diverge; but we have much to learn from each other in our common efforts to achieve practical justice founded upon legal principle.

For these reasons I would dismiss these appeals.

Appeals dismissed with costs.

Solicitors: Denton, Hall, Burgin & Warrens for Simpson & Marwick W.S., Edinburgh; Herbert Smith & Co. for Brodies W.S., Edinburgh.

M. G.

[HOUSE OF LORDS]

REGINA . . . . . RESPONDENT

AND

DONALD JOSEPH ANDREWS . . . . . APPELLANT

1986 Nov. 25, 26, 27;
1987 Feb. 5

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths, Lord Mackay of Clashfern and Lord Ackner

Crime—Evidence—Hearsay—Manslaughter—Victim attacked with knives—Victim's statement to police shortly after attack naming assailants—Death from injuries two months after attack—Whether statement admissible under res gestae exception to hearsay rule

Two men entered M.'s flat and attacked him with knives; property was stolen. Shortly afterwards M., grievously wounded, made his way to the flat below his own to obtain assistance. Two police officers arrived within minutes and M. informed them that O. and the defendant had been the assailants. Two months later M. died as a result of his injuries. The defendant was jointly charged with O. with aggravated burglary and the murder of M. At the trial before the Common Serjeant of London and a jury the Crown sought to have the deceased's statement admitted, not as a dying declaration, but as evidence of the truth of the facts that he had asserted, namely, that he had been attacked by O. and the defendant, and therefore admissible in the circumstances as evidence coming within the res gestae exception to the hearsay rule. The judge ruled in favour of its admissibility. The defendant was convicted of aggravated burglary and manslaughter. On appeal by the defendant against his conviction, the Court of Appeal (Criminal Division) dismissed the appeal.

On appeal by the defendant:—

Held, dismissing the appeal, that where the victim of an attack informed a witness of what had occurred in such

circumstances as to satisfy the trial judge that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim so as to exclude the possibility of concoction or distortion and the statement was made in conditions of approximate but not exact contemporaneity, evidence of what the victim said was admissible as to the truth of the facts recited as an exception to the hearsay rule; that, accordingly, in the circumstances the deceased's statement had rightly been admitted in evidence (post, pp. 293A–C, 300E–F, G—301B, 302F).

Ratten v. The Queen [1972] A.C. 378, P.C. and *Reg. v. Turnbull* (1985) 80 Cr.App.R. 104, C.A. applied.

Myers v. Director of Public Prosecutions [1965] A.C. 1001, H.L.(E.) considered.

Reg. v. Bedingfield (1879) 14 Cox C.C. 341 overruled.

Per curiam. (i) The trial judge having ruled the statement admissible must make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the jury's attention must be invited to those matters (post, p. 302B–D).

(ii) Whatever may be the position in civil proceedings, any attempt in criminal prosecutions to use the doctrine of res gestae as a device to avoid calling, when he is available, the maker of the statement is strongly to be deprecated (post, p. 302E–F).

Decision of the Court of Appeal (Criminal Division) affirmed.

The following cases are referred to in the opinion of Lord Ackner:

Myers v. Director of Public Prosecutions [1965] A.C. 1001; [1964] 3 W.L.R. 145; [1964] 2 All E.R. 881, H.L.(E.)
Reg. v. Bedingfield (1879) 14 Cox C.C. 341
Reg. v. Blastland [1986] A.C. 41; [1985] 3 W.L.R. 345; [1985] 2 All E.R. 1095, H.L.(E.)
Reg. v. Boyle (unreported), 6 March 1986, C.A.
Reg. v. Nye (1977) 66 Cr.App.R. 252, C.A.
Reg. v. O'Shea (unreported), 24 July 1986, C.A.
Reg. v. Turnbull (1984) 80 Cr.App.R. 104, C.A.
Ratten v. The Queen [1972] A.C. 378; [1971] 3 W.L.R. 930; [1971] 3 All E.R. 801, P.C.

The following additional cases were cited in argument:

Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle (1940) 64 C.L.R. 514
Armborst v. Cincinnati Traction Co. (1928) 25 F. (2d) 240
Aveson v. Lord Kinnaird (1805) 6 East 188
Brown v. The King (1913) 17 C.L.R. 570
Dismuker v. State of Alabama (1888) 3 South.Rep. 671
Duncan v. Rhomberg (1931) 236 N.W. 638
Garner v. Township of Stamford (1903) 7 O.L.R. 50
Gilbert v. The King (1907) 38 S.C.R. 284
Green v. State of Indiana (1900) 57 N.E. 637
Holder v. The Queen [1980] A.C. 115; [1978] 3 W.L.R. 817, P.C.

A *Insurance Co. v. Mosley* (1869) 75 U.S. 397
Jarvis v. London Street Railway Co. (1919) 48 D.L.R. 61
Keefe v. State (1937) 72 P. (2d) 425
Leahey v. Cass Ave. and F.G. Railway Co. (1888) 10 S.W. 58
Lutterell v. Reynell (1670) 1 Mod.Rep. 282
O'Hara v. Central S.M.T. Co. Ltd., 1941 S.C. 363
People v. Crosbie [1966] I.R. 490
B *People v. del Vermo* (1908) 85 N.E. 690
People v. de Simone (1919) 121 N.E. 761
People v. Edwards (1979) 419 N.Y.S. 2d 45
People v. Marks (1959) 160 N.E. 2d 26
Reg. v. Gibson (1887) 18 Q.B.D. 537
Reg. v. Goddard (1882) 15 Cox C.C. 7
Reg. v. Lillyman [1896] 2 Q.B. 167
Reg. v. Lunny (1854) 6 Cox C.C. 477
C *Reg. v. McMahon* (1889) 18 Ont.Rep. 502
Reg. v. Parker (1960) 45 Cr.App.R. 1, C.C.A.
Rex v. Christie [1914] A.C. 545, H.L.(E.)
Rex v. Foster (1834) 6 C. & P. 325
Rex v. Leland [1951] O.R. 12
Rex v. Woodcock (1789) 1 Leach 500
Roach v. Great Northern Railway Co. (1916) 158 N.W. 232
D *Schwalbe, The* (1859) Swab. 521
Showalter v. West Pacific Railway Co. (1940) 106 P. 2d 895
State of Maine v. Wagner (1873) 61 Maine Rep. 178
Stobart v. Dryden (1836) 1 M. & W. 615
Sugden v. Lord St. Leonards (1876) 1 P.D. 154, C.A.
Teper v. The Queen [1952] A.C. 480; [1952] 2 All E.R. 447, P.C.
Thompson v. Trevanion (1693) Skin. 402
E *Travelers' Insurance Co. v. Sheppard* (1890) 12 S.E. 18
Weeks v. Sparke (1813) 1 M. & S. 679

APPEAL from the Court of Appeal (Criminal Division).

