CHUKWUEMEKA ODUMEGWU OJUKWU UNIVERSITY JOURNAL OF PUBLIC AND PRIVATE LAW

MAIDEN EDITION
SEPTEMBER 2018

DEPARTMENT OF PRIVATE AND PUBLIC LAW
CHUKWUEMEKA ODUMEGWU OJUKWU
UNIVERSITY, IGBARIAM CAMPUS

Printed and Published by:
Osyora Nigeria Limited,
70 Old Market Road, Onitsha.
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ABOLISHING *RES GESTAE*: AN ANALYSIS OF FACTS ADMISSIBLE UNDER SECTION 4 OF EVIDENCE ACT 2011

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Abstract

This paper analysed, in the Nigerian context, the English doctrine of Res gestae. It examined in material details, the distinctions between the provisions of the repealed and the new Evidence Acts with respect to admissibility of the doctrine in Nigeria. It is found that the extant Act accommodates reception, only of evidence admissible by virtue of legislations validly in force in Nigeria as opposed to the erstwhile Act which allowed facts admissible by other rules, including the received English Common law. It is argued that the new Act has signaled the 'demise' of or an end to continuing admissibility of the doctrine in Nigeria. It is submitted that, the doctrine is no longer, even indirectly part of the corpus of Nigerian law, and as a final point it is established that though certain court decisions would be differently decided today, the abolishment of the doctrine is one of no significant consequence given that the new Act makes admissible relevant facts, even if occurred 'at different times and places', the doctrine therefore merely 'gave-up its ghost' as res gestae but reincarnated in a superlative form as facts admissible under section 4 of the Evidence Act 2011.

I. Introduction

Res Gestae,[1] a doctrine regarded by many evidence law scholars as an 'unsatisfactory inclusionary exception,[2] and a phrase which has given judges, as well as writers on evidence a lot of trouble because its 'precise doctrinal significance at law has remained persistently unclear,[3] is a Common Law principle which though appeared neither in the old[4] nor in the new Evidence Act 2011, Nigerian courts seemed to have constantly applied,[5] being a doctrine, admissibility of which could be justified by Section 5(a) of the repealed Act that actually provided for admissibility of

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1. Singular res gesta, is a corruption of the Latin phrase 'res gesta pars rei gesta.'
ta, is a corruption of the Latin phrase 'res gesta pars rei gesta.'
2. Tapper C, Cross and Tapper on Evidence (11th ed. Oxford University Press, Oxford 2007) 606.
3. Dennis I. H, The Law of Evidence (2nd ed. Sweet and Maxwell, London 2002) 586. It has also been described as a 'blanket phrase' covering reception of a variety of items of evidence for a variety of purposes: Cross R, and Wilkins, An Outline of the Law of Evidence (5th ed. Butterworth, London 1980)193; as 'a damnable pretended doctrine': Pollock, cited in Heydon J.D., Evidence: Cases and Materials (3rd ed. Butterworth, London 1991) 349; as 'a piece of grammatical non-sense': Murphy P, A Practical Approach to Evidence (4th ed. Blackstone Press Ltd, London 1980) and per Lord Tomplin in Home v Newman [1932] 2 Ch.112,120 as 'a phrase adopted to provide a respectable legal cloak for a variety of cases to which no formula of precision can be applied.' It has also been referred to as a rule which lacks 'plausible logical analysis': Morgan 'A Suggested Classification of Utterances Admissible as Res Gestae' (1922) 31 Yale L.J. 31, 229 cited in Uglow S, Evidence: Text and Materials (Sweet and Maxwell, London 1997) 542; or as a phrase to serve as 'a substitute for reasoning....' Morgan in Heydon J. D, ibid.
4. I. e. Evidence Act, Cap. E14 Laws of the Federation of Nigeria 2004; which was initially Evidence Ordinance in existence since 1945.
5. Mainly before the coming into force of the new Act.

evidence which were not explicitly provided therein but were admissible by other rules, including the English Common Law.[6]

The new Act however, appears to provides for reception, only of evidence admissible by virtue of 'other legislations' in force in Nigeria.[7] It is this seeming distinction between the provisions of the two Acts casting doubts on the continuing admissibility in Nigeria of the English doctrine of *res gestae* that motivates this paper. The paper considers whether the enactment of the new Act has really marked the demise of the doctrine.

