



Neutral Citation Number: [2024] EWHC 2171 (Admin)

Case No: AC-2023-LON-003505

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/08/2024

**Before :**

**THE HONOURABLE MR JUSTICE MOULD**

**Between :**

**CARLOS VILHETE**

**Appellant**

**- and -**

**CROWN PROSECUTION SERVICE**

**Respondent**

**MR JACK COYNE (instructed by Sonn Macmillan Walker Ltd) for the Appellant**  
**MS VICTORIA AILES (instructed by CPS Appeals Unit) for the Respondent**

Hearing date: 18 June 2024

**Approved Judgment**

This judgment was handed down remotely at 2pm on Monday 19<sup>th</sup> August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MOULD

## MR JUSTICE MOULD :

### Introduction

1. This is an appeal by way of case stated against the decision of the Snaresbrook Crown Court (Mr Recorder Barnett sitting with two justices) on 24 May 2023 dismissing the Appellant's appeal against conviction at Stratford Magistrates Court. On 20 September 2022 the Appellant was convicted of one offence of inflicting grievous bodily harm on the complainant, Leanne Taylor, contrary to section 20 of the Offences Against the Person Act 1861. He was committed for sentence to Snaresbrook Crown Court. Meanwhile, he appealed against his conviction. Following the dismissal of his appeal, the Appellant was sentenced to a Hospital Order with restrictions, pursuant to sections 37 and 41 of the Mental Health Act 1983.
2. At the hearing of the Appellant's appeal against conviction, the Respondent applied to admit in evidence statements made by the complainant during a 999 call and as recorded in body worn footage of attending police officers under the *res gestae* exception to the hearsay rule: sections 114(1)(b) and 118(4)(a) of the Criminal Justice Act 2003 [**'the 2003 Act'**]. The application was opposed by the Appellant. The Crown Court granted the Respondent's application. The reasons for that decision are recorded in a note of Mr Recorder Barnett's remarks prepared by counsel and included as an addendum to the case stated. The Appellant now appeals against the Crown Court's decision to admit that evidence.
3. On 16 June 2023, Mr Recorder Barnett stated a case posing the following questions –
  - (1) Did the Learned Recorder err in not looking at the lack of efforts made by the prosecution to secure the attendance of the complainant since the magistrates' court trial?
  - (2) Did the Learned Recorder err in concluding that the Crown had properly considered if the complainant could or should be brought to court?
  - (3) Did the Learned Recorder err in admitting the evidence in the case having considered the authority of *Wills v Crown Prosecution Service* [2016] EWHC 3779 (Admin) [**'Wills v CPS'**]?
  - (4) Did the Learned Recorder err in concluding that the inability of the defence to cross-examine the key prosecution witness would not render the defendant's trial unfair.

### The Facts

4. The factual background is summarised in paragraphs 5 to 9 of the case stated. I have also drawn from the agreed additions to the case to which counsel referred, in reliance upon the approach stated at [3] in *Aslam v Chief Constable of South Yorkshire* [2002] EWHC 2743. I agreed to proceed on the basis that the bundle of documents submitted as agreed additions form part of the case stated.
5. The Appellant and the complainant were previously in a relationship and had known each other for two years. It was the Respondent's case that on 2 August 2022, the Appellant attended the complainant's home address. Whilst at that address there

ensued an argument over access to the complainant's wife, during which the Appellant punched the complainant in the face several times, causing a cut to her right eyebrow and swelling under her right eye. Upon noticing that the complainant was bleeding the Appellant left the complainant's home.

6. Once the Appellant had left, the complainant immediately called the emergency services. During that 999 call, the complainant stated that she had been assaulted by her ex-partner around 5 minutes before making the call. The complainant was reported to have been very distressed during the call. She stated that she had suffered a bad injury to the side of her head, which was bleeding heavily. She was informed that both an ambulance and the police had been called and would arrive shortly.
7. The police arrived at the complainant's home address shortly after the conclusion of the 999 call. The complainant was present. Body worn camera footage produced by the attending police officers records the complainant still in some distress and stating that the Respondent had assaulted her 10-15 minutes beforehand.
8. The Appellant was arrested following a probation meeting on 3 August 2022. In interview he denied punching the complainant and alleged that she instead threatened him with a knife. When he pushed the complainant away, she accidentally cut herself in the face. The Appellant was not legally represented during that interview.
9. Having initially provided a witness statement, on 7 September 2022 the complainant made a further witness statement withdrawing her support for prosecution of the Appellant. She stated that when she had initially called the police she had considered that they may send him straight to hospital or get him treatment which, in her view, would have been the best course of action. She didn't think that the matter should be taken to court and instead felt that the Appellant should receive help for his mental health. The complainant said that she had made the withdrawal statement from her own free choice and that nobody had put her under pressure or forced her to do so.
10. The complainant stated –

*“My previous statements had all been true to the best of my knowledge and I am not providing any different information regarding the events that occurred however my wishes going forward have changed and I do not wish to support prosecution.*

...

*If I were to be summonsed it would make me feel very stressed and would trigger my diagnosed anxiety. I have a number of extremely stressful things going on in my life at present and feel unable to cope with the added pressures of this case”.*

11. The officer in charge of the case, TDC Matthew Harvey, made a witness statement on 13 September 2022. He stated that he had regular contact with the complainant in the final week of August and early September 2022. During these conversations, he had discussed with the complainant safeguarding measures that the police could assist with, referrals to independent assistance and the complainant's support for the prosecution. Initially, the complainant had been very supportive and had assured TDC Harvey that she would attend court. However, her resolve then began to waver until

she withdrew her support on 7 September 2022. TDC Harvey stated that he had lengthy discussions with the complainant as to why she was doing so. She had said that she was concerned about the Appellant's mental health and that her support for the prosecution would do him more harm than good. She would prefer that the Appellant receive support for his mental health problems than be prosecuted. She had added that her initial 999 call was in the hope both that the Appellant would be admitted to hospital for treatment for his mental health issues and that, as a result, she would be safe. She had also expressed concern about her own mental health and the effect which attending court may have on her at a stressful time of her life.