This was an appeal, by leave of the House of Lords (Lord Keith of
F Kinkel, Lord Brightman and Lord Templeman) dated 20 March 1986, by the defendant, Donald Joseph Andrews, from the judgment dated 6 February 1986 of the Court of Appeal (Criminal Division) (Croom-Johnson L.J., Kenneth Jones J. and Sir John Thomson) dismissing his appeal from his conviction on 7 February 1985 at the Central Criminal Court before the Common Serjeant of London (Judge Thomas Pigot
G Q.C.) and a jury on an indictment jointly charging him with Peter Campbell O'Neill of aggravated burglary contrary to section 10(1) of the Theft Act 1968, on 13 September 1983, and the murder of Alexander Morrow on the same date. The defendant was sentenced to three years' imprisonment for the aggravated burglary and to nine years' imprisonment for manslaughter.

The Court of Appeal (Criminal Division) certified that the following
H point of law was involved in the decision, namely:

> "Where the victim of an attack tells a witness what has happened and does that in circumstances which satisfy the trial judge that there was no opportunity for concoction, is evidence of what the

victim said admissible as to the truth of the facts recited as an exception to the hearsay rule?" A

Leave to appeal was refused.

The facts are stated in the opinion of Lord Ackner.

Stephen Sedley Q.C. and *S. M. Solley* for the defendant. On the Common Serjeant's ruling as to the voire dire the following questions arise: (1) on the assumption that the Common Serjeant was right to treat the words spoken by the deceased as part of the res gestae, is such hearsay admissible in evidence? The judge treated the facts from the attack on the deceased to his statement to the police officers as a continuing transaction and it was for that reason that they became the res gestae. (2) If such hearsay is so admissible, how wide can the material events go before becoming inadmissible? Further, can those events relate to past events, however recent? (3) Even so, can they include statements made to police officers investigating the crime? B C

(1) The res gestae doctrine is not an exception to the hearsay rule at all. It is simply a recognition that the acts constituting the event may include words and if those words are legally probative they may be proved. But if it is sought to tender such words as proof of the truth of their contents, they are not admissible in evidence. D

As to (2) and (3) above, there are or ought to be exceptions to the admission of such hearsay: (a) material events cannot logically include a subsequent narrative of them; (b) any hearsay becomes inadmissible once it is given in contemplation of proceedings, and (c) no such evidence should be received if it carries any real possibility of error. Underlying all these submissions is the proposition that whilst the rule against hearsay has a rationale, the exceptions to it have not. In 1964 the House in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 recognised the ramshackle nature of the law of hearsay and Parliament recognised this fact and enacted the Criminal Evidence Act 1965 to rectify the gap exposed by the *Myers* case. As regards civil procedure the law was changed by the Civil Evidence Act 1968. E F

As to the decision of the Privy Council in *Ratten v. The Queen* [1972] A.C. 378, error lies in the obiter dicta in that case. They are not consonant with what is stated in *Rex v. Christie* [1914] A.C. 545; *Myers v. Director of Public Prosecutions* [1964] A.C. 1001 and *Reg. v. Blastland* [1986] A.C. 41.

The error in *Ratten v. The Queen* [1972] A.C. 378 and the way in which the Crown now seek to rely on that decision can be demonstrated in a series of propositions: (i) "res gestae" means no more than material events. (ii) To state that material events may often include what a person says is a truism. (iii) To state, however, that the truth of what a person says may be part of the material events does not make any sense at all. (iv) To make sense the proposition needs to be that the material events may be proved by what a person has said about them, but that is precisely what the hearsay rule precludes. Therefore (v), what the appellant seeks in the present case is to limit that proposition to what a person says about the material events if what a person has said is itself part of the material events. The common law has long rejected the G H

notion that the objections to the hearsay go to weight. *Reg. v. Blastland* [1986] A.C. 41, 53H et seq., lucidly states the rationale of the rule against the admission of hearsay evidence. For the exceptions to the hearsay rule, see *Cross on Evidence,* 6th ed. (1985), c. 17, sections I and II; c. 18, sections II to IV; c. 19, section I. Pages 564, 571 and 575 illustrate the heterogeneity of the exceptions to the hearsay rule.

Rex v. Foster (1834) 6 C. & P. 325 is the only clear decision in favour of the Crown's principle. Subsequent cases go contrary to the views expressed in *Foster.* Thus, for example, in the earlier case of *Aveson v. Lord Kinnaird* (1805) 6 East 188 it would appear that it was already well established that only statements which were strictly simultaneous with the res gestae were admissible as an exception to the rule. As to *Thompson v. Trevanion* (1693) Skin. 402, it is not clear to what end the statement in issue there was admitted. *Weeks v. Sparke* (1813) 1 M. & S. 679 is an important case in which Lord Ellenborough C.J. presided. It recognises at an early stage of the development of this branch of the law that the admission of hearsay evidence is to be kept within strict limits. The subsequent history of the hearsay rule is adequately dealt with in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001, 1019 et seq., *per* Lord Reid. See also p. 1027D, *per* Lord Morris of Borth-y-Gest, and p. 1030F, *per* Lord Hodson. The observations of Lord Reid at pp. 1023E, 1024B, are authority for the proposition that the apparent credibility of a statement is not a ground for making a new exception to the hearsay rule.