II. Nature of the Doctrine

The English doctrine of *res gestae* in its Latin origin roughly translated means 'things done', or 'part of the matter', 'the transaction[8] 'event which occurred,' or in a clearer sense 'part of the relevant facts,[9] is an inclusionary exception created at law for statement so intimately intertwined with the fact(s) in issue as to amount to part of what went on, with a view to whittling down the injustice caused by the inflexibility of the hearsay rule.[10] The doctrine has been described as facts, acts, or series of acts, omissions, incidence or declarations which are bound up with the main 'transaction' as to form part of it, especially because of its capacity to explain the fact (s) in question.[11]

The basis of the doctrine being the light which it sheds on the fact in issue to a point that it is required to be admitted so as to 'complete the picture'[12] otherwise the fact in issue may be unmeaning, notwithstanding that such admission may, apart from its contravention of the general rule against hearsay[13] also infringe the general exclusionary rules against similar facts

6. The provision of the said section 5(a) was applied on countless instances to admit evidence which were admissible under the Common Law in situations where the repealed Act made no provisions on the admissibility of such evidence: see (n.55) post.
7. Section 3.
8. Where a main fact consists of several or sequence of other subsidiary facts, and such fact is in issue, all other facts, be they acts or omissions, incidence, or even declarations, which are part of, or accompanying or explaining the main fact, are admissible and referred to as res gestae: see Phipson's Manual of the Law of Evidence (10th ed. Sweet and Maxwel1 972) 27-28; Nokes G. D, An Introduction to Evidence (4th ed. Sweet and Maxwell, London 1967) 88; Kirishna Vasdeve, The Law of Evidence in the Sudan (Butterworth, London 1981) 250-257.
9. In English law, if a fact is said to be part of res gestae it means that it is part of the relevant fact(s): see Richard May, Criminal Evidence (3rd ed. Sweet and Maxwell, London 1995) 192-197.
10. Under the hearsay rule, a witness is not allowed in his testimony to repeats what he was told by another person in order to prove the truth of facts stated. He is only allowed to offer direct evidence of what he personally saw, heard, did or discovered: sections 37-38 and 126 (a)-(d) EA; Judicial Service Commission v Omo [1990] 6 NWLR (Pt.157) 407, 468; Ajiboye v State [1984] 8 NWLR (Pt. 364) 593, 600; Armels Transport Ltd v Martins (1970)1 All NLR 27; Subramaniam v Public Prosecutor (1956)1 WLR 969. Res gestae offered an exception to this rule based on the experience that under certain circumstances of physical or mental shock a statement may be produced outside the control of the maker. The doctrine maintains that such statements should be admissible even though they would otherwise be come within the hearsay rule because evidence of such statement is given by someone else: see Ratten v R referred to in n.31 post.
11. See Thayer, Bedingfield's Case-Declaration as a Part of the Res Gestae 14A M L REV 817, 822-23 (1881); see also Morgan, 'A Suggested Classification of Utterances Admissible as Res Gestae' (n. 3) 321.
12. Tailor A, Lecture Notes on Evidence (Cavendish Publishing Ltd, London 1995)
13. Discussed in n.10 ante.

evidence. In other words, the basis of the inclusionary doctrine of *res gestae* is its obvious relevance in relation to other evidence[14] to an extent that it needs to be admitted in order to perfect 'the picture'[15] otherwise the fact in issue may not be accurately understood or be incomprehensible.