12. TDC Harvey stated –

*“I did implore [the complainant] that she strongly consider her position on not attending court but she remained adamant. Likewise, I questioned what police or other support agencies could offer to ensure her attendance, discussing matters such as special measures that could possibly be set up for the purposes of giving evidence however this did not change [the complainant's] mind or have any effect on her rationale for not wanting to attend.*

*I have since discussed this case with CPS prosecutors and have made my views as the OIC clear. Whilst there is a risk to [the complainant's] mental health and the effect that giving evidence could have on that, I feel that this is outweighed by the risk to her should the case fail to proceed”.*

13. At trial before Stratford Magistrates Court on 20 September 2022, the court granted the Respondent's application to adduce the following statements in evidence under the *res gestae* exception to the hearsay rule –

- (1) The complainant's account as recorded during the 999 call.
- (2) The complainant's account recorded in body worn camera footage by the attending police officers.
- (3) The evidence of the two attending officers, PC Salmon and PC Guidetti, given in their witness statements dated 5 September 2022 and 7 September 2022 respectively.

14. At trial, the Appellant gave oral evidence that the complainant sustained her injuries when she banged her head after he had pushed her away.

15. At the hearing of the Appellant's appeal against his conviction, the Respondent again applied to admit in evidence the complainant's account as recorded during the 999 call and in body worn camera footage by the attending police officers, and the evidence of the two attending officers given in their witness statements. The Respondent's grounds for that application were that –

- (1) The Crown had provided an adequate explanation for the complainant's non-attendance.
- (2) The evidence amounted to *res gestae* in accordance with the test laid down in *R v Andrews* [1987] AC 281.

- (3) The test for exclusion of that evidence under section 78 of the Police and Criminal Evidence Act 1984 [**'PACE'**] was not satisfied.

16. The case stated records the following submissions advanced on behalf of the Respondent –

- (1) The 999 call had been made immediately after a serious assault had been carried out. The complainant was audibly severely distressed to the point that she was hyperventilating and at one stage unable to speak coherently. This supported her later claim that the Appellant wanted to kill her. All three limbs of *R v Andrews* were satisfied.
- (2) The body worn footage was recorded 15 minutes later when the complainant was in the same emotional condition. The gap of 10 - 15 minutes was not sufficient to allow any reasoned reflection or coercion.
- (3) The written evidence of PS Salmon and PC Guidetti who attended the scene was admissible for the same reasons as above.

17. The case stated records the following submissions advanced on behalf of the Appellant –

- (1) The prosecution must thoroughly investigate the non-attendance of the witness: see *Wills v CPS*.
- (2) The evidence itself was not *res gestae* and therefore not admissible.
- (3) If the evidence was admissible as *res gestae*, it ought to be excluded under section 78 of PACE because of the inability to cross-examine the complainant.

18. Mr Recorder Barnett gave the following ruling (based on counsel's note) –

*“In this case, the Appellant objects to the admission of the witness statement of [the complainant], 999 call and body worn footage. The background is set out in the Crown's skeleton argument and I'm grateful to both counsel for the provision of those. In my view the proper format for any appeal on a matter of law is the High Court and I approach this point of law with some trepidation as it is in my view a fundamental issue; and on one view, the correct route might have been to use the High Court by way of case stated, but this is an unusual case as the magistrates' court committed for sentence. I have a dual role, one is to sit on the appeal and also to deal with this matter by way of a committal for sentence which, should this appeal fail, would be for me to decide any sentence together with my colleagues who I sit with today.*

*On the basis that both counsel are agreed that this is the proper venue for this point of law to be aired at this stage, I think it is accepted pragmatically that this is not the only point of the appeal and the Appellant is entitled to the appeal. The objection to these pieces of evidence are set out in the skeleton argument of Mr Coyne which summarises the points as follows. He has made oral submissions to support the skeleton but in fairness to both counsel, the points have been set out in full. The law is set out in *Wills v CPS [2016]* which I have read in detail, the*

*principal judgment being given by Mr Justice Collins where (at [19]) he cited Lord Ackner at page 393 in R v Andrews stating that he would “strongly deprecate 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” ...*

*So far as the res gestae argument is concerned, the Appellant argues that this does not fall into the category which is described as res gestae and does so on the basis of the test which was set out in Wills v CPS, on consideration of R v Andrews. I have considered the starting point at section 118 of the Criminal Justice Act 2003. That was considered in R v Andrews where the three elements of that section were considered in detail. I will first turn my mind to those.*

*Does this evidence amount to res gestae? Before I decide that, the Appellant’s point is to consider the complainant’s failure to attend.*

*This is not a case where she has refused through malice, but enquiries made through the officer in the case, but the reason for withdrawal are that she wished for the Appellant to get better .... And secondly she would find it very stressful and triggered diagnosed anxiety. The point is made by Mr Coyne that special measures could and should have been pursued in this case. The reasons given for failure to attend are not sufficient. As he says, there is no good reason for the complainant not to attend.*

*I bear in mind the dicta of Irwin LJ (at [24]) in Wills v CPS where he talks about the difficulties that arise in the cases of domestic violence. There needs to be careful management. At [25] he said –*