The above was the state of English law in which *Ratten v. The Queen* [1972] A.C. 378 was decided. It is interesting to note that *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 was neither cited in argument nor referred to in the judgment of the Board delivered by Lord Wilberforce. An analysis of that judgment shows that the first example given by Lord Wilberforce at p. 388F has nothing to do with hearsay. The second example given on p. 389 is the first to impinge on the conception of hearsay. But it is the third example which deals with hearsay. In the defendant's submission: (i) the exception is non-existent. The only authority for it is *Rex v. Foster,* 6 C. & P. 325. Alternatively, (ii) *Ratten v. The Queen* [1972] A.C. 378 has extended the exception beyond any previous authority. The real reason for limiting the exception is not because of the danger of the statement being concocted but because there is no opportunity to cross-examine on it. The passage in the middle of p. 389 is not easy to square with what is stated in *Myers* [1965] A.C. 1001, 1023E–1024G. There appear to be two different philosophies expressed in these two cases. The exception to the hearsay rule allowed in *Rex v. Foster,* 6 C. & P. 325 came too late; it is outside the growth period in this branch of the law described in the *Myers* case [1965] A.C. 1001. For many years the law as hitherto understood has been that for any act or statement to be admitted as part of the res gestae, it must be shown to be inextricably and contemporaneously connected with the transaction being inquired into: *Reg. v. Bedingfield* (1879) 14 Cox C.C. 341. The rationale of *Ratten v. The Queen* [1972] A.C. 378 is inconsistent with *Bedingfield.*

As to the cases cited in *Ratten v. The Queen* [1972] A.C. 378, in *O'Hara v. Central S.M.T. Co. Ltd.*, 1941 S.C. 363, 381, the last paragraph on that page conflates two principles. It is arguably wrongly decided. *Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle* (1940) 64 C.L.R. 514, 530 et seq., contains a valuable exposition of the law by Dixon J. in the High Court of Australia. In *Brown v. The King* (1913) 17 C.L.R. 570, 599, Isaacs and Powers JJ., accepting *Reg. v. Bedingfield,* 14 Cox C.C. 341, adopted the proposition that any act or statement admitted as part of the res gestae is not admitted on its own independent footing, but only where it is inseparably bound up with the main fact as part of the transaction itself that is inquired into.

The following cases support the appellant's narrow doctrine: *Reg. v. Goddard* (1882) 15 Cox C.C. 7; *Reg. v. McMahon* (1889) 18 Ont.Rep. 502 and *Teper v. The Queen* [1952] A.C. 480 which reiterates the historic objection to the admission of hearsay. It shows that the principle as applied to a bystander is very strict. In *Reg. v. Gibson* (1887) 18 Q.B.D. 537, which was referred to in *Teper v. The Queen* [1952] A.C. 480, it is interesting to observe that the Court of Crown Cases Reserved made no reference to the res gestae doctrine, which one would have expected if the principle enunciated in *Ratten v. The Queen* [1972] A.C. 378 were correct.

Rex v. Christie [1914] A.C. 545, shows that the doctrine for which the Crown contends in the present case will undercut all the previous law relating to statements made in the presence of the accused. For the most recent discussion in this House of the res gestae exception to the hearsay rule: see *Reg. v. Blastland* [1986] A.C. 41, 52D, 56, 58G–59C. A useful commentary on the present state of the law is to be found in *Cross on Evidence,* 6th ed., p. 589.

At the time of the decision in *Ratten v. The Queen* [1972] A.C. 378, the maximum extent in English law of the res gestae exception to the hearsay rule was the admission in evidence of statements made during the commission of the actual crime or tort: *Reg. v. Bedingfield,* 14 Cox C.C. 341. Once the crime or tort was complete any subsequent statements were inadmissible. By the time that *Bedingfield* was decided in 1879 the accepted doctrine was that only words uttered at the time of the crime or tort were admissible. There is no case that runs counter to that proposition until the decision of the Privy Council in *Ratten v. The Queen* [1972] A.C. 378.

The rationale of any exception to the hearsay rule is that the victim realises that he is reaching a point of no return or, as the old cases put it, is contemplating an impending judgment before his Maker. In other words, it is the supposed psychological guarantee of the truth of the statement which is the criterion of its admission. Reported English cases that have followed *Ratten v. The Queen* [1972] A.C. 378 are *Reg. v. Nye* (1977) 66 Cr.App.R. 252 and *Reg. v. Turnbull* (1984) 80 Cr.App.R. 104.

If, contrary to the appellant's primary submission, the exception exists, how wide is it? It is limited to events making up the crime or tort. The criterion adumbrated in the Australian case of *Brown v. The King*, 17 C.L.R. 570, is adopted, namely, that for the statement of the

A declarant to be admissible as part of the res gestae, it must be a statement uttered substantially contemporaneously with the attack itself. A mere narrative of events, however close in time to the event in question, is not sufficient. This is a clear doctrine understood by the legal profession and the layman alike. It follows that *Rex v. Foster,* 6 C. & P. 325; *O'Hara v. Central S.M.T. Co. Ltd.,* 1941 S.C. 363 and *Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle,* 64 C.L.R. 514 B were wrongly decided, and that *Brown v. The King,* 17 C.L.R. 570, was rightly decided.

The law uses one particular measure in negativing spontaneity of utterance, namely, whether the words were spoken in contemplation of proceedings: see the *Adelaide* case, 64 C.L.R. 514, 530, and the *O'Hara* case, 1941 S.C. 363, 382. In the present case the statement made by the C victim was to police officers some minutes after the attack.

As to the possibility of error, the evidence on the voire dire in the present case shows that the deceased may have had some animus against the defendant Andrews. The deceased's daughter had stated that both defendants had previously done damage to her father's flat. The above factors were such as should have excluded the statement in question. The risk of concoction and the risk of error are very relevant factors. D Where the statement relates to identification the possibility of error is very strong and the observations of Lawton L.J. in *Reg. v. Nye,* 66 Cr.App.R. 252, are supported. In conclusion, it is conceded that the Irish case of *Reg. v. Lunny* (1854) 6 Cox C.C. 477, decided in the formative period of this branch of the law, was wrongly decided on the defendant's primary argument.

E *Michael Worsley Q.C.* and *Godfrey Carey* for the Crown.

[LORD BRIDGE OF HARWICH. Their Lordships do not need to be persuaded of the res gestae exception to the hearsay rule. But they desire to hear argument on the limits of the exception and the criteria for its application].

There is an immense amount of learning on this subject, especially in the United States of America. There are decisions of the Supreme F Court of the United States from the middle of the last century and of the courts of the various States of the Union from even before the American Civil War. It is to be remembered that the United States and the Commonwealth decisions grew out of the common law of England.

The reason for the coming into existence, and subsequent maintaining of, the rule against hearsay was the possible unreliability of such G evidence due to: (a) the absence of an oath (or affirmation) which would have (i) brought about increased moral obligation to tell the truth, (ii) and, in default, given rise to liability to penalty for perjury, and (b) the absence of opportunity to cross-examine and thereby: (i) to test the veracity of the witness by the content of question and answer and by observation of his demeanour, (ii) to explore the possibility of innocent error, whether or not due to repetition, and, quaere (iii) to elicit further H material.

