The Concept of *Res Gestae* as Embodied in the Evidence Ordinance of Sri Lanka

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Defining '*res gestae'*

There has been much confusion as to the exact meaning of *res gestae.* According to Phipson,[2] res gestae does not have an exact English translation. Most authors have found it undesirable as a concept. Wigmore[3] in his famous treaties on evidence state that this phrase, as conceded on all hands, is inexact and indefinite in its scope, and is ambiguous in its suggestion of reasons for the doctrine. Hoffman[4] speaking on behalf of the position in South Africa states that it is vague. Nokes opines that this term is loose, and he cites the statement made by Lord Tomlin in ***Homes v Newman***[5] where his Lordship declared that the phrase is a "respectable legal cloak for a variety of cases to which no formula of precision can be applied".

Field[6] writing on the Indian perspective describes the term as declared to be incapable of any precise definition, and it has been applied to many different and unrelated situations that it has been said that the difficulty of formulating a description of *res gestae* which will serve for all cases seems insurmountable'. Julius Stone[7] remarks that 'no evidential problem is so shrouded in doubt and confusion'. Slough[8] says that 'The Latin expression Res Gestae has been variously defined by scholars of the past and present, and rarely have definitions cleared the haze surrounding its use'. Lord Blackburn[9] remarked sardonically 'If you wish to tender inadmissible evidence, say it is part of the *res gestae*'. Even contemporary scholars like Murphy[10] describes that "The actual expression 'res gestae' is probably best ignored, save for the amusement it has afforded to writers and judges. It is a piece of grammatical nonsense". These views expressed by these learned authors clearly points out the hazardous nature of the

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2 Phipson, S., Malek, H. and Auburn, J. (2005*). Phipson on evidence*. 16th ed. London: Sweet & Maxwell, p.877.
3 Wigmore, J. (1940). *A treatise on the system of evidence in trials at common law*. 3rd ed. Boston: Little, Brown and Company, Vol 4 p. 180
4 Hoffman, L. (1963). *The South African Law of Evidence*. 1st ed. Durban: Butterworths, p.283.
5 (1931) 2 Ch. 112 at 120
6 Chaturvedi, G. and Field, C. (2005). *Field's commentary on law of evidence in India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia, and Singapore.* Delhi: Delhi Law House. P 520
7 Stone, J., Res gesta reagitata"(1939). LQR, 55, p.66.
8 Slough, M.C., 1953. Res Gestae (continued). U. Kan. L. Rev., 2, p.246.
9 Woodroffe, J., Ali, S., Singhal, M. and Singhal, B. (1989*). Sir John Woodroffe & Amir Ali's law of evidence*. 15th ed. Allahabad, India: Law Book Co., p.428.
10 Murphy, P., 2013. *Murphy on evidence*. OUP Oxford. P.280

doctrine which is a way in which to get in everything which is otherwise not allowed in. However even with much criticism the phrase has found much fond in the eyes of judges and lawyers alike.

Richardson[11] finds that "the use of the term has been condemned by some jurists and by many commentators, but without appreciable effect upon the popularity of the term with courts and lawyers". Coomaraswamy[12] states that "in spite of these difficulties and criticism the phrase '*res gestae*' has become a part of the law of evidence and is commonly used by judges and text-book writes. The terms *res gestae* though not having an exact universal definition many jurists and textbook writers alike have given definitions to the term. Heydon[13] states, "Unlike most principles of the law of evidence, the doctrine of *res gestae* is inclusionary. Under it evidence may be received although it infringes the rule against hearsay, the opinion rule or the opinion against self-collaboration. The rationale for this inclusion of the hearsay evidence according to Cross and Tapper[14] was partly on account of the injustice caused by the inflexibility of the hearsay rule, an unsatisfactory inclusionary exception was created at common law for statements so closely intertwined with the events in issues as to amount to part of what was going on. This rule is derived from the obvious consideration that no dispute event or transaction ever occurs isolated from all other events of the transaction[15].

Sarkar[16] observes that 'in testifying to the matters in issue, therefore, witnesses must state them not in their barest possible form, but with a reasonable fitness of detail and circumstance. These constituents or accompanying incidents are said to be as forming a part of the *res gestae'*. Batuk Lal[17] points out that *res gestae* of any case properly consist of that portion of actual world's happenings out of which the right or liability complained or asserted in the proceedings, necessarily arises. Field[18] observes that 'the term *res gestae* has however, frequently been given

11 Richardson, W. and Prince, J. (1964). Richardson on evidence. 9th ed. Brooklyn: Brooklyn Law School, p.249.
12 Coomaraswamy, E. (1989). *The Law of Evidence*. 2nd ed. Colombo: Lake House, p.205.
13 Heydon, J. and Cross, R. (2004). *Cross on evidence*. Sydney: LexisNexis Butterworths. P. 1105
14 Tapper, C. (2007). *Cross and Tapper on evidence*. Oxford: Oxford University Press. p.606
15 Supra note 9, at p.236.
16 Sarkar, M. (1993). Sarkar's law of evidence in India, Pakistan, Bangladesh, Burma & Ceylon. 14th ed. Agra: Wadhwa, p.121.
17 Lal, B. (2005). *Batuk Lal's Law of evidence* (in India, Pakistan, Bangladesh, Sri Lanka and Malaysia). 5th ed. New Delhi: Orient Pub. Co., p.165.
18 Supra note 6 at p 520

a greatly extended application and defined as "those circumstances which are the undersigned incidents of a particular litigated act and which are admissible when illustrative of such act."