*“The Courts must reach... a balanced view on how to proceed, but that must be done with the maximum of information... It cannot be appropriate as a matter of routine without proper enquiry and on the first listed hearing to proceed to an application to admit critical evidence by way of res gestae. Such an approach is frankly lazy”.*

*In my view, the concerns expressed by court have not arisen in this case. This is not a lazy or short cut route to a conviction in my view. The Crown have properly considered if [the complainant] can or should be brought to court. I therefore feel that the guidance offered in Wills v CPS does not militate towards the exclusion of the evidence.*

*Second issue, does it amount to res gestae? the 999 call was made earlier, the Crown submits that R v Andrews applies to both ...*

*[The complainant] bears no ill will to [the Appellant] and wishes him to receive mental health report. The Crown says any concoction or distortion can be disregarded. Mr Jackson says this is textbook res gestae and I agree. Both are properly described as res gestae and the body worn footage evidence related to events that took place 10-15 minutes later. It would be a matter for myself and colleagues to evaluate later. It’s a matter for us to attach what weight we feel appropriate.*

*The final matter that I turn my attention to is the question of whether or not I should exercise my discretion to under s.78 PACE to exclude the evidence on the basis that it would be unfair. I have taken into account all of the matters that have been raised around how the evidence was obtained, what happened at the time and said following but I do not feel that in all the circumstances, the inability to cross-examine or test the evidence would militate me in favour of excluding the evidence. It would amount to a blanket rejection of the ability of the court to consider such evidence, if it were to be taken on principle. I do not find the inability of the Appellant to instruct his counsel to cross-examine the witness would render his trial unfair. We will look at the weight of any evidence that is called and consider the Appellant's lack of ability to cross-examine.*

*I therefore rule that it can be admitted”.*

## **Law**

### *Appeals to the Crown Court against conviction*

19. An appeal to the Crown Court against conviction in a magistrates' court takes the form of a re-hearing of the prosecution's case against the defendant. Section 79(3) of the Senior Courts Act 1981 states –

*“79(3) The customary practice and procedure with respect to appeals to the Crown Court, and in particular any practice as to the extent to which an appeal is by way of rehearing of the case, shall continue to be observed”.*

### *Res gestae*

20. Section 118(4)(a) of the 2003 Act preserves:

*‘Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded.’*

21. In *R v Andrews* [1987] AC 281, 300-301 Lord Ackner said –

*“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.*

...

4. *...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”.*

### *Section 78 of PACE*

22. Section 78 of PACE provides –

*“(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

*(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence”.*

### *Res gestae and section 78 of PACE – admissibility and fairness*

23. In *R v W (Attorney General’s Reference No.1 of 2003)* [2003] EWCA Crim 1286 at [18] and [21] the Court of Appeal gave the following guidance on the correct approach to take in addressing the question whether to admit evidence, applying the *res gestae* exception to the hearsay rule –

*“18. ... Once evidence is within the res gestae exception to the hearsay rule, it is admissible. There is no rider that, as a matter of law, it is not to be admitted merely because the maker of the statement is available and can give evidence...*

...

*21. As it seems to us, the correct procedure was for the judge to have accepted that the evidence was admissible, as it plainly was, but that he should have been prepared to entertain an application by the defence under section 78 of the Police and Criminal Evidence Act 1984 which empowers the court to refuse to allow evidence to be given if it appears to the court that:*

*“. . . the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”*

*If the purpose of the Crown was that the res gestae evidence should be given without any opportunity being given to the defence to cross-examine the maker of the statement, the court might well conclude that the admission of the evidence would indeed have an adverse effect on the fairness of the proceedings and refuse to allow it to be given. As a general principle, it cannot be right that the Crown*



*should be permitted to rely only on such part of a victim's evidence as they consider reliable, without being prepared to tender the victim to the defence, so that the defence can challenge that part of the victim's evidence on which the Crown seeks to rely and, if so advised, elicit that part of her evidence on which the defence might seek to rely”.*

24. That guidance reflects the following observations of Lord Ackner in *R v Andrews* [1987] AC 281, 393 –

*"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 the relevant material facts before the court, so as to ensure that justice is done."*

*Res gestae and cases involving allegations of domestic violence*

25. In *R v C* [2007] EWCA Crim 3463 at [12] the Court of Appeal referred to the difficult position often faced by the complainant in criminal proceedings for domestic violence –

*“12. ...an alleged victim of domestic violence is in a peculiarly unhappy position, namely of being required to give evidence against someone with whom perhaps she is still living but certainly for whom she still has feelings of affection. She is unlikely therefore to want to make matters worse for him, still less to have to do so in a public place. To require her, if that is her attitude and if she has made clear that she does not want to support the prosecution publicly, to go into the witness-box and be cross-examined by the prosecution in that way may, in certain circumstances, only exacerbate the wretched situation in which she finds herself."*

26. In *DPP v Barton* [2024] EWHC 1350 (Admin) at [64], having reviewed the authorities, including *R v C*, the Divisional Court said –

*“64. In the sensitive and specific context of domestic abuse, the position, in our opinion, is ... that it will often not be unfair to allow the prosecution to adduce the res gestae evidence of a complainant where they are not called as a witness, and there is an absence of fear. As is now well understood, it is not uncommon in such cases for there to be sufficient evidence to prosecute the alleged perpetrator of the abuse even where the complainant does not to support the prosecution. In our opinion, in such cases, the public interest may often demand the use of res gestae evidence, particularly recorded evidence, regardless of the cooperation of the complainant”.*

27. At [67] in *Barton*, the Divisional Court referred to *McGuinness v Public Prosecutor for Northern Ireland* [2017] NICA 30 at [41], in which the Court of Appeal of Northern Ireland had to decide whether the trial judge was right to have admitted the *res gestae* evidence of the complainant in a domestic abuse case, or whether she should have excluded it under the Northern Ireland equivalent of section 78 of PACE –