Statements made by persons involved in or witnessing an exciting event, for example, an assault or an accident, so close to the event in point of time (although not necessarily exactly contemporaneously) and

in point of circumstance, as to exclude the possibility of concoction (to the advantage of the maker of the statement or another or to the disadvantage of another) in the very nature of the case removes, wholly or substantially, the objections to receiving evidence of such statements based on doubts as to its veracity. As to the quite separate and well-established exception to the rule against hearsay known as "dying declarations": see *Rex v. Woodcock* (1789) 1 Leach 500, 504, *per* Eyre C.B. Thus in principle there is no substantial distinction between the basis for that exception and the basis for the exception consisting of spontaneous statements, in that in each case the trial judge is satisfied that the *special* circumstances are such that the state of mind of the person whose statement is to be received in evidence was that he was desirous of telling the truth. It makes no difference that the reason why that state of mind exists is different in the one case from the other, that is, (i) the contemplation of approaching death; or (ii) the absence of opportunity to concoct. The indistinguishability of the basis of the two exceptions has been judicially recognised in the careful reasoning of Barrows J., giving judgment in an appeal in a murder case in the Supreme Judicial Court of Maine: *State of Maine v. Wagner* (1873) 61 Maine Rep. 178, 195, 197.

The principal *reason* for affording an opportunity to cross-examine a witness in unusual circumstances is the need to test his veracity. Further, the possibility of innocent error upon the part of the person whose statement is reported exists whether or not the maker of the statement to be relied upon is available for cross-examination. The possibility of error (on the part of the person reporting the statement) occasioned by repetition is one which can be tested by cross-examining the person repeating the statement. The circumstances indicating the likelihood of error or the lack of it, in each case, go to weight rather than to admissibility.

The fact that the person whose statement is to be received may not himself be a witness and thus available to provide testimony as to additional matter is no good reason in itself for refusing to admit his statement made in circumstances negativing concoction. If the person who made the statement is dead or not available to give evidence for some good reason, then such additional matter could not be elicited from him in any event. If that which he *has* stated is or may be incomplete, then that is a factor going to weight not to admissibility.

The rule now contended for by the Crown is as stated in *Ratten v. The Queen* [1972] A.C. 378, 391c: "hearsay evidence may be admitted [of] the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused." Such evidence is admitted on the footing that "the words said to have been used involve an assertion of the truth of some facts stated in them and that they have been so understood by the jury" (p. 388E).

Whether the qualification of that rule added by the Court of Appeal (Criminal Division) in *Reg. v. Nye*, 66 Cr.App.R. 252, 256, that the circumstances must be such as to satisfy the trial judge that there was no

A possibility of error by the declarant, may require reconsideration. That is because, there being the possibility of error in almost all human activity, that factor is a matter of weight for the jury and not of decision for the judge upon the issue of admissibility.

The rule against hearsay became crystallised as a rule of law from about 1670 onwards: see *Lutterell v. Reynell* (1670) 1 Mod.Rep. 282 and succeeding cases. The history is summarised in *Phipson on Evidence,* B 11th ed. (1970), section 648 and *Wigmore, Evidence in Trials at Common Law,* 2nd ed. (1923), vol. 2, section 1364, pp. 9 to 25.

At about the same time as that rule became established, an exception to it was recognised in such cases as the present. That is, spontaneous statements in circumstances negativing concoction: *Thompson v. Trevanion,* Skin. 402, and succeeding cases. Thus the rule against C hearsay is not an all-embracing absolute rule of law, but one to which there was an exception or modification virtually as old as the rule itself. The rule now contended for by the Crown is supported by an enormous body of case law in common law jurisdictions, for example, England, The United States of America, Canada, Australia: see *Wigmore, Evidence in Trials at Common Law,* 4th ed. (1976), vol. 6, pp. 191–247. Thus the rule now contended for by the Crown does not involve any D extension of the existing hearsay rule and so is not in conflict with the ruling of the majority of this House in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001, which was to the effect that it is now too late to add further exceptions to the rule against hearsay otherwise than by legislation. That exception is not to be confused with two further and quite separate rules: (a) recent complaints by the victims of sexual E assaults; (b) dying declarations. It is to be noted that the particular facts of some cases might come within both the rule now contended for by the Crown and one of these two rules.

As to recent complaints in sexual cases—a rule that goes right back to Bracton: (a) the origin of the rule lay in the ancient requirement that a woman lodging an appeal of rape had to show that she had raised a hue and cry. For its history, see *Phipson on Evidence,* 11th ed., para. F 356, and *Reg. v. Lillyman* [1896] 2 Q.B. 167. (b) The rule is that the complaint is not evidence of the truth of the facts recited but is admissible as evidence of the consistency of the complainant's conduct and thus goes to absence of consent. (c)(i) The rule does not require the spontaneity and absence of opportunity for concoction that is essential for the rule contended for by the Crown in this case. (ii) For example, G in a case of indecent assault upon a girl at 10 a.m., evidence that she made her way from the scene along populous public highways and found her way home and there waited for her mother to return at, say, 2 p.m. and thereupon told her of the assault, is admissible under the rule relating to recent complaints in sexual cases. However, it plainly would not be admissible as evidence of the truth of its contents under the rule now contended for by the Crown. That is because there would have H been ample *opportunity* for concoction due to the *absence of spontaneity.* (d)(i) That rule is itself an exception to the general rule that, at any rate in examination-in-chief, evidence cannot be given by a witness as to his own previous statements consistent with his evidence in the witness box,

that is, he cannot make evidence for himself or corroborate himself. (ii) that general rule has existed for a long time but is a reversal of the previous opposite rule which was asserted in, for example, *Lutterell v. Reynell,* 1 Mod.Rep. 282. As to dying declarations: (a) the foundation of that rule is the proposition that if a person believes that he is about to die and his soul pass on to judgment by the Almighty, the earthly motives he might otherwise have had for lying have been displaced by that consideration and that therefore that circumstance is at least of equal weight to the taking of an oath in court. (b) It follows from the reason for that rule that the spontaneity required under the rule now contended for by the Crown does not have to be shown in the case of a dying declaration, for example, if a man be grievously wounded but survives the attack upon him by hours or days and then, when he has lost hope of living, makes a dying declaration, that is admissible as evidence of the truth of its contents even though, in the hours or days between attack and declaration, he had the *opportunity* to concoct.