However, as the doctrine is used in the law of evidence in relation to 'facts in issue' of which evidence may be adduced, it is necessary to examine the meaning of a fact in issue. The Act defines a fact in issue to 'includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liabilities or disability asserted or denied in any suit or proceeding necessarily follows.[16] It would seem therefore, that under the Act, facts in issue are those facts which the party must prove to establish his case or defence[17] and facts such as those concerning the credibility of witness or the admissibility of any piece of evidence as elicited in cross-examination of witness.[18]

One point that needs be emphasized is that a fact in issue must be established only by facts which the Act regards as relevant,[19] but as more often than not what appears logically relevant are not under the Act relevant to fact in issue, there is the need to pay close attention to rules set out in the Act, for it is only such facts which the Act declares to be relevant that are allowed to be used to prove a fact in issue. Conversely, evidence of facts or occurrences which merely deepen suspicion is not admissible.[20]

As has been explained previously, proceedings may bother on an incident in which, for instance, the court is dealing with an event that took only moment, but sometimes facts surrounding that event may be so multifaceted to be dealt with in isolation without taking hints from or allusion to its antecedents in time, place or surrounding, in such situations, it would be incongruous for witnesses to be allowed to give evidence as to only what was seen, but disallowed from testifying as to what was heard when such words are the means to appreciating the

14. See section 12 of the Act. Generally speaking, it was not competent for the prosecution to prove a man guilty of another unconnected felony; and as this evidence tended to show that the accused person was guilty of other crimes other than the one with which he was charged, it is generally inadmissible; but as it was part of the whole event of 'taking,' in which several felonies are connected together, and form part of one entire transaction then the one is evidence to show the character of the other: see s.35EA; Nkada v Obiano (1997) 5 SCNJ 33, 60; Ishola v The State (1978) 2 LRN 111; Akerele v The King (1940) 8 WACA 5; R v Adeniji & Others (1937) WACA 185; see also Idundun v Okumagba (1976) NMLR 200; Okechukwu & Others v Okafor & Others (1961) 1 All NLR 685.
15. Tailor A, Lecture Notes On Evidence (n.12).
16. Section 258 (1) EA.
17. See Section 123 EA; Olufosoye v Olorunfemi [1989]1 NWLR (Pt.95) 26 SC; Adebiyi v Umar [2012] 9 NWLR (Pt.1305) 296; Akpan v Union Bank of Nigeria PLC [2011] 2 NWLR (Pt.1231); Palm Beach Ins. v Bruhns [1997] 9 NWLR (Pt.519) 80 CA. Note however, that in an action for a declaration, facts must be proved by evidence even if they have been admitted in the statement of defence: Akpan v UBN PLC Ibid.; Vincent Bello v Magnus Eweke (1981) 1SC 101, 102.
18. Section 223 EA.
19 Sections 4-13 EA; Candide-John v Edigbin [1990] 1 NWLR (Pt. 129) 659.
20. *Harris v DPP (1952) AC 708; R v Olubunmi Thomas (1958) 3 FSC 8; R v Grillopolous (1953) 20 NLR 114.*

incident.
Even if the one who made the statement is not called as a witness, such statement may be proved in some material detail as to make the 'main incident' sufficiently understandable as evidence of the fact stated in it, even though that might breach some exclusionary rules of evidence,[21] in so far as it was made on impulse and sufficiently enough to be regarded as an element of the event.

It should be added that such connected facts do not need to constitute facts in issue for them to be regarded as forming component of it, all that is required is that they be closely associated with, and throws more light on the fact in issue because of its close proximity to the main event in point of time, place and circumstance as to amount to circumstantial evidence or part of the 'thing done.'[22]

III. Conditions for the Admissibility of *Res Gestae*

Situations in which the doctrine of *res gestae* has been applied are diverse, and various ways of classifying them have been made. It would appear that, the theme of the principle runs similarly in all of them, hence classification is not of much importance. It suffices to simply state that for a declaration or an act to be admissible as forming part of the *res gestae* of an incidence; it is required to fulfill certain conditions the underlying principle of which is to ensure a minimum assurance of truth as a basis of judicial decisions. Each of these conditions should now be examined in turn.

