A REFORMULATION OF THE *RES GESTAE* RULE

Ratten v. *R*[1]

Section 6 of the Malaysian Evidence Act, 1950[2] states the *res gestae* rule in these terms:—

> Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

Despite its apparent clarity, the term *res gestae* has occasioned many vexed problems. Most of these problems arise because there is no consistent usage of this term. Lord Wilberforce in the recent Privy Council decision of *Ratten* v. *R* enumerated three situations to which the term *res gestae* is applicable. It is proposed to review this area of the law of evidence by reference to these different uses of the term.

First, a question may arise, when does the situation begin and when does it end. The doctrine of *res gestae* is invoked to admit evidence which is so interwoven with the act in issue that its dissociation from it would render the act unintelligible. Thus when a situation of fact (e.g. a killing) is being considered, if the evidence is to be confined merely to the insertion of the knife, without more, it may often render the whole transaction unintelligible and hamper the discovery of truth. The facts in *R.* v. *Ellis*[3] make this patent. A shopman was charged with stealing 6 shillings from the till. These shillings had been marked. They were removed together with other unmarked coins throughout the course of the day. The removal of the unmarked coins was not a fact in issue nor indeed relevant. The court held that as it was inextricably intertwined with the fact in issue (i.e. the taking of the coins) it could nevertheless be proved as *res gestae*. Similarly in *Kanapathy* v. *R*[4] the appellant an Inspector of Police was charged with accepting $50.00 without consideration from the complainant against whom a charge of attempted rape was withdrawn. Since the complainant's arrest the appellant had made various overtures to him to obtain his watch, wrist band and glass cutter. Only when he was informed by the complainant that the articles had been pawned did the appellant substitute his earlier demands to one for cash. Could the earlier demands

[1] [1972] A.C. 378 (PC).

[2] Laws of Malaysia, Act 56 (Revised 1971). Hereafter referred to as the Act.

[3] (1826) 6 B. & C. 145.

[4] (1960) M.L.J. 26.

for the goods which no longer formed the subject-matter of the charge be admissible as part of the *res gestae*? Here clearly the significance of the final act could not be understood without the narration of the earlier conduct. Similarly in *Hamza Kunju* v. *R.*[5] the appellant was convicted on 3 charges of causing hurt by a dangerous weapon. The incidents occurred at night. The question that arose for determination was whether evidence of an incident which occurred that morning between one of the complainants and the appellant was admissible. The complainant had intervened in a 'fight' between the appellant and another complainant and threatened to report the matter to the union. Buttrose J. held all of his evidence to be part of the *res gestae*. Again the transaction really started with the incident in the morning. Hence to exclude such evidence could well render wholly unintelligible the entire episode.

Many writers state that as such evidence is admissible under other rules of evidence, it is not useful to base admissibility on the rather difficult *res gestae* doctrine. For example, in *Hamza Kunju*'s case it was sought to establish motive for the subsequent attack by the appellant on the complainant. This was clearly admissible by section 8(1) of the Act which reads:

> Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Contemporaneity between the principal act and the other acts sought to be admitted under the *res gestae* doctrine used in this sense is crucial. The time place and circumstances of the transaction are necessarily weighty and critical considerations in determining whether the facts were inextricably bound to each other such that the exclusion of the accompanying conduct or utterance would render the principal act practically meaningless.

The second sense in which Lord Wilberforce used the term was: The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the *res gestae* or part of the *res gestae*, i.e. are the relevant facts or part of them. Thus if A were to hand B a watch with the accompanying sentence, "I am loaning it to you for the week", the words are the physical part of the transaction, without which the very act is incomplete. A better illustration of this is the description by Professor Julius Stone of the facts of *R.* v. *Petcherini*[6]

> The charge was the blasphemous burning of the Holy Scripture. The act of burning being proved, declarations accompanying it were admitted to show that the intent was blasphemous. The declarations were as much a part of the act charged as the burning.[7]

[5](1963) M.L.J. 228.

[6](1855) 7 Cox. C.C. 81.

[7]55 L.Q.R. 66, 76.