In some of the cases preceding *Ratten v. The Queen* [1972] A.C. 378, the rule now contended for by the Crown was not applied in favour of the Crown due to the lapse of time between the crime and the declaration: *Teper v. The Queen* [1952] A.C. 480 and *Rex v. Christie* [1914] A.C. 545. In such cases the non-application of the rule was thus due to the absence of merits upon the facts, so the origins and history of the rule did not receive that exhaustive consideration such as it received in the *Ratten* case [1972] A.C. 378. That may explain, inter alia, why there are to be found apparently conflicting dicta about cases such as *Reg. v. Bedingfield,* 14 Cox C.C. 341.

As to any argument that *Stobart v. Dryden* (1836) 1 M. & W. 615 overruled *Thompson v. Trevanion,* Skin. 402, it is not sustainable for *Thompson v. Trevanion* is nowhere mentioned in *Stobart v. Dryden.*

In support of the approach adopted in *Ratten v. The Queen* [1972] A.C. 378, *Wigmore on Evidence,* 4th ed., vol. 6, pp. 191, 197 is adopted. For a clear judicial exposition of the problems raised by the use of the words 'res gestae': see the judgment of Lockwood J. in *Keefe v. State* (1937) 72 P. (2d) 425, 427, referred to by Wigmore at pp. 192, 193. Wigmore shows by a wealth of authority that the exception contended for exists and it would seem that it appears shortly after the hearsay rule itself was established at the end of the 17th century, for the exception was recognised in *Thompson v. Trevanion,* Skin. 402.

It is proposed to cite a number of American and Commonwealth authorities which support the rule for which the Crown contends. Thus in *Insurance Co. v. Mosley* (1869) 75 U.S. 397 the United States Supreme Court followed *Thompson v. Trevanion,* Skin. 402 and *Rex v. Foster,* 6 C. & P. 325. The following are also relied upon: *State of Maine v. Wagner,* 61 Maine Rep. 178; *Dismuker v. State of Alabama* (1888) 3 South. Rep. 671; *Travelers' Insurance Co. v. Sheppard* (1890) 12 S.E. 18; *Green v. State of Indiana* (1900) 57 N.E. 637; *People v. del Vermo* (1908) 85 N.E. 690; *Roach v. Great Northern Railway Co.* (1916) 158 N.W. 232; *People v. de Simone* (1919) 121 N.E. 761; *Armborst v. Cincinnati Traction Co.* (1928) 25 F. (2d) 240; *Duncan v. Rhomberg* (1931) 236 N.W. 638; *Showalter v. West Pacific Railway Co.* (1940) 106

A P. 2d 895. Of these authorities special mention may be made of *Travelers' Insurance Co. v. Sheppard,* 12 S.E. 18, 26, where Bleckley C.J. in the Supreme Court of Georgia succinctly stated the proposition for which the Crown contend, namely, "what the law altogether distrusts is not after-speech, but after-thought." *Green v. State of Indiana,* 57 N.E. 637, 638, a decision of the Supreme Court of Indiana, is a very good illustration of the principle for which the Crown contend and the B dictum of Baker C.J. that "the admission of the declaration depends upon its being so connected in time and circumstances with the principal act that the assailed appears to be the spontaneous spokesman of the act, and not the deliberate utterer of an afterthought" is adopted. For an important statement of the relevant principle, see also *Showalter v. West Pacific Railway Co.,* 106 P. 2d 895.

C For a comprehensive review of the American authorities: see especially *Wigmore,* 4th ed., vol. 6, pp. 222–224, 228, 230–232(d). The discussion of *Reg. v. Bedingfield,* 14 Cox C.C. 341, in *Wigmore,* 4th ed., vol. 6, pp. 233–234 is adopted. It supports the observations of Lord Wilberforce in *Ratten v. The Queen* [1972] A.C. 378. For very recent English authorities in which *Ratten v. The Queen* has been considered D and applied: see *Reg. v. O'Shea* (unreported), 24 July 1986, and *Reg. v. Boyle* (unreported), 6 March 1986, both decisions of the Court of Appeal (Criminal Division).

It must be emphasised that this question of admissibility has nothing to do with the veracity of the victim but the nature of the occasion on which the words in question were uttered. The judge at the trial on the voire dire has to examine the facts carefully and be satisfied that the E statement sought to be admitted was made at a time when the person in question was under the influence of the excitement of the occasion and had no time for concoction. If the House follows Holt C.J. in *Thompson v. Trevanion,* Skin. 402, there is no risk of the doctrine getting out of hand: see *Wigmore,* 4th ed., vol. 6, p. 196. The criterion is that the mind of the victim at the time of the utterance was under the control of F a startling event.

To revert briefly to the American authorities, in *Ratten v. The Queen* [1972] A.C. 378, the judgment of the Board relied upon, inter alia, *People v. de Simone,* 121 N.E. 761. If that case is to be followed, then the other much stronger American authorities which were not cited in *Ratten* should also be followed. *The Schwalbe* (1859) Swab. 521 shows that the doctrine for which the Crown contends is not confined to the G criminal law. Further it is relied upon by the American courts. This demonstrates that American law has not grown up independently from English law on this matter.

As to the Canadian authorities, *Reg. v. McMahon,* 18 Ont.Rep. 502 is distinguishable on its facts but it presupposes the principle for which the Crown contends. It is conceded that *Rex v. Leland* [1951] O.R. 12 is H against the Crown. But *Jarvis v. London Street Railway Co.* (1919) 48 D.L.R. 61 shows that there is a strong line of Canadian authorities in favour of the Crown's principle. See in particular *Gilbert v. The King* (1907) 38 S.C.R. 284 where *Rex v. Foster,* 6 C. & P. 325, was approved

and the Crown's principle supported by 11 judges in the two appellate courts.

As regards *Reg. v. Parker* (1960) 45 Cr.App.R. 1, the present point was not considered. In that case there was no voire dire. But in *Holder v. The Queen* [1980] A.C. 115 the Judicial Committee of the Privy Council followed the second part of *Ratten v. The Queen* [1972] A.C. 378.

The authorities establish that Lord Wilberforce's judgment in the *Ratten* case correctly stated a principle in the wide terms there found which has existed for 200 years, albeit it has been forgotten from time to time.