Firstly, it is necessary that the declaration or the act be, if not absolutely synchronized with the event, be at least, in the nature of an uncalculated outburst, and made spontaneously as to be clearly associated in time, place or circumstance with the main event as to leave no room for doubt as regards its connection with the event.[23] This condition is to safeguard against concoction or chance for reasoned reflection, so that at all the material time the mind of the declarant is dominated by the event, as to regard the utterance as unpremeditated.[24] This is the most important

21. Section 37-38 EA; see Ozude v IGP (1965) 1 All NLR 102; Armels Transport Ltd v Martins (1970) 1 All NLR 27.
22. See the old case of Thompson v Trevanion (1693) Skin 402 which was an action by the plaintiff for an assault on his wife. The court held that the declaration made by the injured wife immediately upon the hurt received, and before she had time to contrive anything for her own advantage was part of the incidence because it was made instantaneously upon receiving the wound and before she had time to think up or devise 'anything for her own advantage.' See also R v Gibson (1887) 18 QBD 537; see Per Lord Tomplin in Home v Newman (1931) 2 Ch. 112, 120.
23. See R v Foster (1834) 6 C 325 in which the statement of the deceased in a running down accident that it was the accused that knocked him down and made immediately after the accident was held to be admissible.
24. See Thompson v Trevanion (n.22), but note that the time interval between the facts sought to be included as part of the res gestae vis-à-vis the fact in issue depends on the circumstances of each case.

requirement and such impulsive exclamation is indeed, the most important type of declaration admissible as part of *res gestae.*[25]
The dictum per Holt C.J in *Thompson's Case*[26] was correct in underscoring the requirement of spontaneity, and it would have been good had the same been held fast to in the spirit, rather than in the letter in the well known case of *R v Bedingfield* [27] where instead, the concept of spontaneity was carried to an extent, far beyond the purpose of ensuring reliability. In that case the accused was charged with murder. The deceased came from a room in which she had been alone with the accused-Harry Bedingfield, with her slashed throat, she staggered and exclaimed

'Oh dear Aunt, see what Harry has done to me.' The question in issue was murder or suicide. The deceased statement was held (of course wrongly) to be lacking in the needed contemporaneity with the fact in issue because it came when the mortal had already been inflicted and all action on the part of the assailant had ceased,[28] therefore inadmissible as part of *res gestae.*[29] This decision, it is submitted had no basis in precedent. Indeed, it was plainly contrary to any earlier authorities, for instance, much earlier in *R v Foster* [30] a case involving a charge of manslaughter by the reckless driving of an automobile, a statement made by the deceased after the event was admitted to prove the nature of the vehicle which had run him down.

The absurdity of the decision in *Bedinfield's case* has however been realized, and the decision has been overruled. Commenting on *Bedingfield* in a comparatively recent English case,[31] it was observed by the Privy Council that 'there could hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement, than in *Bedinfield.*'[32] Therefore, it was held that the decision in *Beddingfield* no longer represented the law.

25. The rule is branded in the United States as 'The Excited Utterance Rule.'
26. n. 22.
27. (1879)14 Cox CC 341, or 70 LT 867.
28. In other words, in the opinion of the court the statement i.e., 'Oh dear Aunt, see what Harry has done to me' was merely a narration of a transaction which has ended. It was suggested however that, if the statement had been spoken during the attack e.g. 'Look what Harry is doing' or 'Don't Harry' while the act of cutting the throat was being carried out it would have been admissible as part of res gestae, but that 'See what Harry has done' was rather said following 'something done': see Smith J.C, Criminal Evidence (Sweet and Maxwell, London 1995); Aguda T.A, The Law of Evidence (4th ed. Spectrum Law Publishing, Ibadan 2000) 32; Nwadialor F, Modern Nigerian Law of Evidence (Ethiope Publishing Corporation, Benin 1979) 40.
29. The statement was also inadmissible as dying declaration for lack of any evidence to prove that the woman had a settled hopeless expectation of death when it was made: Akinfe v The State [1988] (Pt. 88) 35.
30. R v Foster (1834) 6 C & P 325.
31. Ratten v R (1972) AC 378.
32. Ibid, at 390 per Lord Wilberforce. On strict application of Bedingfield, the evidence in the case would have been rejected, but it was held that Bedinfield no longer represented the law.