Wigmore refers to such evidence as the "verbal part of the act" to admit which contemporaneity is essential. As without the words the very act is incomplete, Wigmore argues, any subsequent utterance, however, proximate in time is inadmissible.[8]

Again it has been emphasised by various writers that the doctrine of *res gestae* is not needed to admit a 'verbal' part of the act. Further, insofar as Lord Wilberforce's categorisation of the second use of the term *res gestae* envisages the proof of the making of the statement, if it be a fact in issue or a relevant fact, then it is original evidence and adducible without recourse to any special doctrine.

The third sense in which the term is used viz. "a hearsay statement to be made either by the victim of an attack or by a bystander – indicating directly or indirectly the identity of the attacker." The admissibility of the statement is then said to depend on whether it was made as part of the *res gestae*."[9] Here the statement is being adduced to evidence the truth of its contents. It is an exception to the hearsay rule and as such ought to be admitted under carefully prescribed circumstances which guarantee its reliability. Thus in *Thompson* v. *Trevanion*[10] Holt C.J. admitted the statement of the complainant as she uttered it immediately on receiving the hurt before she had time to devise or contrive anything for her own advantage. The circumstantial guarantee of trustworthiness of this statement lay in the fact that the statements were uttered as a spontaneous and natural response to her pain.[11] This appears correct in principle and reflects very closely the American position which accords "greater recognition . . . . to the guarantee of truth provided by spontaneity and the lack of time to devise or contrive."[12] Unfortunately this valuable formulation of the *res gestae* rule was obscured, primarily by the controversial decision in *R. v. Bedingfield.*[13] In this case the mistress of the accused ran out of a room where the accused was subsequently found, pointed to her throat which was slit and said "see what Harry has done to me." She died

[8] Wigmore on Evidence, Vol. 6, para. 1772, p. 191.

[9] *Per* Lord Wilberforce, *op. cit.*, n. 1 p. 389.

[10] (1693) Skin 402.

[11] *Contra* Hutchins and Slesinger, 28 Columbia L.R. 432, 439, who argue forcefully that this circumstantial guarantee may be illusory. They argue that one under emotional stress, while unlikely to concoct or fabricate, is more likely to have his observations impaired. In their opinion the best evidence of all is a statement made in immediate response to an external stimulus which produces no shock or nervous excitment whatever.

[12] *Op. Cit.* n. 1 p. 390.

[13] (1879) 14 Cox C.C. 341.

shortly after. Harry was the accused's first name. Cockburn C.J. rejected the statement as it was made after the transaction (slitting of the throat) had been completed. The court was unimpressed by the substantial contemporaneity between the acts. According to its formulation of the rule, only statements made during the continuance of the transaction could be admitted under the *res gestae* rule. The Privy Council in *Teper* v. *R*,[14] an appeal from British Guiana, adopted the formulation of this rule and rejected the evidence of a Police constable who testified that he heard a woman shouting, "(Y)our place burning and you going away from the fire", as the statement was not sufficiently associated with the burning of the house in time, place and circumstance such that it was a part of the "thing being done". This formulation of the rule has been the subject of considerable controversy. Unhappily for us, these cases with their controversial features were incorporated into our body of law by the case of *Mohamed bin Allapitchay & Ors.* v. *R.*[15] The Court of Criminal Appeal (Singapore) had to determine, inter alia, whether a statement made by the deceased "Mata Mata Mohamed has stabbed me" was admissible as part of the *res gestae.* The statement was heard by two others who had been sleeping alongside the deceased. They woke up as a result of the deceased's shouting and saw him pursuing three men. Whyatt C.J., relying on *R.* v. *Bedingfield* and *Teper* v. R. rejected these words to establish the truth of its contents as they were uttered after, and not during the continuance of the transaction (viz., the stabbing). This decision may be criticised for three reasons. First, section 6 of the Evidence Act contemplates the admission of statements and conduct even after the transaction. Support for this is derived from illustration (a) to the section, which reads:

> A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating or so shortly before or *after it* as to form part of the transaction is a relevant fact.
> (emphasis supplied).