It may also be defined in a general way as meaning the circumstances, facts and declarations which grow out of the main fact and serve to illustrate its character and which are so spontaneous and contemporaneous with the main fact as to exclude the idea of deliberation or fabrication. According to Nokes,[19] 'The conventional uses of the term embrace facts which either form part of, or accompany and explain, a fact in issue. If any fats do not comply with either condition, they are outside the rule, and may be inadmissible because they are irrelevant.

Batuk Lal observes that 'the test of the admissibility of evidence as part of *res gestae* is whether the act, declaration or exclamation is so intimately interwoven or connected with the principle fact or event which it characterizes as to be regarded as a part of the transaction itself and also whether it negatives any premeditation or purpose to manufacture testimony'. In ***Hari v. State of U.P.***[20] the fact that the eyewitnesses travelled in the same bus with the victim, that they saw the accused holding the pistol against the victims and saw the victim falling and that they chased the acused all form part of the same transaction. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the transaction[21]. Hoffman[22] observes that 'the central notion, therefore, is that a statement may be admissible either because it is itself a fat in issue or a fact relevant to the issue, or because it is so closely associated in time and circumstance with the transaction under investigation that, technically hearsay or not, it has a high degree of relevance'. He further observes that 'the phrase *res gestae* is occasionally used to refer to acts or events which form part of the transaction in issue but its principal use is in connection with statements.

19 Nokes, G. (1967). *An Introduction to Evidence*. 4th ed. London: Sweet, Maxwell, p.88.
20 1993 CriLJ 1383
21 Supra note 9, at p.426
22 Supra note 4 at p 293

Amir Ali[23]further observes that a fact beside being relevant under Section 6, by virtue merely of its being so connected with a fact in issue as to form a part of the same transaction, may also be relevant on the grounds mentioned in one or other succeeding Sections. Therefore, where several offences are connected together and form part of one entire transaction, then the one is evident to show the character of the other. Statements relevant under this section may also be used to impeach the credibility of a witness under Section 155, or to corroborate his testimony under Section 157, or as evidence of intention. The section shows only one of the ways in which a fact can be relevant, and it cannot be said that because a fact or statement is not relevant under this Section, it is not relevant at all. A statement may not be relevant under this section, but may still be admissible for an example like under Section 32 or 157.

From the above-mentioned facts, the notion of *res gestae* could be, whittled down to encapsulate the following characteristics: The *res gestae* is as exception to the hearsay rule and hence hearsay evidence maybe received not as hearsay but as original evidence if it falls under the doctrine and this true in both civil and criminal cases alike. Under the doctrine, primarily statements will be received in and on a somewhat narrower margin; acts themselves may be taken in as a part of *res gestae*. Importance to spontaneity and contemporaneousness is given and only those statements or acts that form a part of the same transaction may be taken in to account and hence when it comes to statements much emphasis on spontaneity and contemporaneousness is given.

The doctrine allows the jury or the judge to get an idea about the surrounding events or the circumstantial factors litigated in front of them. It throws in light to otherwise a darker environment. Furthermore, there is no rule that a statement cannot be admitted under the *res gestae* principle where the maker of the statement is available to give evidence, and the statement may have evidential value both as evidence of the truth of the matters stated and to show its consistency with the witness's evidence[24].

[23]Supra note 9 at P 423
24 Supra note 10 at p 280

***Res gestae* as found in the Evidence Ordinance.**

The Evidence Ordinance No 15 of 1895 governs the law of evidence in Sri Lanka. It lays down as to what evidence are admissible. According to Section 5, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others. Under this section, to be received as evidence, it has to be about either a fact in issue or a relevant fact.

Section 3, which defines relevant as 'one fact is said to be relevant to another when the one is connected with the other in any ways referred to in the provisions of the Act relating to the relevancy of facts. Therefore, to be relevant a fact has to find some connection with another to be received as evidence. Coomaraswamy[25] states that, this is accomplished in our Ordinance by Sections 6 to 55, which lay down the recognized kind of "circumstantial evidence" as opposed to evidence of the actual-facts in issue. Sarkar[26] observes that 'These particular ways of connection which the law regards as relevancy have been described in sections 6 to 55 deal with relevant facts. Facts, which are not themselves in issue, may affect the probability of the existence of facts in issue and be used as the foundation of inferences respecting them; such facts are described in the Act as relevant.

Here it must be pointed out the terms 'admissible' and 'relevance' are not synonymous. Nokes[27] makes it clear that every admissible fact is relevant but not the vice versa. This was also discussed in the local case of ***King v. Arnolis Perera***[28] where it was pointed out that 'All admissible evidence must be relevant, but all relevant evidence is not admissible, viz., a statement made to a police officer may be relevant but inadmissible'. Hence, there could be instances where a fact though relevant be inadmissible due to some other reason of law or policy.

According to Coomaraswamy[29] 'In a broad sense, Sections 6, 7 and 8 of the Evidence Ordinance deal with the application of the rule governing the admissibility of *res gestae*. However, a very different view is advanced by Professor Peiris[30] he observes that 'Sections 6 to 16 of the

25 Supra note 12 at p 203
26 Supra note 16 at p 124
27 Supra note 19 at p 90
28 28 NLR 481 at 485
29 Supra note 12 at p 204
30 Peiris, G. (1987). *The law of evidence in Sri Lanka*. 3rd ed. Colombo, Sri Lanka: Lake House, p.112.