*"As to the purpose of the prosecution in relying on the res gestae exception, this is not an instance of seeking to avoid inconsistent evidence or anticipating an untruthful account or providing protection from reprisal. Rather, this is an instance of providing support to the Complainant in the changed circumstances brought about by the reconciliation of the parties while at the same time seeking to deal with the alleged previous conduct of the Appellant. This is a balance which the prosecution has to make in deciding whether and in what manner to prosecute the Appellant and does not involve any improper motive or device or unfair tactics."*

28. The Divisional Court expressed their agreement with those observations.

*Wills v CPS*

29. In his written and oral submissions on behalf of the Appellant, Mr Jack Coyne placed particular reliance upon the judgment of the Divisional Court in *Wills v CPS*. In that case, the appellants faced charges of assault. The victim made a statement on the day of the alleged offence but did not attend the hearing before the magistrates' court. Neither the prosecution nor the defence was aware of any problem which might prevent the victim from attending to give evidence. The justices adjourned for one hour in case she had been delayed for some reason. She did not attend. Having heard no explanation for her failure to attend, the justices proceeded to try the case against the appellants. The justices granted the prosecution's application to admit as *res gestae* statements given by the victim to a neighbour immediately after the alleged offence, to a police officer responding to a 999 call and in a witness statement made on the following day.

30. Having referred to section 118(4)(a) of the 2003 Act, at [7] Collins J said –

*"That is the test that the justices had to apply on the assumption that it was an appropriate case for consideration of the admission of a statement which was of course hearsay evidence. However, before reaching the stage of considering whether it was appropriate to consider the admission under the res gestae principles, it was in my view essential for the justices to have discovered, so far as it was possible, why the witness had not attended"*.

31. At [8] to [11] Collins J acknowledged that this was an alleged offence of domestic violence. Having referred to *R v C* [2007] EWCA Crim 3463, Collins J continued –

*"8. ...There are many circumstances in which undoubtedly in domestic situations difficulties arise, but that is something which ought to be investigated in any case before the decision is made. No enquiries were made in this case, as Mr Chiaweze accepts, and the justices on the CPS's application went straight into considering whether the principles which would admit the statements as res gestae applied.*

*9. That, in my judgment, was an entirely inappropriate and wrong way of dealing with it. As I said, it is of vital importance that the reasons are given. That is the more important when the witness in question is a central witness to the proceedings. Obviously, without any evidence from the victim, the chances of securing a conviction were not perhaps impossible but remote. I say "not*

*impossible", because of course the state of the victim, that is to say that she was clearly thoroughly upset and any injuries that she sustained, could be evidence in any event. In this case what was being said by the appellants was that the violence was started by an attack by the complainant and the reaction by both appellants was merely self-defence in seeking to prevent her violence to them.*

*10. That, as I say, was the issue that was raised, but there can be no question that her evidence was of fundamental importance in order to establish the case. It was important that there should be the ability for her evidence to be tested. Even if in the result the decision was that self-defence went too far and that, notwithstanding that she had started any violence, the reaction was excessive, that could have been material in deciding the level of culpability and so the appropriate sentence which should be imposed.*

*11. Thus, for many reasons, not only for the question of conviction, it was a case in which the presence of the complainant was clearly essential, if there was no good reason why she should not attend. If she was concerned for her own safety, measures could be taken to protect her. If she was concerned about confronting the appellants in court, again, measures could be taken to enable her to give evidence out of their sight although obviously in their hearing. Equally, one must bear in mind that there were measures that can be taken to protect her if that was necessary. Equally, if it transpired that there was a good reason for her to fear to give evidence that would be an important factor which could influence the justices to decide it was an appropriate case for use of the res gestae gateway as a means of progressing the prosecution case. Regrettably, as I say, no enquiries were made. In my judgment, that failure is by itself fatal to the decision made to admit the res gestae evidence”.*

32. At [17] to [18] Collins J turned to consider the appellants’ further contentions which founded upon section 78 of PACE –

*“17. A further matter that was argued was that even if the evidence was admitted applying Section 78 of the Police and Criminal Evidence Act, the court should have decided that it was unfair that there should be the admission of the evidence because of the absence of the complainant and the inability to cross-examine or to test the evidence that was being relied on. I suppose too there was, in any event, the problem the justices faced in deciding which was the genuine complaint, i.e. was it what she originally said or was it what she said in the Section 9 statement, because the two were somewhat different, albeit of course each involved a clear allegation of assault.*

*18. This witness, as I have said, was of fundamental importance to the case. It seems to me that in all the circumstances there was a powerful argument that it was unfair. Again, in considering unfairness, it is appropriate to bear in mind the failure to make any enquiries as to why the witness had not attended, because without those enquiries and without knowing the true circumstances, it was surely difficult to accept that it was not unfair in as much as the appellants were deprived of the opportunity of testing the evidence that was relied on against them from the complainant. The original failure that I have described as fatal to the consideration as to whether there should be admission of the res gestae evidence is also highly material on the question of the application of fairness*

*under Section 78 of the Police and Criminal Evidence Act and should in the circumstances in my view have persuaded the justices that it was not an appropriate case in which the res gestae evidence should have been able to be relied on”.*

33. At [21], Collins J concluded that the convictions should be quashed –

*“The matter in my view should be sent back and consideration should be given by the Crown Prosecution Service, having ascertained all that needs to be discovered as to the willingness or otherwise of the complainant to give evidence and, if she is unwilling, why she is unwilling, before any final decision is made”.*