Other types of statements admissible as parts of the *res gestae* are those concerning contemporaneous physical condition of the person making it;[33] and statement of present intention.[34] A statement is also admissible in evidence as forming part of *res gestae* if it explains a relevant fact in the case,[35] and evidence of declaration that are inextricably mixed-up with the act as to form part of the *res gestae*,[36] but of course, not of a prior or subsequently disjointed facts. Any declaration, incident or acts which pass these tests form part of the *res gestae*.

IV. Application of the Doctrine under the Repealed Act

As has been noted, the doctrine of *res-gestae* was not directly applicable under the repealed Evidence Act having not been enacted into same. Nonetheless, its principles was recognized and applied until the repealed of that Act, being a Common Law rule which came into Nigeria as part of the received English law, continued application of which was preserved by Section 5(a)[37] of the old Act.

The case of *Sunday Akpan v The State* [38] provides a good example of the application of the doctrine through section 5(a) of the repealed Act. The appellant in that case was convicted of murder. The only eyewitness called for the prosecution was a twelve years old boy who stated that he was in bed on the night of the incident, but later heard his mother shout 'Sunday has killed me,' and that when he ran out he saw the appellant cutting his mother with a matchet. It was held that the deceased's statement as heard and narrated by the boy, 'Sunday has killed me' was admissible as part of the *res gestae* since the statement accompanied and explained the fact in issue which was the murder of the deceased.[39]

Similarly, in *Sule Salawu v State*[40] a number of persons one might heard

33. See for example the case of R v Conde (1867) 10 Cox CC 547 where evidence of a child's complaints of hunger to neighbours was held admissible to prove that the child was starved. The statement was admissible to prove the condition, not the cause.
34. This may be exemplified by R v Beckley (1873) 12 Cox CC 550 where a police constable was murdered. His inspector heard the deceased say on the morning of the murder that the accused was 'at his old game of thieving again,' and that he (the deceased constable) intended to watch the accused's movements that evening. The inspector was allowed to give evidence of what the constable had said.
35. In Bliss (1837) 7 A & E 550 however, the deceased's statement that he was planting a willow tree to mark the boundary of the road was held to be inadmissible as it was equivocal whether the statement was explanatory of the act.
36. Thing may be in the form of things done or said prior to a factual situation being considered, e.g. evidence that the arsonist had, some minutes or even days before the incident been seen loitering about the building with a box of matches and a keg of petrol will be relevant to show preparation and so may be received as part of the res gestae: See Howe v Malkin (1897) 40 LT 196 per Grove J; see also the English case of Agassiz v London Tramway Co. Ltd. (1873) 21 WR 199.
37. The section provides as follows: 'nothing in this Act shall prejudice the admissibility of any evidence which apart from the provisions of this Act would be admissible.' Note that evidence that was to be part of res gestae of an incidence must be relevant under the Act: see Agunbiade v Sasegbon (1968) NMLR 223.
38. (1967) NMLR 185.
39. See Okokor v The State (1969) NMLR 189, where during the night of the incident, two of the prosecution's witnesses in the case who lived very close to the deceased heard him shout ' Ovuomarienor has killed me!' As they ran out of their houses they saw the deceased lying in a pool of her own blood on the ground outside his house while the appellant who was a few yards away, tried to run away. The evidence of the statement was held admissible as part of the res gestae.
40. (1971) 1 NMLR 249.