Evidence Ordinance amount to a recognition of the doctrine of *res gestae*. With due respect to both the learned authors, they do not cite any authorities for the assertions they make.

Sarkar[31] commenting on the Indian Evidence Act, which is a replica of our Evidence Ordinance, asserts that, 'The subject matter of Sections 6,7,8,9 and 14 are treated in English and American books under the head of *res gestae'*. Field[32] observes that 'under the English law statements referred to in Explanation (2) to Sec. 8, *post*, are admissible on the ground that they are part of the *res gestae*. This view collaborates the one expressed by Coomaraswamy. Woodroffe and Ali[33] do not make any assertions as to in what sections this doctrine is embodied in and it may be safe to presume that they find the doctrine embodied solely in section 6.

Batuk Lal[34] opines that sections 6,7,8, and 9 give the various ways in which the facts are so related to each other as to form components of the principal fact. However, a plausible view would be to prefer the section 6 as the genus and to treat the rest as the species. As Aronson and Weinberg[35] observes 'that one of the main reasons for the confusion about the doctrine has been the failure of the courts to recognize the limited circumstances which call for its application'. Therefore, it is important to demarcate the boundaries of the application of the doctrine. Here it seems that narrower the better.

Res gestae as used by Courts in Sri Lanka.

The doctrine of res gestae has found its place in many cases decided in Sri Lanka. However, it has not come in to prominence in recent times. An early illustration of the doctrine is to be found in the decision of ***King v. Attanayaka et al[36].*** The three accused were charged together in the same indictment, the first accused with forging four currency notes, the second and third accused with aiding and abetting him. The third count in the indictment charged the three accused with having aided and abetted one D to utter the aforesaid notes. To establish the last count, the Crown led in evidence certain statements incriminating the accused, alleged to have been made

31 Supra note 16 at p 123
32 Supra note 6 at p 520
33 Supra note 9 at p 432
34 Supra note 17 at p 168
35 Aronson, M. and Hunter, J. (1988*). Litigation: Evidence and Procedure*. 4th ed. Sydney: Butterworths, pp.1045-1046.
36 34 NLR 19

by D, in the course of his attempt to pass the notes, to the witnesses called by the prosecution. These statements were denied by D in the witness box.

Here the Court looked at Sections 6, 7, 8, and 10 of the evidence ordinance. With regard to *res gestae,* the court observed that 'Under Section 6 of the Evidence Ordinance hearsay is admissible when it forms part of the res gestae. This section allows the admission in evidence of statements made by third parties in the course of the same transaction'. It was argued that the statements if not admissible under the res gestae doctrine are alternatively or additionally admissible under Section 8 or under Section 10 of the Evidence Ordinance or under both these Sections. It can be observed that both Section 6 and 10 allow evidence to be admitted if it is from the same transaction that is under consideration.

However, it is to be noted that there is a clear distinction between the application of Section 6 and 10. If evidence is to be led under Section 10 of the Evidence Ordinance, common intention of the parties must be established but section 6 does not have any requirement as such. Illustration (b) of Section 6 could also fall under Section 10 of the ordinance but what sets them apart is the common intention, which is required under Section 10.

This emphasizes the fact that while Section 6 is of a general application Section 10 has an extra condition attached to it if it is to be applicable and that being the common intention. Hence, this shows that Section 6 could be considered as the genus and whatever comes under it as the species. Therefore, we could conclude that Section 10 is one of the species of Section 6. In fact when you read the illustration (b) of Section 6 with the illustration given in Section 10 it becomes evident that Section 10 is concentric of Section 6.

Section 6 declares that, '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. Section 6 does not limit its application only to statements or verbal utterances. Even acts that may form a part of the same transaction may be taken in as evidence. In ***R v. Ellis***[37] when a shopman was charged with stealing money from his employer's till, evidence was given by the shopkeeper's son that during the same day the accused had taken money from the till a number of times, and when searched had in possession 14s. 6d, of which

37 (1826) 6 B. and C.145.

6s., the subject of the charge, consisted of marked coins put into the till earlier, and it was held that this evidence was relevant and admissible, as the various thefts were part of the same transaction.

In order to grasp the application of Section 6 and the doctrine of *res gestae* the phrase "same transaction" needs to be understood. The Evidence Ordinance does not define the phrase 'same transaction'. Woodroffe and Ali[38] observes that 'For the purpose of this section, it must be said that a transaction is a group of facts so connected together as to be referred to by a single name, e.g., a contract, tort or crime'. Stephen[39] in his digest gives a similar account on the term as 'a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue.

Batuk Lal[40] opines that 'from its very nature the word "transaction" is incapable of exact definition. It should be interpreted not in any strict or technical way in its ordinary etymological meaning of "an affair" or "carrying through". The rule of efficient test for determining whether a fact forms part of the same transaction or another "depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as probable and subsidiary acts as to constitute one continuous action. However, it is not so easy to get a proper meaning of the phrase 'same transaction' from the above definitions themselves. For this we have to look into some judgments.

