

Statements outwith presence of accused

Law

1. Unless part of the *res gestae*, an extra-judicial statement made by one accused incriminating a co-accused outwith the presence of the latter is not generally admissible and a failure to direct the jury accordingly is likely to amount to a misdirection ([*Jones v HM Advocate* 1981 SCCR 192](#); [*McIntosh v HM Advocate* 1986 JC 169](#); [*Johnston v HM Advocate* \[2011\] HCJAC 32, 2012 JC 49](#)). What amounts to such a statement depends on the circumstances. For example, it has been held that when other evidence indicates that two persons were involved in the offence and one accused makes a statement that 'some other boy' was involved, such a statement is not incriminatory of the other accused ([*Callaghan v HM Advocate* \[2021\] HCJAC 4, 2021 JC 140](#)).

A statement made after the *res gestae* by accused [A] in the absence of accused [B], which is favourable to B, is not admissible for the purpose of assisting B's defence ([*Mathieson v HM Advocate* 1996 SCCR 388, 398](#) (opinion of the court)).

This is subject to the following exception set out in [section 261 of the Criminal Procedure \(Scotland\) Act 1995](#):

"(1) Subject to the following provisions of this section, nothing in sections 259 and 260 of this Act shall apply to a statement made by the accused.

(2) Evidence of a statement made by an accused shall be admissible by virtue of the said section 259 at the instance of another accused in the same proceedings as evidence in relation to that other accused.

(3) For the purposes of subsection (2) above, the first mentioned accused shall be deemed—

(a) where he does not give evidence in the proceedings, to be a witness refusing to give evidence in connection with the subject matter of the statement as mentioned in paragraph (e) of subsection (2) of the said section 259; and

(b) to have been, at the time the statement was made, a competent witness in the proceedings.

(4) Evidence of a statement shall not be admissible as mentioned in subsection (2) above unless the accused at whose instance it is sought to be

admitted has given notice of his intention to do so as mentioned in subsection (5) of the said section 259; but subsection (6) of that section shall not apply in the case of notice required to be given by virtue of this subsection."

2. On the question of statements made *in the presence* of an accused, *Renton and Brown* states:

"A statement by another person, whether or not that person is a co-accused, made in the presence of an accused, is not in itself evidence against that accused. The accused's reaction to that statement, or indeed his failure to react to it where it is inculpatory is, however, evidence against him in the same way as a statement made by him, silence in the face of accusation being capable of being construed as an admission of guilt. The evidence of the other person's statement is therefore admissible for the limited purpose of explaining the accused's reaction." (*Renton & Brown, Criminal Procedure*, 6th ed, para 24-56, equivalent passage in 5th ed, para 18-41 approved in *Buchan v HM Advocate* 1995 SLT 1057, 1059 (opinion of the court); see also *McDonnell v HM Advocate* 1998 JC 228 and *Campbell v HM Advocate* [2020] HCJAC 47, 2022 JC 243, where the court held at paragraph [12] that there is no requirement that the accused has to be aware that his lack of reaction might be observed by others).

NB This must be read subject to the general admissibility of statements forming part of the *res gestae* discussed immediately below.

3. Anything spoken or written by one accused (or indeed anybody) relevant to proof of the commission of the crime and/or its perpetrators and forming part of the *res gestae* is admissible in evidence against all of them (*McGaw and Reid v HM Advocate* [2019] HCJAC 78, at paragraphs [36] to [37]; *Bennett and Moyes v HM Advocate* [2020] HCJAC 12, 2020 JC 191, at paragraphs [12] to [14] and *Representatives of Megrahi v HM Advocate* [2021] HCJAC 3, 2021 SLT 73, at paragraph [72]). This is confined to evidence of things said in furtherance of the common purpose and does not apply to statements, claims, or allegations made after the common purpose has been achieved or failed (*Johnston v HM Advocate* [2012] JC 49, 2011 SCCR 369). Unless forming part of the *res gestae*, the statement is evidence only against the accused who made it (Dickson, *The Law of Evidence in Scotland*, (1887), para 363). For a definition of *res gestae*, see [Lord](#)

[*Advocate's Reference Nos 2&3 of 2023* \[2024\] HCJAC 43, 2024 SLT 1207](#). It is the whole thing that happened and does not end with the completion of the *actus reus*. Unless coming within the *res gestae*, if, after the crime has been committed, a statement is made to the police, or anyone else, outwith the presence of another accused, it is inadmissible against that other accused ([*Jones v HM Advocate* 1981 SCCR 192](#); Macphail, *Evidence*, paras 20-33 and S20-33; *Walkers on Evidence*, 4th ed, para 9.6.2).