In conclusion, as to the danger of a statement being concocted, it is for the trial judge to determine on the evidence whether the animus of the declarant against the accused is such as to throw such doubt on the spontaneity of the utterance of the declarant as to warrant its exclusion: see *People v. Marks* (1959) 160 N.E. 2d 26.

Sedley Q.C. in reply. The flood of decisions cited by *Wigmore,* 4th ed., vol. 6, is to show that judicial practice outruns judicial statements. It is, however, well known that in English law there is far less certainty on this issue than Professor Wigmore asserts. *Reg. v. Bedingfield,* 14 Cox C.C. 341 has stood for over a century and has been applied on many occasions. On the other hand, *Rex v. Foster,* 6 C. & P. 325, has been forgotten. The same applies to *Thompson v. Trevanion,* Skin. 402. It must be emphasised that the English courts have followed and applied *Reg. v. Bedingfield*: see, for example, *Reg. v. Goddard,* 15 Cox C.C. 7. Even after *Ratten v. The Queen* [1972] A.C. 378 was decided in the Privy Council, it was not built upon until *Reg. v. Turnbull,* 80 Cr.App.R. 104, in 1984, since when there have been some four cases. There is real doubt as to the ambit of the Crown's principle and of *Reg. v. Bedingfield,* 14 Cox C.C. 341, and of the doctrine of hearsay itself. [Reference was made to *Wigmore,* 4th ed., vol. 6, p. 198.]

If the courts are to go beyond *Bedingfield,* it will be difficult to decide on which side of the line a particular case will fall. As to the problems which arise on the Crown's principle, animus may come to the fore in the moment of shock and not necessarily retreat. Further, error is possible and is a factor which the trial judge must try to eradicate.

The dictum of Black J. in *Leahey v. Cass Ave. and F.G. Railway Co.* (1888) 10 S.W. 58, 60, that "The better reasoning is that the declaration, to be a part of the res gestae, need not be coincident in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause," which was relied on by the Crown, is too imprecise a guide.

On its facts, the present is a borderline case. There are real conceptual difficulties once one departs from the usual psychological concept of the admissibility of evidence under this exception to the hearsay rule. See the dictum of Mellish L.J. in *Sugden v. Lord St. Leonards* (1876) 1 P.D. 154, 250.

Their Lordships took time for consideration.

5 February. LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend Lord Ackner, with which I agree, I would dismiss this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it, and for the reasons which he gives, I would dismiss the appeal.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it, and for the reasons he gives I would dismiss this appeal.

LORD ACKNER.
My Lords,

The facts

On 13 September 1983 Alexander Morrow, who lived at flat No. 3, Rouple House, London, was attacked and stabbed with two different knives and robbed. Within minutes of the attack, and bleeding profusely from a deep stomach wound, he went downstairs to the flat below for assistance. The police and ambulance were immediately telephoned, and again within a matter of minutes the police arrived, shortly followed by the ambulance. Mr. Morrow had been mortally wounded. He was kept alive on a life-support machine but died two months after this attack. Both O'Neill and the appellant, Andrews, were charged with murder. O'Neill pleaded guilty to manslaughter, which plea was accepted by the prosecution. The appellant pleaded not guilty and O'Neill was the prosecution's main witness at the appellant's trial. O'Neill lived in flat No. 5, on the floor above that of the deceased. He and the appellant had been out drinking that day and returned home in the evening about 8.30 p.m. to his, O'Neill's flat. The substance of his evidence was that as they were about to leave the flat a very short while later, the appellant asked if O'Neill had any knives, and when O'Neill told him there were some in the kitchen, the appellant helped himself to a large bread knife and a small potato knife. He also took a blanket from O'Neill's daughter's cot. On the way out, the appellant stopped at the deceased's flat, put the blanket over his and O'Neill's head, handed O'Neill the small potato knife and tried to force the lock of the flat using the bread knife. He failed. He then knocked on the door and when the deceased answered, the appellant shouldered the door open, lunging with the knife, and stabbing the deceased in his chest and stomach. As the deceased fell down the appellant said, "I am going to finish the old bastard off." O'Neill said he then dropped the potato knife, tried to

save the deceased but in the process was stabbed twice in the leg. The cot blanket by this stage had come off their heads. The appellant then ran into the room, came back with the deceased's stereo player, told O'Neill to get the deceased's money and O'Neill took about £4.

They then returned to O'Neill's flat and put the blanket back. They then left, taking with them the two knives and the stereo record player and went to the appellant's flat in Droitwich House. Subsequently, O'Neill was taken by ambulance to hospital to have his wounds dealt with.

The hearsay evidence

There were effectively two trials, the first in January 1985 before the Recorder of London. Mr. Michael Worsley who appeared for the prosecution, considered that there was an adequacy of evidence capable of corroborating that of O'Neill, the appellant's accomplice. Without going unnecessarily into detail, this consisted, inter alia, of the stolen stereo record player being found on the bed in the appellant's flat, his lies to the police about how he had come by it, evidence of the appellant being seen, after he returned to his flat, in possession of the two knives, the appellant's own admission of his disposal of those knives and forensic evidence with regard to blood stains on the appellant's clothing. However, in the event, the jury failed to agree.

On the retrial before the Common Serjeant, which began a week later, Mr. Worsley wished to strengthen the case of the prosecution and he accordingly sought the judge's ruling on the admissibility of the deceased's statement identifying his assailants and made in the following circumstances. According to the neighbours' agreed witness statements, the deceased was found on the landing on the floor below his flat between 8.35 p.m. and 8.45 p.m. This must have been within a very few minutes of the stabbing, bearing in mind O'Neill's evidence as to time when he had returned to his flat and the very nature of the stab wound in the deceased's stomach, from which blood was pouring. The 999 call made by the neighbour was at 8.43 p.m. and P.C. Worboys and P.C. Hanlon must have arrived a couple of minutes or so thereafter (P.C. Worboys stated in evidence that the ambulance arrived between 10 or 15 minutes after them and the uncontradicted evidence was that the ambulance arrived at 9.01 p.m.) P.C. Worboys' main preoccupation was in administering first aid, in particular in stopping blood pouring from the stab wound in the stomach. While he was so doing he asked the deceased how he had received his injuries. The deceased replied that he had been attacked by two men. He gave the names of his attackers, as being Peter O'Neill from flat 5, Rouple House, and the other, as a man he knew as Donald. He said he had gone to the door of his flat, opened the door and was attacked by these two men. P.C. Worboys noticed that P.C. Hanlon, who was making a note of this statement, had written down the name "Donavon." P.C. Worboys was convinced that the name was Donald and he told P.C. Hanlon that he was wrong. P.C. Hanlon

A was not as close to the deceased as P.C. Worboys. In his evidence P.C. Worboys confirmed that the deceased had said that he had been attacked by two persons, one of whom he knew as O'Neill and a person, whom P.C. Hanlon thought the deceased had referred to as "Donavon." P.C. Hanlon said that he heard "Don" quite clearly but as he pronounced the rest of the word his voice "mellowed and he got quieter." He said he did not notice that the deceased had any accent. The evidence was that
B the deceased spoke with a Scottish accent.