In ***R v Bridseye***[41] it was decided that Acts are not part of the same transaction, unless they were done at the same time, although they are similar in other respects. This was illustrated in ***R v. Rodley***[42]**.** On a charge of burglary with intent to ravish, evidence that about an hour later the accused entered another house by a chimney, and then had sexual connection with a women by her consent, was held to be wrongly admitted. However, in ***R. v. Whiley & Haines***[43], Lord Ellenborough, cited a case where a man committed three burglaries in one night. The accused stole a shirt at one place and left it at another, and they were all so connected that the Court heard

38 Supra note 9 at p 431
39 Stephen, J. (1911). *A digest of the law of Evidence*. 9th ed. New York: Garland Pub., p.166.4
40 Supra note 17 at p 169
41 1830 4 C. and P. 386
42 (1913) 3 K.B. 468
43 [2 Leach 983.]

the history of all the burglaries, and remarked that if crimes do intermix, the Court must go through the detail. In ***Ram Chandra v. Emperor***[44] it was observed that to ascertain whether a series of facts are part of the same transaction, it is essential to see whether they are linked together to present a continuous whole.

Further, it has been observed that[45] whether a series of acts are so connected together as to form the same transaction is purely a question of fact defending on proximity of time and place, continuity of action and utility of purpose and design. Here again there is hardly a uniformity shown in applying the doctrine. In the local case of ***King v. Mendias***[46], on a charge of murder the defense of the accused was that, he did not inflict the blow that caused the death of the deceased. Evidence was led by the Crown to the effect that persons other than the deceased received injuries from blows struck by the accused on the same occasion as well as medical evidence as to the nature of the injuries. The Court held 'the fact that other persons than the deceased received injuries was admissible in evidence under Section 6 of the Evidence Ordinance as being so closely connected with the guilty act as to form part of the same transaction.

However, the Court also held that 'the medical testimony as to the precise nature and extent of the injuries on other persons was not admissible in determining whether the accused had a murderous intent when he inflicted injuries on the deceased. It was observed by the court that 'the precise nature and extent of these injuries were not in their opinion facts so connected with a fact in issue as to form part of the same transaction and so relevant under Section 6. In ***Babulal Chaukhani v. Western India Theaters***[47] it was observed that, similar facts not forming the part of the same transaction are not relevant under Section 6. However, in ***Wau pillai v. State***[48] it was held that if there is a connection between the offence charged with other offence or the two facts form part of the same transaction as to fall within section 6 of the Evidence Act (as in India) the evidence about the other offence is admissible. Thus, in a charge of murder of **K** where the prosecution's case was that on the day of the incident the accused uttered a threat that he would

44 AIR 1939 Bom 129:41 BLR 98: 40 Cri LJ 579.
45 Supra note 9 at p 427
46 42 NLR 244
47 AIR 1957 Cal 709
48 AIR 1961 Bom 114

finish off **K** and thereafter also finish himself off, here the evidence of this utterance was allowed to show that the accused tried to kill himself after killing **K.** It has further been observed that 'the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defense which would otherwise be open to the accused.

With the above-mentioned case law it may be observed that the decision in ***King v Mendias***[49] took a somewhat narrower view of the doctrine of *res gestae*. In ***People v Marble***[50] it was concluded that two distinct offences may be so inseparably connected that the proof of one necessarily involves proving the other, and in such a case on a prosecution for one, evidence proving it cannot be excluded because it also proves the other. Charles Frederic Chamberlayne[51] points out that 'where proof of guilt is circumstantial-, and these are the cases in which distinct offences are most often incidentally proved it would greatly impair the cogency of the incriminating proof to attempt the elimination of evidence statements or other acts tending to show that crime in question was not the one committed by the accused at or about the same time. Hence it could be argued that the evidence regarding the nature and extent of the blows aimed at the others should might have been possible to be taken as part of the *res gestae* in ***King v Mendias,*** if the court directed itself to the above mentioned factors. However, if we are to be adamant with the decision given in ***Mendias*** it would tend to indicate that Sections 14 and 15 of the Evidence ordinance could not be taken in as part of the *res gestae* and that the view expressed by Prof. Peiris that the concept of *res gestae* is embodied in sections 6-16 of the Evidence Ordinance cannot be sustained. Section 14 and 15 themselves are different in their operations and hence section 15 is a subsidiary of section 14.

Section 14 deals with the admissibility of facts showing existence of state of mind or of body, or bodily feeling when the existence of any such state of mind, or body, or bodily feeling is in issue or relevant and section 15 deals with the admissibility of Facts bearing on question whether act

49 Supra note 44
50 38 Mich. 309
51Chamberlayne, C. (1919). *Hand Book on the Law of Evidence: A Concise Statement of the Rules in Civil and Criminal Trials Based Upon The Modern Law of Evidence, 5 Volumes*. 2nd ed. New York: M. Bender, p.612.

was accidental or intentional. According to illustration (c) of section 15 where' ***A*** is accused of fraudulently delivering to ***B*** a counterfeit rupee. The question is, whether the delivery of the rupee was accidental. The facts that soon before or son after the delivery to ***B***, ***A*** delivered counterfeit rupee to ***C***, ***D***, and ***E***, are relevant, as showing that the delivery to ***B*** was not accidental.