Secondly, even on the narrow formulation of the rule by Cockburn C.J., the transaction was not really over as the deceased was in hot pursuit of his assailants. Support for this may be found in an extra judicial article written by Cockburn C.J. in which he states that:

> "Whatever may be said by either of the parties during the continuance of the transaction, with reference to it including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive – as e.g., in the case of flight or applications

[14] [1952] A.C. 480; [1952] 2 All. E.R. 447.

[15] (1958) M.L.J. 197.

for assistance – form part of the principal transaction, and may be given in evidence as part of the *res gestae.*"[16]

Finally, at the time when the case fell for determination *R.* v. *Bedingfield* was already the subject of wide-ranging, and it is submitted, valid criticism. Thayer, for example, critized the literal interpretation given by Cockburn C.J. to the term "contemporaneity". He opined that substantial contemporaneity ought to suffice.

That the decision in *Bedingfield* was unjust is not difficult to establish. Insofar as it was sought to establish the truth of the content of the words uttered, there could hardly be a greater guarantee of its reliability than that the statement was made in response to an extremely painful injury. There was no time for reasoned reflection, nor concoction. In Cockburn C.J.'s words: "at the time she made the statement she had no time to consider and reflect (that she was dying)". This itself surely provided more than ample guarantee of its trustworthiness.

Fortunately, *Mohamed Allapitchay* and *Bedingfield*'s case may now be safely ignored after the recent Privy Council decision in *Ratten* v. *R.* In this case, the prosecution sought to adduce the evidence of a telephone operator that she heard the hysterical and sobbing voice of the deceased over the phone saying "get me the police please". The deceased had died from gunshot wounds. It was established that the shooting occurred shortly after the statement was made. In considering its admissibility, Lord Wilberforce remarked that most of the difficulties in the application of this doctrine stemmed from the failure by the courts to focus attention upon the rationale for excluding this type of evidence, viz. the possibility of concoction or fabrication. The test, therefore, was not "the uncertain one whether the making of the statement was in some sense part of the event or transaction." So long as circumstances existed which guaranteed the reliability of the statement ("spontaneity or involvement in the event that the possibility of concoction can be disregarded") then it mattered little that the statements were made after the transaction. Such considerations as time, place and circumstances, hitherto decisive, were henceforth to be evaluated merely as relevant factors.

Proximate and not exact contemporaneity was required. His Lordship therefore concluded that the circumstances indicated that the statement was produced by an over-whelming pressure of contemporary events. As such it carried its own stamp of spontaneity and was admissible as part of the *res gestae.* It appears that, at long last, the courts have adopted the distinction between "verbal act doctrine" and "spontaneous exclamation".

[16] Cited in Salhany and Carter, *Studies in Canadian Criminal Evidence* (1972), at p. 24.

According to Wigmore and Professor Stone it was the failure to distinguish between them which led so many decisions astray. Wigmore states that the requirement of exact contemporaneity as adumbrated in *Bedingfield* is only necessary for the verbal act doctrine. Contemporaneity in this sense is not requried for "spontaneous exclamations" which occur as "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. . . . Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy, ... and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."[17]

Ratten v. *R.* appears to have recognised this distinction and the different "contemporaneity" requirement applicable to "spontaneous exclamations" is satisfactorily formulated. While some difficulties may still persist, as ultimately the sound exercise of court discretion will determine each issue, a new and rational basis has been laid to resolve an old controversy.

Gurdial Singh Nijar

DISTINGUISHING A CONTRACT OF SERVICE

Employees Provident Fund Board v. *M.S. Ally & Co. Ltd.*[1]

The task of distinguishing between a contract of service and a contract for services has once again taxed the ingenuity of our courts. In *E.P.F.* v. *M.S. Ally & Co. Ltd.*, the Federal Court had to determine, inter alia, whether a group of persons designated "working assistants" conducting and managing the business of the respondents – a private company dealing in provisions, medical supplies and general merchandise – were "employees" within the meaning of the Employees Provident Fund Ordinance 1951. As the creation of the relationship of employee and employer is still a matter primarily of contract between the parties, the court determined this question by reference to the common law, there being no provision in the Contracts Act (Malaysia Act No. 136) on this point. Rejecting the traditional control test as a survival of simpler socio-economic conditions of a

[17] *Op. Cit.* n. 81.

[1] [1975] 2 M.L.J. 89.