NB The full bench in *Lord Advocate's Reference No 1 of 2023* determined that *res gestae* can extend beyond the *actus reus*. In the cases of *Jones*, *McIntosh and Johnston*, cited above, the comment in question was made to the police in statements or on being charged, plainly after the *res gestae*. In *Johnston*, the statement was made days after the crime was committed.

It is suggested that a distinction drawn, in Dickson *The Law of Evidence in Scotland*, at (para 363), between utterances forming part of the *res gestae* and subsequent confessions or narratives of past conduct, gives an indication of a refinement to this broad principle:

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

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

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

However, a judgement may be required as to whether what was said did form part of the *res gestae*. Dickson continues, in para 254, to examine *res gestae* utterances, explaining:

“Yet it is not necessary that they may be contemporaneous ‘for the nature and strength of the connection are the material things to be looked to; and although concurrence of time cannot but be always material evidence to show this connection, yet it is by no means essential.’ On the other hand, a statement which resolves into a narrative of a past occurrence will not be admitted to qualify or explain it.”

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

4. Where there is evidence of written communications such as text, Facebook or WhatsApp messages which were part of the commission of the offence and form part of the *res gestae*, the contents are capable of incriminating all the accused, whether or not a particular accused sent or received the communication, since they are pieces of evidence capable of showing what was going on and who was involved. There is no need for the Crown to prove concert in advance or that the accused whose case is under consideration was at that time acting in concert. The content of, for example, messages may themselves ultimately prove that the accused were acting in concert and so guilty of the crime (see [McGaw and Reid v HM Advocate \[2019\] HCJAC 78](#), at paragraphs [36] to [37] and [Bennett and Moyes v HM Advocate \[2020\] HCJAC 12, 2020 JC 191](#), at paragraphs [12] to [14]).

Where a co-accused is not ultimately proved to have been acting in concert, his statements, if part of the *res gestae*, are nonetheless available in the case against other accused (see [Representatives of Megrahi v HM Advocate \[2021\] HCJAC 3, 2021 SLT 73](#), at paragraphs [27] to [29] and [72]).

5. Where a co-accused tenders a plea of guilty and then gives evidence for the Crown in the same matter, it does not follow that some direction or advice from the trial judge, effectively amounting to a *cum nota* warning, is required. Provided the issue has been properly focused by each side, the proper course is not to mention the matter and leave it to the jury ([Cook v HM Advocate \[2006\] HCJAC 82, 2007 SLT 81](#), at paragraph [11]). In this case it was observed that although it might have been preferable for the sheriff to remind the jury of the apparent conflict between the co-accused’s plea and his evidence, he was under no obligation to do so).

6. Evidence of incriminating statements made by a co-accused, who has been incriminated, is admissible against the co-accused while he remains a co-accused. But if he is acquitted, that evidence, unless part of the *res gestae* (see paragraph 5 above), becomes hearsay, and is not available to the remaining accused for any purpose. The jury should be told to ignore it ([McArthur v HM Advocate \[2006\] HCJAC 83](#), at paragraph [33]).

7. An accused, in the course of his evidence, may be asked about a self-serving prior statement to the police for the purpose of supporting his credibility, even if it may incriminate a co-accused by implication. In such circumstances, the trial judge should simply give the usual directions that the statement may assert or support the accused's credibility, but that it is not evidence against the co-accused ([Mackay v HM Advocate \[2008\] HCJAC 16, 2008 SCCR 371](#), at paragraph [1]).

8. An accused wishing to elicit evidence about a statement made by a co-accused outwith his presence can proceed in one of two ways:

- i. If the co-accused gives evidence on his own behalf, [section 266 of the 1995 Act](#) makes him a competent witness for the defence. Section 266(9)(b) allows another accused, and section 266(3) allows the Crown, to ask him any question in cross-examination. That includes questions about the statement. Under [section 263\(4\)](#) he may be cross-examined by the accused, or the Crown, about differences between his statement and his evidence in court.
- ii. If the co-accused does not give evidence, the accused can lead evidence of the content of the co-accused's statement, provided the requirements of [section 259](#) and [section 261 of the 1995 Act](#) are met, and the appropriate notice under section 259(5) and (5A) has been given. These provisions have no application until the co-accused has decided not to give evidence. ([McIntyre v HM Advocate \[2009\] HCJAC 32, 2009 SLT 716](#).)