To further elaborate on this in ***R v, Mansfield***[52] on a charge of receiving stolen tin, the fact that on the accused premises being searched stolen iron and brass were found was held to be admissible as part of the transaction, though the iron and tin were the subject matter of the charge. However, in ***Mendias*** neither section 14 nor 15 came into discussion. It would seem possible to take in the evidence of the nature and the extent of the blows received by the others as to show the state of the mind of the accused at the time when the accused gave those blows and hence it could have been admitted under section 14. And further it could have been adduced to prove that the blows so given were not accidental. From this it could be pointed out that in some narrow instances' *res gestae* may said to be embedded in sections 14 and 15. However, this would more be a case of trying to match the doctrine to these sections rather than to find the substance of the doctrine from the sections themselves. Therefore, in any even the argument for considering that Sections 14 and 15 of the Evidence Ordinance embodies the doctrine of *res gestae* seems a very fragile one. It would also seem that if sections 14 and 15 were also to be included in the broader picture of *res gestae* it would be superfluous as this could be captured under section 6.

As we noted above *res gestae* is an exception to the general rule of inadmissibility of hearsay evidence. The rationale for excluding hearsay as admissible evidence lies in the fact that the person who made the statement cannot or is not available in the witness box and therefore his/her credibility cannot be evaluated by cross examination. However, hearsay evidence may be allowed to show the circumstances in which an event has occurred. For an example, if A tells a police officer that when you go to arrest B 'please be careful he has a gun' the statement made by A cannot be used to prove the fact that B had a gun but it could be given to explain as to why

52 Car amd M 140

the police officer carried a loaded gun with him. However when it comes to *res gestae* if the requirements are met some statements may be used to prove the truth that they themselves assert.

In ***Lenssen v. R.,***[53] the accused was charged with keeping a gaming house. Police witnesses who kept watch upon the house were allowed to give evidence of what they heard people say as they entered and left. The court ruled that these expressions formed a part of the *res gestae*. The fact that persons resorted to the house was relevant to whether it was a gaming house or not, and statements which accompanied and explained their visits were therefore admissible. Such statement is received to show why or with what intention its maker did a relevant at. Here, it can be seen that if such statements are part of the *res gestae* they are not excluded for simply being hearsay. Wigmore[54] observes that 'where the utterance of specific words is itself a part of the details of the issue under the substantive law and the pleadings, their utterance may be proved without violation of the hearsay rule'. Hence if the utterance is itself a part of the transaction like in the case of a bystander, the statement made by the bystander may be admissible as part of forming the same transaction. This is illustrated in section 6 under illustration (a). However, the contemporaneous of the transaction is highlighted in the illustration itself where it states that 'so shortly or after' and this would be so to exclude the possibility of fabrication or imagination. The statement made by a bystander must be impulsive so that there is on chance or opportunity to think over and to respond. The "bystander" means the persons who are present at the time of incident and not the persons who gather on the spot after it. It must be noted that such statements is relevant only if it is that of a person who has seen the actual occurrence and who uttered it simultaneously with the incident or so soon thereafter as to make it reasonably certain that the speaker is still under the stress of excitement caused by his having seen the incident[55].

In the local case of ***Queen v. Yahonis Singho***[56] a witness called by the prosecution testified that she heard of people going past her house crying out that the accused had stabbed the deceased. T.S Fernando J, opined that, "These were by no means shouts of bystanders and therefore did not come within the category of relevant facts admissible under section 6 of the evidence ordinance.

53 1906 T.S 154.
54 Supra note 3 at p (Vol 6) page 185 s 1770
55 Supra note 17 at p 174
56 (1964) 67 NLR 8

The same was held in ***Pakhar Singh v. Emperor***[57] where the statements of witnesses to the effect that they went to the spot of the murder and there heard the bystanders talking that the four persons had communicated the murder was held irrelevant. However, In ***Raban v. R***[58]**,** on a trial for murder of mother of a child whose cries attracted the passers-by, the witnesses can speak to the nature of the child's cries and even as to what the child said so far as to explain their conduct. The difference being that the bystanders being there at the scene when it happened.

The rationale for this can be seen in the fact that if a person is at the event or the spot of the event, the repulsive nature of the response as an effect of the shock or the unhesitant nature of the response given out would mitigate against any fabrication of the event that is in question. If the person was not actually there at the event then there is greater possibility of fabrication of the event that took place. These spontaneous statements are ones which are made contemporaneously with the perception of an event or so soon thereafter that the stimulus of excitement or spontaneity is still present. Such statements are genuinely hearsay when relied upon to prove the facts stated, but they are exceptionally admissible if they form a part of the *res gestae*[59].

Coomaraswamy[60] observes that it is a principle that a spontaneous exclamation or statement at time of a relevant event is admissible if it relates to the event. Wigmore[61] justifies the admissibility of such statements upon the ground that "In the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unflecting and sincere expression of one's actual impressions and beliefs. However, McCormick[62] observes that "psychologists would probably conclude that excitement stills the voice of reflective self-interest but they might question whether this factor of reliability is not over-borne by the distracting effect which shock and excitement might have on observation and judgment. But, they might well conclude that contemporaneous statements both excited and unexcited are so valuable for the accurate reconstruction of the facts that the need is not top narrow the use of excited

57 1925 AIR Lah 578
58 A 1938 S 97: 175 IC 324
59 Supra note 11 at p 177
60 Supra note 12 at p P 211
61 Supra note 3 at (Vol 6) SS 1747-1749
62 McCormick, C. (1954). *Handbook of the law of evidence*. 1st ed. St. Paul, Minn.: West Publishing Company, p.579.

statements but to widen the exception to embrace as well unexcited declarations of observers near the time of happening".