the deceased cry 'Sule is killing me' from a room. In reaction to this cry of distress, the witness promptly rushed into the deceased and found her in a pool of her own blood. On appeal it was held that the words 'Sule is killing me' credited to the deceased was spontaneous and contemporaneous with the attack on her, as it was forced out of the deceased by the pressure of the emergency which she was exposed to and therefore admissible as part of *res gestae*.[41]

On the contrary, what seemed to be the Nigeria's version of the incongruity in *Bedingfield case*,[42] indeed an extremely restrictive appliance of the principle can be found in *Udor v The Queen*[43] where the deceased received injuries on her neck as a result of an assault committed on her by the appeallant. After the injury the appellant did all he could to treat her, he (the appellant) sent for the wife of a neighbour who arrived to find him trying to treat his victim and asked them both what the matter was. The appellant said nothing but the deceased said the appellant had 'put his hand between her legs, carried her up, and knocked her to the ground headlong.' On the following day the deceased sent for her brother and repeated the same statement as to the cause of her injuries. It was held, somewhat without resort to earlier authorities and, apparently contrary to any, that the evidence of the deceased statement was not part of the *res gestae*.[44] Following this decision, there were a number of other Nigerian cases (discussed below) in which the evidence tendered before the court afforded good reason for resort to the doctrine of *res gestae* but was either not canvassed or adverted to, or the courts resorted to other common law principle, or other provisions of the Act as a basis of the decisions.

In *Ozoemana v The State* [45] for example, the appellant was spotted fighting with the deceased in the process of which he bit the right ear of the deceased, virtually cutting off the ear to the extent that the ear had to be stitched. There was evidence that a few minutes of the fight the deceased cried that the appeallant had sink his teeth into his right ear. Blood was seen rushing when they were separated. On appeal, the statement attributed to the deceased was referred to but no allusion was made to the

41. See also the case of Vorgho v The State (1972) 5 SC 192, (1972) 1 All NLR (Pt.2) 1 where it was held the words 'Bansa has killed me' are contemporaneous with the gun-shot as to be admissible as part of the Res gestae.
42. n. 27.
43. (1964) 1 All NLR 21.
44. See also the earlier case of R v Bang Weyeku (1943) 195 WACA, where the accused was charged with murder and the main evidence against him was the statement of the deceased shortly after he had been stabbed viz, 'Bang has shot me' which was made in the absence of the accused. It was held on appeal that the evidence of the statement was inadmissible as forming part of res gestae because it was made after an appreciable time after the event. In this case, it was suggested that anything uttered by the deceased person at the time when the shot was being fired e.g. 'Don't Bang, show mercy on me' or 'if you dare shoot me' while the act of shooting was being done would have been admissible as part of res gestae.
45. [1998] 10 NWLR (Pt. 571) 632.

doctrine of *res gestae* in the court judgment.[46]

On another hand, in *Utteh & Anor v The State,*[47] the appellants had indicted an Italian resident in Lagos of an immigration offence[48] in an attempt to get him arrested. The arrestee suggested and all agreed to go to his business partner's house. Afterward, the appellants agreed to compromise the alleged crime with payment of money. The appellants were subsequently charged with the offence of 'demanding with menace and stealing' under sections 516, 406 and 390(9) respectively of the Criminal Code.[49] Although the victim did not testify at the trial of the appellants, his partner testified as to what his colleague had told him when they came to him and what happened in his house.

It was held that the narration at the trial by the partner, of what the victim said in his house in the presence of the appellants lacked contemporaneity with the demand constituting the offence charged which was laid in the house of the victim and therefore not admissible under the doctrine of *res gestae,* but admissible under sections 9 and 10 (now ss. 6-7) of the Act.[50] It follows from these lines of cases that reliance was placed on the provisions of the repealed Act rather than on doctrine of *res gestae* as a basis of admissibility in the cited cases.