Mr. Worsley sought to have the statement of the deceased admitted as evidence of the truth of the facts that he had asserted, namely that he had been attacked by both O'Neill and the appellant. Since evidence of this statement could only be given by a witness who had merely heard it, such evidence was clearly hearsay evidence. It was not being tendered as
C evidence limited to the fact that an assertion had been made, without reference to the truth of anything alleged in the assertion. The evidence merely of the fact that such an assertion was made would not have related to any issue in the trial and therefore would not have been admissible. Had, for example, the deceased's state of mind been in issue and had his exclamation been relevant to his state of mind, then evidence of *the fact* that such an assertion was made, would not have
D been hearsay evidence since it would have been tendered without reference to the truth of anything alleged in the assertion. Such evidence is often classified as "original" evidence.

The res gestae doctrine

E Mr. Worsley based his submission that this hearsay evidence was admissible upon the so-called doctrine of "res gestae." He could not submit that the statement was a "dying declaration" since there was no evidence to suggest that at the time when the deceased made the statement (two months before his ultimate death), he was aware that he had been mortally injured. Mr. Worsley in support of his submission, both before the Common Serjeant, the Court of Appeal and in your
F Lordships' House relied essentially on a decision of the Privy Council, *Ratten v. The Queen* [1972] A.C. 378, an appeal from a conviction for murder by the Supreme Court of the State of Victoria in which the opinion of the Board was given by Lord Wilberforce. Mr. Worsley, for whose researches into this field of law I readily express my gratitude, invited your Lordships' attention to American, Canadian and Australian
G authorities in order to demonstrate their consistency with that decision and to support his contention, which is the real issue in this appeal viz. that your Lordships should accept the analysis, reasoning and advice tended by the Privy Council as being good English law.

I do not think it is necessary to burden this speech by travelling again over all the ground, which, if I may say so respectfully, was so admirably covered by Lord Wilberforce in his judgment. Before turning
H to the decision in *Ratten's* case, it is convenient at this stage to quote from *Cross on Evidence*, 6th ed. (1985), p. 585:

> "Before Lord Wilberforce's important review of the authorities in *Ratten v. The Queen*, the law concerning the admissibility of

statements under this exception to the hearsay rule [the res gestae doctrine] was in danger of becoming emmeshed in conceptualism of the worst type. Great stress was placed on the need for contemporaneity of the statement with the event, but, what was far more serious, much attention was devoted to the question whether the words could be said to form part of the transaction or event with all the attendant insoluble problems of when the transaction or event began and ended."

Ratten v. The Queen [1972] A.C. 378

The appellant was charged with the murder of his wife by shooting her with a shotgun. He accepted that he had shot her, but his defence was that the gun had gone off accidentally, whilst he was cleaning it. There was evidence that the deceased was alive and behaving normally at 1.12 p.m. and less that 10 minutes later she had been shot. To rebut that defence, the prosecution called evidence from a telephone operator as to a telephone call which she had received at 1.15 p.m. from the deceased's home. She said the call came from a female who sounded hysterical and who said "get me the police, please—," gave her address, but before a connection could be made to the police station, the caller hung up. The appellant objected to that evidence on the ground that it was hearsay and did not come within any of the recognised exceptions to the rule against the admission of such evidence. The Judicial Committee held that the telephone operator's evidence had been rightly received. They concluded that the evidence was not hearsay, but was admissible as evidence of facts relevant to the following issues. First, as rebutting the defendant's statement that his call for the ambulance after he had shot his wife was the only call that went out of the house between 1.12 and 1.20, by which time his wife was dead. Secondly, that the telephonist's evidence that the caller was a woman speaking in an hysterical voice was capable of relating to the state of mind of the deceased and was material from which the jury were entitled to infer that Mrs. Ratten was suffering from anxiety or fear of an existing or impending emergency. Lord Wilberforce said, at p. 387:

"The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', i.e., as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 965, 970: 'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is

admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.'"

Lord Wilberforce then proceeded to deal with the appellant's submission, on the assumption that the words were hearsay in that they involved an assertion of the truth of some facts stated in them and that they may have been so understood by the jury. He said, at pp. 388–390:

"The expression 'res gestae,' like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. In the context of the law of evidence it may be used in at least three different ways: 1. When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening. Thus in *O'Leary v. The King* (1946) 73 C.L.R. 566 evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J. said at p. 577: 'Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.'

"2. 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.

"3. A hearsay statement is 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. A classical instance of this is the much debated case of *Reg. v. Bedingfield* (1879) 14 Cox C.C. 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason, why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used and because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been victims of assault or accident. The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person (as he could not at the time when earlier reported cases were decided) can give his own account if different. There is no such difference in kind or substance between evidence

of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

"The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and the differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression 'res gestae' may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings."

Lord Wilberforce then reviewed a number of cases, in England, in Scotland, in Australia and America and concluded, at p. 391, that those authorities:

"show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

Applying that principle to the facts of the *Ratten* appeal [1972] A.C. 378, there was in their Lordships' judgment ample evidence of the close and intimate connection between the statement ascribed to the deceased and the shooting which occurred very shortly afterwards. Lord Wilberforce commented, at p. 391:

"The way in which the statement came to be made (in a call for the police) and the tone of voice used, showed intrinsically that the

A statement was being forced from the deceased by an overwhelming pressure of contemporary event. It carried its own stamp of spontaneity and this was endorsed by the proved time sequence and the proved proximity of the deceased to the accused with his gun."

Thus, on the assumption that there was an element of hearsay in the words used, the Privy Council concluded that they had been properly B admitted.