Possible form of direction on statements outwith presence of the accused

Generally, what one accused said about a co-accused outwith that co-accused's presence is not evidence against that co-accused.

[Or: What one accused said in messages to another accused/person is not evidence against a co-accused.]

1. Statements forming part of the res gestae

But what is said or written by an accused or anyone else which is part of the preparation for, or commission of, the crime is available as evidence to implicate the accused in the commission of the crime itself or as acting in concert with others in its commission. If those statements/messages were made/sent prior to, or at the time of, the events giving rise to the charge, they are available as evidence against each accused. That is so whether the accused whose case you are considering was present at the time or not, or whether the particular accused received the message or not.

[One or more of the following directions should be given as appropriate. The directions proposed in the four scenarios which follow will almost certainly require to be adjusted to the particular circumstances of the case, given the large number of possible permutations in such situations.]

(i) Verbal statements by co-accused

You have heard evidence that the accused [X] said [specify what was said] to [Z].

If you are satisfied that the accused [X] said that and conclude that the statement forms part of the preparation for and/or commission of the offence, even though what accused [X] said was outwith accused [Y's] presence, that statement is evidence against [each of] the accused.

(ii) Verbal statements by others

You have heard evidence that [A] said [specify what was said] to [B].

If you are satisfied that [A] said that and conclude that the statement forms part of the preparation for and/or commission of the offence, even though what [A] said was outwith the accused's presence, that statement is evidence against [each of] the accused.

(iii) Statements in writing by co-accused

You have heard evidence that the accused [X] wrote [specify] to [Z].

If you are satisfied that the accused [X] wrote that and conclude that the statement forms part of the preparation for and/or commission of the offence, even though what accused [X] wrote was outwith accused [Y's] presence and not sent to the accused, that statement is evidence against [each of] the accused.

(iv) Statements in writing by others

You have heard evidence that [A] wrote [specify] to [B].

If you are satisfied that [A] wrote that and conclude that the statement forms part of the preparation for and/or commission of the offence, even though what [A] wrote was outwith the accused's presence and not sent to the accused, that statement is evidence against [each of] the accused.

2. Statements potentially forming part of the res gestae

[The following direction will be appropriate where it is a jury question whether an utterance was part of the res gestae, for example, when the utterance occurred after the conclusion of the actus reus but where the utterance could still be res gestae depending on what view the jury take of the evidence. In cases where there is no basis to consider a post actus reus utterance as part of the res gestae, the directions at section 3, below, are likely to be appropriate.]

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

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

If you conclude that these were spontaneous remarks prompted by the events unfolding and part of the whole thing that happened, then it is evidence in the case which can prove facts and from which you can draw inferences. It is an independent piece of evidence. It can corroborate other evidence against the accused or be corroborated by other evidence. Although it was said outwith the accused's presence, what was said is evidence against [each of] the accused.

However, after a crime has been committed, what one accused said about a co-accused outwith that co-accused's presence is not evidence against that co-accused.

[Or: What one accused said in messages to another accused/person is not evidence against a co-accused].

3. Statements made by one accused about a co-accused after the commission of a crime and after the res gestae.

(i) Where the co-accused is present at time

You will remember evidence from witness [C] that the accused [A] made a statement in the presence, and in the hearing, of the co-accused [B]. What [A] said incriminated

[B], and [B] did not deny or dissociate [B] from what [A] said. [A's] statement, of itself, is not evidence against [B].

But you can take account of it in this context. You can look at [B's] reaction, or lack of reaction, on hearing what [A] said. That is admissible evidence against [B]. It is for you to decide, but if [B] made no response to what [B] heard, you might infer from [B's] silence that [B] was impliedly admitting what was said about [B].

(ii) Where the co-accused is absent at time.

[If this direction has not already been given]

In his statement to witness [C] the accused [A] mentioned the co-accused [B]. What [A] said was said outwith [B's] presence.

What [A] said to witness [C] can be evidence for or against [A] as I have already explained, but it is not evidence for or against [B]. Also, it is not evidence that can be used to show that [B] has been consistent in [B's] account of events. The reason why, is because [B] was not present when the statement was made. [B] did not have the chance to admit, deny or comment on it. It would not be right to take that into account as part of the evidence for or against [B].

So, you can take account of that statement only so far as concerns its maker [A].

Section 261(2)

[In the event of the provisions of this subsection being used, the specimen charge for section 259 will require to be adapted to the particular circumstances.]