34. Irwin LJ gave a short concurring judgment. At [24] and [25] he said –

*“24. This court is very cognisant of the difficulties that can genuinely arise with witnesses in domestic violence cases. We are also very aware of the high priority rightly given to the prosecution of domestic violence cases. They need careful management. We are also cognisant of the real pressure on the courts, the need for active case management to maximise efficiency, the need not to grant adjournments automatically without good reason and not to grant adjournments repeatedly without very good reason, but, in respect of a crucial witness in a significant prosecution, it is important that that witness be brought to court, if that is at all possible of achievement. That should hardly need stating.*

*25. The courts must of course in difficult circumstances as they can arise reach a balanced view on how to proceed, but that must be done with the maximum of information. It has long been clear that there is a duty on the parties, prosecution and defence, to keep both the court and the other parties informed of the position in relation to important witnesses. It cannot be appropriate as a matter of routine without proper enquiry and on the first listed hearing to proceed to an application to admit critical evidence by way of res gestae. Such an approach is frankly lazy”.*

## **Submissions**

35. On behalf of the Appellant, Mr Jack Coyne submitted that in *Wills v CPS* the Divisional Court identified three factors which must be considered and determined before evidence should be admitted under the *res gestae* exception to the hearsay rule and in the absence of a key prosecution witness –

- (1) What reason is given for the witness’ failure to attend? Is the reason sufficient to justify depriving the defendant of the ability to test their evidence?
- (2) Does the evidence fall within the *res gestae* exception?
- (3) In all the circumstances, can it be shown that the admission of *res gestae* evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it?

36. It was submitted that the usual rule was that the Crown would either call or offer to call those witnesses upon whose evidence the Crown seeks to rely: *R v Haringey Justices ex parte DPP* [1996] QB 351. The starting point, therefore, was the

importance of bringing a key witness to court, if that was at all possible to achieve. See *Wills v CPS* at [24].

37. In deciding how to proceed, the Crown Court must have the maximum of information. There is a duty placed on the parties, particularly the Respondent, to keep the court informed of the position in relation to key witnesses. See *Wills v CPS* at [25].
38. Mr Coyne emphasised that the Appellant was entitled on his appeal against conviction to a re-hearing of the prosecution case against him. In his notice of appeal, the Appellant had given notice that the complainant's evidence was in issue and that the admission of that evidence as *res gestae* was contested. There was, however, no evidence before the Crown Court to explain what, if any, attempts had been made to secure the complainant's attendance at court to give evidence at the hearing of the appeal on 24 May 2023. There was nothing to indicate whether any steps had been taken following the hearing before the magistrates' court and in preparation for the hearing of the Appellant's appeal against conviction, to persuade the complainant to attend.
39. The evidence, such as it was, explaining the reasons for the complainant's non-attendance at the trial was prepared in anticipation of the trial before the magistrates' court in September 2022. Eight months had elapsed between that trial and the hearing of the Appellant's appeal against conviction in the Crown Court. The Respondent had provided no information about the position in late May 2023. Mr Recorder Barnett had erred in that he had not taken into account the failure by the Respondent to take any steps since the trial in the magistrates' court to secure the attendance of the complainant at the hearing of the Appellant's appeal.
40. In any event, the Appellant submitted, applying the approach stated by Irwin LJ at [24] of *Wills v CPS*, Mr Recorder Barnett ought properly to have concluded that the efforts made by the Crown prior to the trial before the magistrates' court to secure the attendance of the complainant had not been sufficient for that purpose. The complainant was a crucial witness in the Crown's case. Her evidence as to how she came to be injured was contested. She had given insufficient reasons for declining to attend court. The Respondent could and should have taken further and more effective steps to secure her attendance, if necessary serving a witness summons for that purpose. Failing that, the Crown Court should have considered issuing a witness summons of its own motion.
41. Mr Coyne did not seek directly to challenge the Crown Court's conclusion that the complainant's statements made during the 999 call and as recorded on the body worn camera footage were *prima facie* admissible as *res gestae* under the principles stated in *R v Andrews*. Nevertheless, applying the guidance given in *Wills v CPS*, it was submitted that conclusion was vitiated by the Crown Court's failure to require an up-to-date assessment from the Respondent as to whether the complainant's attendance could be secured or to consider exercising its own powers to secure her attendance. Had the Crown Court properly addressed those matters, it should have refused the Respondent's application.
42. Finally, it was submitted that the inadequacy of both the explanation for the complainant's non-attendance and of the efforts made to secure her attendance was compounded by the resulting inability of the Appellant through cross-examination to

challenge her account of how she came to sustain her injuries. The Appellant had put forward a positive case of self-defence when interviewed by the police. Fairness demanded that the Appellant should have the opportunity to cross-examine the complainant not only in order to test her evidence but also to put his account of what had happened to her, so that the Crown Court could assess her evidence in response. The Crown Court ought properly to have exercised its power under section 78 of PACE to exclude the complainant's evidence given during the 999 call and as recorded in body worn camera footage.