In *Reg. v. Blastland* [1986] A.C. 41, 58, my noble and learned friend Lord Bridge of Harwich, regarded the authority of the *Ratten* case [1972] A.C. 378 as being of the highest persuasive authority. It was followed and applied in the instant case by the Common Serjeant and by the Court of Appeal (Criminal Division) and accordingly the appellant's C appeal against his conviction for manslaughter was dismissed. It had previously been applied in *Reg. v. Nye* (1978) 66 Cr.App.R. 252, by the Court of Appeal where a victim of a criminal assault, which had occurred within a few yards of a police station, in a statement to police officers made within minutes of the assault, identified the defendant as the man who had hit him in the face. Lawton L.J. in giving the judgment of the court put, as he described it, a gloss upon Lord D Wilberforce's test by adding as an additional factor to be taken into consideration "was there any real possibility of error?" I will return to this particular point later. In *Reg. v. Turnbull* (1984) 80 Cr.App.R. 104 the Court of Appeal again applied the *Ratten* approach, where a man who had been mortally wounded staggered into the bar of a public house and in answer to questions put to him in the bar and in the E ambulance on the way to hospital he was understood to say that "Ronnie Tommo" had done it. He died half-an-hour later in hospital. The victim had a Scottish accent and had consumed a great quantity of alcohol and the name "Ronnie Tommo" was said to constitute his attempt to name the appellant. There have been two further decisions of the Court of Appeal this year which have followed *Ratten's* case. *Reg. v. Boyle* (unreported) decided on 6 March 1986, involved the theft of a F grandfather clock from an old lady to whose home the appellant had obtained access by a false representation. When he took away the clock she came out of the house with a piece of paper in her hand and when asked by a neighbour, "what is happening?" she said "I am coming for his address." This statement was admitted to support the victim's account that the removal of the clock was against her will and to G negative the defence that it was being taken away by the defendant with her consent, to have it repaired, I, for myself, would doubt whether this evidence was hearsay evidence. A clear issue in the case was the state of mind of the victim in relation to the removal of her clock. Her statement in the circumstances, as the car drove off, was evidence from which the jury could infer that she was not consenting to the clock being taken away. *Reg. v. O'Shea* (unreported) decided on 24 July 1986, is a clearer H case. The appellant was charged with burglary and manslaughter. The prosecution case against the appellant was that he went to a second floor flat and while he was battering down the door, the occupier of the flat, who was 79 years of age, attempted to escape through the window,

slipped and fell some 20 feet and sustained bruising to his heart, which resulted in his death a week later. The statement made by the deceased to two passers-by an hour or so later, when they found him lying where he had fallen, that he had tried to get out of his flat because he was frightened that two robbers who were trying to break down his door would kill him and that he had therefore jumped from the window to escape, was admitted, as was a similar statement which he made to two police officers less than 20 minutes later.

Mr. Sedley for the appellant submitted, first that there is no such exception to the rule against the admission of hearsay evidence as that said to be covered by the res gestae doctrine. Having regard to the authorities there is no substance in this proposition. Secondly, he submitted that a hearsay statement cannot be admitted under the doctrine if made after the criminal act or acts charged have ceased. He contended that the hearsay statement must form part of the criminal act for which the accused is being tried. He relied strongly upon *Reg. v. Bedingfield*, 14 Cox C.C. 341. In that case the accused was charged with murder. The defence was suicide. The accused was seen to enter a house and a minute or two later the victim rushed out of the house with her throat cut and said to her aunt "See what Harry has done." This exclamation was not admitted by Cockburn C.J. at pp. 342–343 because "it was something stated by her after it was all over, whatever it was, and after the act was completed." Mr. Sedley submits that the decision in *Ratten's* case involved an extension of the existing hearsay rule and so was in conflict with the ruling of the majority in your Lordships' House in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 that it is now too late to add a further exception to the rule against hearsay otherwise than by legislation. This submission is not assisted by the fact that both Lord Reid and Lord Hodson, who were party to the majority decision in the *Myers* case, were also members of the Board in the *Ratten* case [1972] A.C. 378.

I do not accept that the principles identified by Lord Wilberforce involved any extension to the exception to the hearsay rule. Lord Wilberforce clarified the basis of the res gestae exception and isolated the matters of which the trial judge, by preliminary ruling, must satisfy himself before admitting the statement. I respectfully accept the accuracy and the value of this clarification. Thus it must, of course, follow that *Reg. v. Bedingfield*, 14 Cox C.C. 341 would not be so decided today. Indeed, there could, as Lord Wilberforce observed, hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement.

The trial judge

My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the res gestae doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as "hearsay evidence?"

1. The primary question which the judge must ask himself is—can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

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

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

Croom-Johnson L.J., in giving the judgment of the Court of Appeal (Criminal Division) dismissing the appeal, stated, in my respectful view quite correctly, that the Common Serjeant had directed himself impeccably in his approach to the evidence that he had heard. It is perhaps helpful to set out verbatim how the judge stated his conclusions:

> "I am satisfied that soon after receiving very serious stab wounds the deceased went downstairs for help unassisted and received some assistance. He was able to talk for a few minutes before he became unconscious. I am satisfied on the evidence—and not only the primary evidence but the inference of fact to which I am irresistibly driven—that the deceased only sustained the injuries a few minutes

before the police arrived and subsequently, of course, the ambulance took him to hospital. Even if the period were longer than a few minutes, I am satisfied that there was no possibility in the circumstances of any concoction or fabrication of identification. I think that the injuries which the deceased sustained were of such a nature that it would drive out of his mind any possibility of him being activated by malice and I cannot overlook as far as the identification was concerned, he was right over Mr. O'Neill who was a former co-defendant with the accused."

Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal. Of course, having ruled the statement admissible the judge must, as the Common Serjeant most certainly did, make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the juries' attention must be invited to those matters.

My Lords, the doctrine of res gestae applies to civil as well as criminal proceedings. There is, however, special legislation as to the admissibility of hearsay evidence in civil proceedings. I wholly accept that the doctrine admits the hearsay statements, not only where the declarant is dead or otherwise not available but when he is called as a witness. Whatever may be the position in civil proceedings, I would, however, strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place all the relevant material facts before the court, so as to ensure that justice is done.

My Lords, I would accordingly dismiss this appeal.

Appeal dismissed.

Solicitors: Fisher, Meredith & Partners; Crown Prosecution Service.

J. A. G.