In ***Ratten v. R***[63] The defendant was charged with the murder of his wife. He claimed that she had been shot accidentally while he had been cleaning his gun. The prosecution adduced evidence of three telephone calls that had been made: (1) at 1.09 pm, the defendant's father telephoned and spoke to the defendant; he heard the wife's voice in the background and all appeared normal; (2) at 1.15 pm, the local telephone exchange received a call from the defendant's house. The caller, a woman, was hysterical and asked for the police; (3) the telephonist informed the police and, at 1.20 pm, the police telephoned the defendant's house. The defendant asked them to come immediately. By this time, the wife was already dead. The defendant denied that the second call was ever made and in order to rebut the husband's account as to the cause of his wife's death by shooting and that the wife had made no telephone call, the prosecution obtained leave to call the telephonist from the local exchange that when she said, "number please", a women replied in a hysterical voice, "get me the police please", and sobbed, giving the address of the appellant house, after which the caller hang up and the telephonist spoke to the police and told them that they were wanted at the house. Objection was taken on the ground of hearsay, but the Privy Council advised that the evidence was not hearsay and was admissible as evidence of a fact relevant to an issue, but that if the evidence had been properly treated as hearsay, it would have been admissible as the statement ascribe to the deceased women and the shooting was closely associated in time and place and the statement carried its own stamp of spontaneity. Lord Wilberforce remarked that "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', that is, as establishing some fact narrated by the words". This was further elaborated in the leading case of ***R v, Andrews***[64]where, Donald Andrews was convicted of manslaughter and aggravated burglary. Andrews and another man, O'Neill, with a blanket covering their heads, knocked on the door of the victim's flat and,

63 1971 3 W.L.R 930.
64 [1987] AC 281

when he opened it, stabbed him. Then, no longer covered by the blanket, they stole property from the flat. Minutes later, the victim, bleeding profusely from a deep stomach wound, went to the flat below for assistance. Again, within a matter of minutes, the police arrived. One of the constables asked the victim how he had received his injuries. In reply, the victim referred to one of his assailants as a man known to him as 'Donald'. The other constable present, who was making a note of this statement, heard and wrote down the name 'Donavon'. There was evidence that the victim had a Scottish accent, had drunk to excess, and had a motive to fabricate or concoct, namely a malice against the accused because he believed that on a previous occasion O'Neill, accompanied by Andrews, had attacked and damaged his house. The House of Lords held that the victim's statement to the police had been properly admitted under the *res gestae* doctrine.

In the South African case of ***R v. Taylor***[65] the accused was charged with culpable homicide. He was alleged to have caused the death of his wife by beating her with a leather cosh. Neighbors said that they heard sounds of a struggle and the wife's voice saying, "John, please don't hit me anymore. You will kill me." This statement was admitted under the *res gestae* rule to prove that the accused was in fact beating his wife. Hence, at times even evidence given by people who were not actually seeing the event but was in close proximity and clearly heard what was going on may be taken as admissible evidence under this doctrine. In ***King v Herashamy***[66], the three accused were convicted of the offences of attempted murder and causing simple hurt. According to the evidence, on the day of the offences, the injured man made a statement to the headman, who went to the scene for investigation, that the three accused had assaulted him. The injured man subsequently died, but with regard to the cause of his death, the medical evidence was that the injury received at the hands of the accused had healed and that the death was caused by septic absorption due to bedsores. Evidence was also given by S, who was the son of the deceased, that hearing cries on returning home he ran and saw his father lying fallen, that he spoke to his father and asked him who had assaulted him and his father said that the accused had done so, and that then he accused assaulted him (S). The court held that the statement of the deceased to S was inadmissible under section 32 (1) but was admissible, as part of the res gestae, under section 6 of

65 1961 (3) S.A. 616 (N), at pp. 618-619.
66 (1946) 47 NLR 83

the Evidence Ordinance. The rationale for admitting the evidence of the son and rejecting that made to the headman was the proximity of time between the occurrences. The fact that the son came so soon after the assault and that the headman took some time to come is the demarcation between admissibility where the statement made to the son pass the test of contemporaneousness, the one made to the headman fails. Further in ***Queen v. Appuhamy***[67] were a Police Constable coming to the spot found the deceased lying on the road with a fractured skull, which, according to the medical evidence, was the result of a blow or fall. In reply to the Constable, the deceased said "Appuhamy assaulted me." It was held that this statement is, as part of the *res gestae*, admissible in evidence in support of the contention that the injury the deceased had received was the result of an assault and not of a fall. From this, it is clear that the proximity of time and place are of vital importance when it comes to the admissibility of statements made in the course of the transaction if they are to be introduced under the doctrine of *res gestae.*

In several local cases the relationship between section 6 and 32 has been discussed. The question then posed is whether a piece of evidence be admissible under both section 32 dealing with dying declarations and/or as part of the same transaction under section 6 or as part of the *res gestae*. In ***King v. Arnolis Perera***[68] this was discussed in length. M, who was living in the house of her parents near the Botanic Gardens, Henaratgoda, disappeared on the night of June 30, and her corpse, was found, in the afternoon of the following day, lying on a mat in a threshing floor about half a mile from the house. At the trial of A, who was a watcher at the Botanic Gardens, for the murder of M, evidence was led of circumstances, which, it was alleged, proved that M was murdered by A, and it was sought to give in evidence a statement alleged to have been made by M to her daughter Jane on June 30 to the effect that she was going away with the accused to Rambukkana. One question that arose in the case was whether the statement made by the deceased to her daughter could held to be admissible as part of the *res gestae.*

The court opined that, the concept of *res gestae* covered under Section 6 of our Evidence Ordinance is more restrictive than the English law and all that is covered by the English Law is not covered by the Section 6. Further court went on to say that "*The rule as it is stated in Section 6 makes ' facts which though not in issue are so connected with a fact in issue as to form part of*

67 1 S. C. R. 59.
68 (1927) 28 NLR 481

the same transaction' relevant. Both declarations and acts would under this rule be admissible- provided they are so connected with the fact in issue as to form part of the same transaction.