Happily, as in *Ratten v R,* [51]cases such as *Otti v State* [52] have realized the irrationality and overruled *Udor v The Queen* and *R v Bangweyaku.* In *Otti's Case*, the complainant was robbed by the appellant and two other persons. About six days thereafter the complainant saw the appellant trapped in a traffic jam, she jump out from the bus, came to the appellant, grab and identified him and, described her experience of six days earlier to the crowd that had assembled. To confirm her story she opens the glove

46. See also the case of *Effia v State* [1998]2 NWLR (Pt. 537) 275, 209, in which the accused/appellant was charged with the murder. Evidence was tendered that the deceased was heard shouting 'Jonas has murdered me-Jonas has murdered me,' while the accused/appellant was seen running away from the scene of crime. It was then realized that the deceased had a knife-cut in his neck. He fell and died on the spot. The doctrine of res gestae was neither canvassed at the trial nor adverted to in the judgment, although the evidence of the utterance attributed to the deceased was admitted as dying declaration. Likewise, in Braide v State [1999] 5 NWLR (Pt. 504) 141 SC the appellant and one other person were charged with the offence of conspiracy to murder and murder of the deceased by stabbing him to death. It was the appellant's evidence that the deceased rush into and collided himself with the knife he (the appellant) was holding as he (the deceased) tried to strike him with the broken bottles which he was holding all along and he then suddenly cried out 'he has stabbed me.' The doctrine was not adverted to. See also Okereke v State [1998]3 NWLR (Pt. 540)75, 87 where the doctrine was raised but was also not considered.
47. [1990] 3 NWLR (Pt.138)307, 310, also reported in [1992] 2 NWLR (Pt.223) 257, 273.
48. I.e. that his international passport was not genuine.
49. Cap. 77 LFN 1990 (Now Cap. C38 LFN 2004).
50. See also Olayemi v Olaoye [1999] 10 NWLR (Pt.624) 600, 619 where s.7 (now s.4) of the Act was invoked by the trial court to justify the admission in evidence of a connected facts which, though not in issue, and also occurred several years before the transaction in issue with a view to knowing accurately the parties historical background. And it was held on appeal that the trial court was right in examining the pre-1931 historical evidence relating to the chieftaincy title and tradition of decades so as to arrive at a just resolution of the issue in controversy between the parties.
51. n.31.
52. [1991] 8 NWLR (Pt. 207) 103.

box of the taxi, and brought out some of the exhibits used on her.[53] She also recognized her stolen rings on the finger of the appellant.

It was held that the *res gestae,* particularly the specific acts of the appellant and, the exhibit tendered before the court which show a clear nexus between the appellant and the offence of robbery he was charged with could give rise to his conviction.[54]

V. Effects of Section 3 of the New Evidence Act

As has been rightly established, the provisions of Section 5(a) of the old Act permitted reception of any evidence admissible under some other rules including the Common law in situations where the Act was silent.[55] The provision is however, no longer the same, as Section 3 of the new Act provides for admissibility, only of evidence that is made admissible by any other legislation validly in force in Nigeria. This provision does clearly not accommodate importation of Common law rules of admissibility like Section 5(a) of the old Act did.[56]

It may perhaps be contended that Common law rules, not less the law of evidence, are component of Nigerian Law, being part of the received English Law, and reliance could be placed on Section 32 of the Interpretation Act.[57] However, in line with express proviso to the section,[58] evidence may only be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as the Act declared to be relevant and of no others.[59] It appears that while the repealed Act did not pretend to be an exhaustive legislation, as it admitted its insufficiency in Section 5(a), and as that provision of the section is not repeated in the new Act, the reception of the English Common law rules of admissibility like section 5(a) of the old Act did is not allowed. Presumably, the new Act is designed to be exhaustive as to do without resort to any received rule.