## **Discussion**

### **Questions (1) to (3)**

43. Both parties in their oral arguments addressed questions (1) to (3) of the case stated as raising essentially the same complaint as that which was upheld by the Divisional Court in *Wills v CPS*. I therefore approach the issues raised by those three questions as being essentially linked.
44. There was some debate between counsel during oral argument as to the significance of the Divisional Court's decision in *Wills v CPS*. As noted in paragraph 35 above, Mr Coyne founded his submissions for the Appellant on the premise that *Wills v DPP* provides important guidance on the correct approach to be taken by the court in deciding whether to admit evidence under section 118(4)(a) of the 2003 Act and in accordance with the *res gestae* doctrine stated by Lord Ackner in *R v Andrews*. Whereas Miss Victoria Ailes for the Respondent submitted that the Divisional Court's reasoning and conclusions in *Wills v CPS* must be considered in the context of the very unusual facts of that case. Ms Ailes drew attention the fact that in a comprehensive recent survey of the case law concerning the application of the *res gestae* doctrine in cases of domestic violence, the Divisional Court in *DPP v Barton* [2024] EWC 1350 (Admin) had made no reference to *Wills v CPS*. It would, Ms Ailes submitted, be wrong to read *Wills v CPS* as having established a particular threshold test for the admission of *res gestae* evidence in the prosecution of offences involving domestic violence.
45. Ms Ailes' submissions as to the significance of *Wills v CPS* as an authority seem to me essentially to be correct. It is important to acknowledge the facts of that case, as they presented to the Divisional Court. The justices had been informed that the alleged victim of the assaults had not arrived at court. No explanation was offered for her failure to attend and the justices appear to have sought none. They simply adjourned the hearing for one hour in case the victim had been delayed. No further enquiries appear to have been made by the prosecution to establish her whereabouts, to ascertain the reasons for her failure to attend and to discover whether she was willing to attend on a later date. It appears that the hearing in question was the first date on which the case had been listed, yet there was no application by the prosecution to adjourn the hearing to enable such enquiries to be made and to establish whether the victim's attendance to give evidence could be secured. It was against that factual background that the justices acceded to the application to admit the victim's statements under the *res gestae* doctrine in a trial conducted later that same day, which resulted in the defendants' conviction.

46. In my view, it is wholly unsurprising that in the light of these facts the Divisional Court in *Wills v CPS* allowed the defendants' appeal. As Collins J said, the victim was a central witness in the prosecution's case against the defendants. Her evidence was of fundamental importance to that case. It was obvious that an application to admit her evidence under the *res gestae* doctrine could not properly be determined by the justices from a position of ignorance as to why she had failed to attend court on that first day and whether she could be brought to court on a later date. As was explained by Lord Ackner in *R v Andrews*, the *res gestae* doctrine operates as an exception to the hearsay rule. The ordinary expectation is that a witness of central importance to the prosecution's case will attend to give their evidence in court. As is evident from the observations of Lord Ackner at page 393 in *R v Andrews* to which I have referred in paragraph 24 above, the question whether the witness is available to give their evidence in court is a likely to be an important factor for the court to consider in judging whether to admit evidence under the *res gestae* doctrine. The fact that, in the light of the guidance given by the Court of Appeal in *R v W (Attorney General's Reference No.1 of 2003)*, that question arises for consideration in the exercise of the court's powers under section 78 of PACE, does not alter the essential point. In order properly to judge whether the evidence of such a witness should be admitted under the *res gestae* doctrine, it was necessary for the prosecution to inform the court of the reasons why the witness was unavailable to attend court and to give their evidence, if necessary following an adjournment, and for the court to take appropriate steps to ascertain those matters.
47. In the absence of those inquiries and that information, the court will not ordinarily be in a position to form a proper judgment whether or not to admit the witness' evidence as *res gestae*, applying the principled approach stated in *R v Andrews* and *R v W (Attorney General's Reference No.1 of 2003)*. In *Wills v CPS*, the justices were simply in no position to consider that question and made no attempt to seek the information which they needed in order to put themselves in a position to do so. Nor did the prosecution seek to assist them in obtaining that necessary information.
48. It was the prosecution's decision to proceed without those proper enquiries straight to an application to admit the victim's evidence under the *res gestae* doctrine, and the justices' willingness to accede to that application, which Irwin LJ understandably characterised as "lazy".
49. The proper approach to take was that summarised by Collins J in [21] of *Wills v CPS*. The Crown should make the necessary enquiries of the victim to discover whether she was willing to give evidence in court; if not, why not; and having ascertained the position in the light of those enquiries, then only to decide whether to proceed with the application to admit her evidence under the *res gestae* doctrine. Insofar as *Wills v CPS* may be said to offer guidance for future cases, it is essentially limited to the need for the prosecution to make proper enquiry to establish whether the witness is willing to come to court to give their evidence; and, if not, the reasons why the witness is unwilling to do so. Possession of that information will enable the prosecution, and ultimately the court, to form a judgment as to whether the witness is or may be made available to give their evidence in court; and to take that factor properly into account in deciding whether to admit the witness's evidence under the *res gestae* doctrine.
50. In the present appeal, Mr Recorder Barnett concluded that the Respondent had made the necessary enquiries in order to establish whether or not the complainant was

willing to come to court to give evidence. Those enquiries had established that, although initially willing, the complainant had changed her mind and had ceased to be willing to support the prosecution in early September 2022, in the weeks leading up to the trial in the magistrates' court. The officer in charge of the case had sought to persuade the complainant to attend court and give her evidence. He had drawn her attention to police and other support agencies and to the availability of special measures to assist her. However, she had remained adamant that she did not wish to attend court.