The court found it difficult to see how the statement of Dingiri Menika (the deceased) can fairly be said to be so closely connected with the murder as to form an incident of that event. There is not that connection which exists between facts which are contemporaneous, and it is conceivable that it had no actual connection with the circumstances which led to and culminated in the murder. It is impossible to say that it grew out of the main fact, as in the case of the cries of the victim of an assault; or that it is explanatory of the nature of the transaction, as in the case of the cries of a mob in a trial for riot. The determination of the question whether or not a particular fact forms part of the res gestae is often attended with considerable difficulty.

Differences of opinion must and do arise. Further the court stated that the court prefer in any doubtful case, especially when it relates to a statement of a person who is dead, to adopt the course of rejecting such evidence.[69]" Further, this issue was discussed in ***Sinniah Palaniyandy v, The State[70],*** where the accused-appellant was convicted of the murder of a woman and her son who was four years and one month old. According to the evidence, the boy, while he was lying fatally injured, uttered the appellant's name "Palaniandy" when he was questioned by his father as to the name of the assailant. Shortly after the boy uttered that single word, he died before he could be admitted to hospital. The most important item of evidence on which the conviction was based was that statement made by the boy to his father when the latter came to the scene during the afternoon when the boy was injured. Among other things the court had to decide whether the statement made by the boy to his father could be taken in as part of the *res gestae.*

The court held that the statement made by the boy was not part of the res gestae, inasmuch as it was not substantially contemporaneous with the transaction. Court further stated that to make a statement admissible under this section (section 06) the declaration must be substantially contemporaneous with the facts they accompany and to be admissible as part of the res gestae the test of contemporaneousness must be strictly followed. The court cited ***Lejzor Teper v. The***

69 *Ibid pp.487-88*
70 (1972) 76 NLR 145

Queen[71] where the Privy Council held " that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement. Therefore, the court concluded that "When father came to the house the transaction" had been completed and an interval of time had elapsed before the boy made his statement. Therefore, the statement is not admissible as part of the *res gestae*.

It is evident from the above cases that where a statement is taken in as evidence whether it amounts to a dying declaration or not and hence admissible as such, but if it is to be admissible as part of the *res gestae* the requirement of contemporaneousness has to be strictly met and it doesn't matter whether the statement was nevertheless admissible as a dying declaration. The sanity or the specialty that is given to a dying declaration is not given when it is considered as part of the *res gestae.* There may be instances where *Res Gestae* may play a part when it comes to statements, which proves state of mind of a person. Nokes[72] observes that the mental element in crime, tort and other legal conceptions is often a fact in issue, as in the case of *mens rea* in crimes at common law, and, irrespective of the as to the question whether a declaration as to a mental state may be part of the *res gestae*, evidence from which a state of mind may be inferred is frequently relevant.

Richardson[73] observes that declarations admitted in evidence under this rule are received for the limited purpose of showing the declarant's state of mind at the time of the declaration made. Such declarations are not admissible for the truth of the past facts recited in them. Sections 7, 8 and 9 of the Evidence Ordinance in general deals with the issue of the 'state of mind'. Section 7 deals with facts which are the occasion, cause, or effect of facts in issue and hence from the illustration (a) of that section which gives an example where the facts, that shortly before the robbery B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant and this is relevant to show that B had in possession the money which has been stolen. This kind of a situation may come under the

71 (1952) A. C. 480 at 487
72 Supra note 19 at P 99
73 Supra note 11 at P 261

doctrine of *res gestae* as well. But, for that to happen this showing of the money and the robbery thereof has to be contemporaneous to one another, if it is so then the above evidence may be admissible as part of the res gestae.

However, as Coomaraswamy observes[74], Section 7 covers a much larger variety of evidence that is not covered under *res gestae*. It is evident that Section 7 much of the evidence that could not be taken in under *res gestae* may be taken in if it shows occasion, cause or the effect of the relevant fact or fact in issue. Section 8 deals with motive, or preparation and previous or subsequent conduct. Here especially with regard to previous or subsequent conduct that is in question may form part of the same transaction, however, with the insertion of this section the contemporaneousness requirement of the *res gestae* doctrine is much relaxed. Thus the acts of preparation need not be confined to events immediately preceding the alleged offence. This is evident from the earlier discussed casa of ***King v. Attanayaka et al***[75] where Lyall-Grant, J. held that the statements made by D were admissible in evidence under section 6, and 8 as preparation and conduct.

