be admitted as

evidence for the purpose of corroborating what happened but not who did it? In my opinion that distinction risks bringing the law in this area into disrepute.

[155] It is also difficult to understand why any perceived difficulty with the primary source of evidence – the identification of the accused by the complainer in court or at an identification parade – should result in exclusion of a source of secondary corroborating evidence. Indeed in many ways the evidence of a statement made *de recenti* identifying the accused might be thought to be more reliable than evidence of identification given at a later date.

[156] Finally, as Lord Pentland points out all the safeguards in terms of the burden of proof, standard of proof and the directions that judges are required to give juries on the dangers of mistaken identity remain. These safeguards include the right to cross-examine, not only the complainer on the issue of identification but the witness or witnesses speaking to the terms of the *de recenti* statement.

[157] For all of these reasons I respectfully disagree with Lady Paton. In my opinion it is difficult to see why the primary evidence of the complainer identifying the accused either in court or at an identification parade cannot be corroborated by her *de recenti* statement, spoken to by a third party, identifying an accused.



APPEAL COURT, HIGH COURT OF JUSTICIARY

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Lord Justice General
Lord Justice Clerk
Lady Paton
Lord Pentland
Lord Matthews
Lord Boyd of Duncansby
Lady Wise
Lord Armstrong
Lord Beckett

OPINION OF LADY WISE

in the References by

HIS MAJESTY'S ADVOCATE

Appellant

against

PG and JM

Respondents

Appellant: The Lord Advocate (Bain KC), Harvey AD, Scullion, D Blair; the Crown Agent

Respondent (PG): McCall KC, Crowe, Lawrie; Central Court Lawyers, Livingston

Respondent (JM): MD Anderson KC, Cloggie, Loosemore; PDSO

30 October 2024

[158] I have read in draft the opinion of your Lordship in the chair and the concurring opinions of the Lord Justice Clerk, Lord Pentland and Lord Boyd of Duncansby. I agree entirely.



APPEAL COURT, HIGH COURT OF JUSTICIARY

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OPINION OF LORD ARMSTRONG

in the References by

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OPINION OF LORD BECKETT

in the References by

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