51. The enquiries made by the officer in charge had established the reasons why the complainant was unwilling to attend court and give evidence. She had formed the clear opinion that prosecution was not in the best interests of the Appellant, whom she considered to require hospital treatment for his mental health problems. She took the view that proceeding with the trial would do him more harm than good. She was fearful that the trial process would harm her own fragile state of mental health. To be summonsed to attend court to give evidence would risk triggering her diagnosed anxiety. Although she maintained the accuracy of her previous statements as to the events which occurred on the evening of the alleged offence at her home, she no longer wished to support the prosecution.
52. As is clear from the reasons given by Mr Recorder Barnett in his ruling, the Crown Court judged that in the present case the Respondent had made the necessary enquiries in order to establish whether the complainant was willing to attend court and give evidence. Those enquiries had established that she was unwilling to do so. The Respondent had ascertained the reasons why she was unwilling to do so. The complainant had explained why she no longer wished to support the prosecution. She was clear in her view that hospital treatment, rather than prosecution, was the right way forward for Appellant; and that her own mental health was at risk were she to attend court and give evidence, whether voluntarily or under the compulsion of a witness summons.
53. Mr Recorder Barnett concluded that the Respondent had properly considered whether the complainant could or should be brought to court. In his view, unlike the situation *Wills v CPS*, this was not a case in which the Respondent's application had failed to make the necessary enquiries in order properly to inform the application to admit evidence under the *res gestae* doctrine.
54. In my judgment, Mr Recorder Barnett and his colleagues were correct to reach those conclusions. The complainant's reasons for being unwilling to attend court were clear. Indeed, her position could hardly have been more clearly stated: she no longer wished to support the prosecution, since she believed it to be the wrong course of action in relation to the Appellant and harmful to her own mental health and well-being. Given that she had reached that decided position in September 2022, in the weeks leading up to the trial before the magistrates' court, it was proper and reasonable for the Respondent and the Crown Court to proceed on the basis that further inquiries and attempts to persuade the complainant to change her position and to attend the hearing of the appeal would be fruitless. Put another way, it was proper and reasonable for the Respondent and the Crown Court to assume that the complainant had long since made the settled decision that she wished to play no active part in the criminal proceedings against the Appellant.



55. Mr Coyne drew a contrast between this case and other decided cases in which the impact on them of a witness giving evidence in court is likely to be so detrimental that it is undesirable for the witness to be compelled to attend. Reference was made to *Barnaby v DPP* [2015] EWHC 232 (Admin), *Ibrahim v CPS* [2016] EWHC 1750 (Admin) and *Morgan v DPP* [2016] EWHC 3414 (Admin). In the present case, it was submitted, the complainant had not expressed herself to be in fear of the Appellant. She had made it clear that she was unwilling to attend court because she did not agree with the decision to continue with the prosecution.
56. Although the complainant had raised general concerns about the possible impact of her attending court on her mental health, those concerns had not been tested by medical or psychiatric examination. Relying on Irwin LJ's observations at [24] of *Wills v CPS*, Mr Coyne submitted that the only conclusion properly open to the Crown Court was that the Respondent ought to make further efforts to bring the complainant to court and, if the Respondent was unwilling to apply for a witness summons, the Crown Court should have issued one itself. In this case, it was contended, there was insufficient reason not to summons the complainant to give her evidence in court.
57. I accept that the complainant's stated reasons for being unwilling to attend court in the present case did not found upon fear of the Appellant. It does not follow that the Respondent had failed properly to justify not issuing a witness summons to compel the complainant to attend court and give evidence.
58. In my judgment, that question must be considered against the context of the settled decision by the complainant made in early September 2022. The complainant had stated the reasons for her unwillingness to attend court and give evidence. The officer in charge had clearly discussed those reasons with the complainant with great care and had attempted to reassure her, albeit without success. In so doing, the officer had raised with the complainant the possibility of a witness summons. Her reaction was that a witness summons would trigger her diagnosed anxiety. In his witness statement, the officer stated that he had discussed this with the prosecutors and it was his view that the risk to the complainant's mental health of giving evidence was outweighed by the risk to her if the case did not proceed.
59. That difficult balance of risk facing the Respondent is an example of the "*peculiarly unhappy position*" faced by an alleged victim of domestic violence, as described by the Court of Appeal in the passage at [12] in *R v C* [2007] EWCA Crim 3463 which I have set out in paragraph 25 above. In [24] and [25] of *Wills v CPS* Irwin LJ spoke of the difficulties that can genuinely arise with witnesses in domestic violence cases. As he said at [25], in such difficult circumstances the courts must "*reach a balanced view on how to proceed, but that must be done with the maximum of information*".
60. Taking a balanced view on how to proceed must therefore embrace not only the evidence before the court as to the position of the alleged victim and their willingness or not to come to court to give evidence, but also their reasons for not wishing to do so and, in the light of those reasons, the likely efficacy of compelling them to attend through the issue of a witness summons (or reassuring them through offers of supportive measures). Each of those matters was addressed in the information before the Crown Court. In my judgment, as is apparent from reasons given by Mr Recorder

Barnett in his ruling, the Crown Court properly followed the approach identified by Irwin LJ at [25] of *Wills v CPS* in this case.

61. For the reasons I have given, I conclude that in each case, the answer to questions (1), (2) and (3) of the case stated is “No”.
62. As to question (1), in early September 2022 the complainant had made clear her decision that she would no longer support the prosecution of Appellant, which she considered to be the wrong course of action. She had made clear her decision not to attend court and to give evidence, because she did not think prosecution was appropriate and she feared for the impact of giving evidence on her own mental health. No purpose would have been served by approaching the complainant again following the conviction of the Appellant and with a view to persuading her to attend and give evidence at the hearing of his appeal. It is simply unrealistic to suggest that there was any prospect that the complainant might change her mind. The Crown Court was justified in not looking at the lack of efforts made by the Respondent to secure the attendance of the complainant since the trial before the magistrates’ court.
63. As to question (2), in his ruling Mr Recorder Barnett followed the approach stated by Irwin LJ in *Wills v CPS* and reached a balanced view based upon the information and evidence that was before the court. The Respondent had through careful enquiry established that the complainant had firmly decided that she did not support the prosecution and would not attend court. The possibility of a witness summons and other supportive measures had been discussed with her. Her position was described by the senior investigating officer as adamant. Having regard to the observations of the Court of Appeal in *R v C*, the Crown Court was justified in concluding that the Respondent had properly considered whether the complainant could or should be brought to court.
64. As to question (3), Mr Recorder Barnett was justified in concluding that the circumstances of the present case were plainly distinguishable from those which were the basis for the Divisional Court’s decision in *Wills v CPS*. For the reasons I have given, the Crown Court in the present case was justified in concluding that the Respondent had through proper enquiry established both that the complainant was unwilling to attend court to give evidence and her reasons for that decision. There was evidence before the court that the Respondent had sought to persuade her to change her mind. The possibility of a witness summons had been discussed, as had other supportive measures. In this case, the Respondent had taken the necessary steps to ascertain all that needed to be discovered as to the willingness or otherwise of the complainant to give evidence and, if she was unwilling, why she was unwilling, before any final decision was made. Mr Recorder Barnett and the other members of the court were justified in admitting the complainant’s evidence under the *res gestae* doctrine, having considered *Wills v CPS*.