In the case of ***King v. Arnolis Perera***[76] Gravin, J. refused to admit under Section 8(2) a statement by the deceased women alleged to have been made by her to her daughter on the day on which she disappeared that she was going away with the accused to another village, for the reason that the fact in issue was not shown to have been influenced by the conduct of the deceased which it was sought to explain by the statement. Section 9 deals with Facts necessary to explain or introduce relevant facts. Here to if the requirements of the *res gestae* doctrine are met then such evidence necessary to explain or introduce relevant facts may be taken as admissible. In the Canadian case of ***R v. Evans***[77] a married couple had sold a car to a man who did not give his name. The car was later used as the gateway vehicle in an armed robbery in which a security guard was seriously injured. The man who bought the car had said that he worked in chain-link fencing and had a pregnant dog. This description fitted the accused, however, the couple were unable to positively identify him. The Canadian Supreme Court (by majority) held that evidence of what the purchaser had said when he purchased the car was admissible because it narrowed

74 Supra note 12 at P 217
75 Supra note 35
76 Supra note 27
77 1993 3 S.C.R 653

the identity of the purchaser to a group of people who were in a position to make similar representation. The statements were not adduced for a hearsay purpose. The Court further stated that "The more unique or unusual the representations, the more probative they will be on the issue of identity" Court further emphasized that the statements are not being used as truth of their contents at this stage. This case could very well have come under the ambit of Section 9 of our Evidence Ordinance. However, Phipson[78] submits that if others beside the accused could have known the fact disclosed by the statement and could have framed the accused, there is danger of insincerity and the evidence is hearsay, albeit admissible under *res gestae* (state of mind) hearsay exception.

Recent Developments in the Doctrine.

With the recommendations of the Law Commission[79] in the United Kingdom, the *res gestae* doctrine has been put in to statute under the Criminal Justice Act 2003. This primarily governs the reception of such evidence in criminal cases. Under section 118 which preserves certain common law categories of admissibility subsection (4) of section 118 deals with *res gestae*. The multiplicity of cases in which hearsay statements have been received under the doctrine were usefully subdivided, by the late Sir Rupert Cross, into the following categories: (i) statements by participants in or observers of events or, as they would more accurately be described in the light of subsequent developments, statements by persons emotionally overpowered by an event; (ii) statements accompanying the maker's performance of an act; (iii) statements relating to a physical sensation; and (iv) statements relating to a mental state. The same categorization has been used in the 2003 Act to identify the common law rules preserved and put on a statutory footing[80]. The relevant part of the Act is as follows,

Res gestae

4) Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if—

78 P 900 para 31-37
79 Law Commission No 245, 1997
80 Supra note 10 at p 355

(a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded,

(b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement, or

(c) the statement relates to a physical sensation or a mental state (such as intention or emotion).

Phipson[81] observes that the above is a restatement of the common law rule that relevant spontaneous statements made during the drama of an event is admissible in evidence to prove that matter stated provided that the risk of concoction or distortion can be excluded. This exception, preserved by section 118(1)4, is in fact an umbrella term that encapsulates a number of distinct, albeit similar, exceptions.

The Civil Evidence Act 1995 of the United Kingdom achieved the abolition of the rule against hearsay in civil cases. This means that hearsay statements are generally admissible in civil proceedings as evidence of the truth of any relevant matter stated in them, regardless of any other evidential value they may have[82]. In common with other statutes which have provided for the admissibility of hearsay evidence, the 1995 Act does not cure any defect of evidence other than its hearsay quality. Section 14 specifically provides that nothing in the Act affects the exclusion of evidence on a ground other than hearsay: 'whether the evidence falls to be excluded in pursuance of any enactment or rule of law, for failure to comply with rules of court or an order of the court, or otherwise'.

However, there has been such developments in the United Kingdom neither India nor Sri Lanka has made such amendments to the existing statute relating to Evidence. It can be said that the Courts in Sri Lanka has found much flavor in the existing common law cases of the United Kingdom. It would be a good time to do an evaluation on the current practice on the admissibility of evidence under the doctrine of *res gestae.*

81 Supra note 2 at p 879
82 For example, as previous consistent or inconsistent statements; though, in these cases, s. 6 of the Act preserves the common law rules of admissibility while widening their evidential value

Conclusion

As we have seen, the doctrine of *res gestae* even with its criticisms has found the liking of the judges and lawyers alike. It it therefore, submitted that the doctrine will find its place in many of the cases regarding the admissibility of such evidence that falls under the ambit of the doctrine. However, due to the lack of uniformity in allowing for the evidence to be admitted under the said doctrine much confusion and uncertainty has surrounded its application. From all the authorities that have been looked upon, it seems that a uniform set of rules regarding requirements for the admissibility of such evidence as *res gestae* should be created in order to ease out the tension and confusion that surrounds the application of the above doctrine.

With regard to the Sri Lankan experience, it is somewhat surprising to see a lack of situations in which this doctrine has been called upon to decide on the admissibility of evidence in recent times. But moving on with the trends in other jurisdictions the author fields that the existing law should be amended to clarify and ease out the uncertainties that surrounds the doctrine. For this purpose, the United Kingdom's model could be looked upon.

Though much criticized the doctrine does help a judge or a jury to get an idea of the circumstantial evidence when this doctrine is in play. From it, certain inferences can be drawn and which would lead to a better understanding of the liability or rights asserted by each parties. It has to be also remembered that, since this doctrine is so rooted in everyone who is dealing with evidence that it would be almost impossible to abolish the doctrine in whole. It is therefore the duty of the legislature to remove the uncertainties that surround the doctrine and to clarify it in order for the better use of the doctrine.