#### **Question (4)**

65. The Appellant’s submission at the hearing of his appeal was that the Crown Court should exercise their powers under section 78 of PACE and refuse to allow the Respondent to rely on the complainant’s evidence recorded in the 999 call and the body worn camera footage, albeit admissible under the *res gestae* doctrine, because of the resulting inability of the Appellant to cross-examine the complainant. In his

ruling, Mr Recorder Barnett concluded that the inability of the Appellant to instruct his counsel to cross-examine the complainant would not render the re-hearing of his case unfair. The court would consider the weight of the evidence in the light of the Appellant's lack of opportunity to cross-examine the complainant.

66. Mr Coyne placed particular emphasis on the fact that the Appellant in interview had advanced a positive case as to how the complainant had sustained her injuries. Fairness demanded that the Appellant have a proper opportunity to put that case to the complainant in cross-examination and to test her evidence. In the absence of cross-examination, the only evidence before the court of the events which gave rise to the prosecution was the complainant's account as recorded during the 999 call and in body worn camera footage. There was a real need for cross-examination in this case. Reliance was placed upon the observations of Lord Ackner at page 393 in *R v Andrews* and of the Court of Appeal at [21] in *R v W (Attorney General's Reference No. 1 of 2003)* – see paragraphs 23 and 24 above.
67. In considering the adequacy of the Crown Court's response to these submissions, it is important to have clearly in mind the distinction between the admissibility of evidence under the *res gestae* doctrine and the power to exclude evidence under section 78 of PACE. That distinction is clearly drawn by the Court of Appeal in *R v W (Attorney General's Reference No. 1 of 2003)* in the passages that I have set out in paragraph 23 above. In [24] in *R v W*, the Court of Appeal referred to section 78 of PACE as a “discretionary power”. Miss Ailes drew my attention to the guidance given by the Court of Appeal in *R v O'Leary* (1988) 87 Cr App R 387, 391 –

*“It is the duty of the court to take into account all the circumstances of the case, and then to answer the question: Will the admission of the relevant evidence have such an effect on the fairness of the proceedings that the court ought not to admit it?”*

*Subject to the question of Wednesbury unreasonableness, that is a matter for the discretion of the court below, with which this Court would be loath to interfere”.*

68. It is clear from the reasoning of Mr Recorder Barnett that he and his colleagues took into account all the circumstances of the case in reaching their conclusion, that to admit the complainant's evidence under the *res gestae* doctrine would not have such an effect on the fairness of the proceedings that they should exclude it in the exercise of their power under section 78 of PACE. They were well aware that the complainant did not support the prosecution of the Appellant. They knew that she had withdrawn her support not out of fear but because she considered that prosecution was the wrong course of action to take. They were also aware that although the complainant maintained her version of the events leading to the alleged assault, the Appellant had contested that evidence and at interview had advanced a different explanation for her injuries.
69. As explained by the Divisional Court at [64] in *DPP v Barton* to which I have referred in paragraph 26 above, it is not uncommon in cases of domestic violence for the prosecution to rely on *res gestae* evidence, particularly recorded evidence, in the absence of co-operation by the complainant whether or not out of fear of further violence. The present case is an example of such a case. Having reviewed the

authorities, the Divisional Court said that such an approach in the sensitive and specific context of domestic abuse will often not be unfair.

70. The Crown Court did not consider it to be unfair to follow that approach in the present case. The particular question for the court to consider was whether, in so doing, they could address the obvious detriment to the Appellant in being unable to cross-examine the complainant of her version of events. As Mr Recorder Barnett stated in his ruling, the court had taken account of the information which had been placed before them as to how the evidence had been obtained, what had happened at the time of the alleged offence and what was said thereafter. They had concluded that they could maintain the fairness of the trial by evaluating the evidence which was led before them in the knowledge of and taking account of the absence of testing of that evidence through cross-examination.
71. I am unable to accept that the Crown Court acted unreasonably in deciding, for those reasons, that they should not exercise their power under section 78 of PACE to exclude the complainant's evidence which was otherwise admissible under the *res gestae* doctrine. In my judgment, the Crown Court was entitled reasonably to conclude that by careful evaluation of the evidence which was relied upon during the hearing of the Appellant's appeal, recognising the inability of the Appellant to test or to challenge the complainant's evidence through cross-examination, they would be in a position to maintain the fairness of the trial process before them.
72. For these reasons, the answer to question (4) of the case stated is "No". Mr Recorder Barnett and his colleagues did not err in concluding that the inability of the defence to cross-examine the complainant as the key prosecution witness would not render the Appellant's trial on his appeal against conviction unfair.

## **Disposal**

73. For the reasons I have given, the answer to each of the four questions posed in the case stated is "No". The appeal is therefore dismissed. I am very grateful to counsel for their excellent written and oral submissions.