53. E.g. the four plastics containing the charms used on her.
54. See also the earlier case of Oyename v Oyedele (1957) LLR 37, in which the facts were that following an accident the defendant's driver told the plaintiff that it was his brake that had failed and that in the circumstance he was confronted with the emergency of either running into the plaintiff's vehicle or falling into a river. The statement made by the driver was held admissible as part of the res gestae in that it explained how the accident happened.
55. See n.6 ante; see R. v Itule (1961) ALL NLR 462; which provided a good illustration of the import of the provision of the then s. 5(a). In that case considering whether a confessional statement which was in favour of an accused person was admissible in support of the accused's case, the Supreme Court held that as the matter was not dealt with expressly in sections 27 to 32 of the old of the Evidence Act, the Common Law rule therefore applies by virtue of section 5(a). See also the case of Onyeanwu v Okpupara (1953) 14 WACA 21, 311.
56. Thus, under the new Act, it would seemed difficult to find a basis for the application of the Common Law if a court is faced with a situation such as that in R v Itule ibid where the Evidence Act is silent on admissibility and only the Common Law permits the admission of the evidence in question.
57. Cap.123 laws of the Federation of Nigeria, 2010, the section provides inter alia that subject to the provisions of the section and except in so far as new provisions is made by any Federal Law, the Common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in as much as they relate to any matter within the legislative competence of the Federal legislature, be enforced in Nigeria.
58. i.e. 'except in so far as other provision is made by any federal law…' ibid.
59. S.1 EA

IV. Evidence Admissible Under Section 4

Unarguably, the doctrine of *res gestae* is no longer, even indirectly or by implication part of the *corpus* of Nigerian law of evidence having not been enacted in the new Act.[60] However, it is obvious that Section 4 dealing with relevancy of facts forming part of the same transaction not only embraces fields covered by the doctrine but much more. Thus, it is important to analyse the provisions of Section 4 of the Evidence Act. The section provides as follows:

> 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 and at different times and place (underlines added).

This provision makes admissible, facts which though not in issue and even occurred not 'contemporaneously' but 'at different times and places' as the fact in issue provided they form part of the same transaction, and provided that such facts satisfies the test of relevancy under the Act.[61] The effect ultimately being that evidence which may not be admissible under the doctrine of *res gestae* may well be admissible under that provision of the Act.[62]

However, though it may be difficult to prove how a fact which occurred at another time or place from the fact in issue is nonetheless so associated with the fact in issue as to be part of it. The case of *Ishola v The State* [63] offered a good example. In that case, the appeallant, in company of four other accomplices, allegedly shot the deceased on a moonlit night, hurried into a nearby bush, and afterward crossed into a road on which his car was packed and drove off with the other accomplices. Evidence was given by the wife of the deceased that even though the appellant managed to escape from the scene of the crime, she could recognized him from the rear as he was holding the gun and also from the dress he was wore, while another witness testified that he saw him and the others getting into a car which was recognized as the appellant's own though he could not read the number plates.

The fact in issue was whether in circumstances, the evidence identifying the appellant was admissible. Refusing the defence counsel's objection to

60. Section 3 of the new Evidence Act specifically provides only for evidence that is admissible under other legislations in force in Nigeria, this is in contrast with the repealed Act section 5(a) thereof which provided for the admissibility of evidence which were admissible by other rules. And this was in a number of occasions used to admit facts admissible in Common Law in situations where the Act made no explicit provisions on the admissibility or otherwise of such evidence.

61. It is a fundamental rule of the law of evidence that facts must be relevant under the Act in order to be admissible, thus what is not relevant under the Act is not admissible: See Salawu Agunbiade v A. O. Sasegbon (1968) NMLR 223. The converse, however, is not necessarily true, because a lot of relevant evidence is inadmissible under specific rules affecting admissibility.

62. It also goes without saying those cases such as R v Beddingfield (n.27); R v Bangwayeku (n44); Udor v The Queen (n.43) etc would be differently decided today.

63. [1978] 2 LRN 11, (1978) 9-10 SC 81, 104-106.

the admissibility of evidence of identity on the ground of mistaken identity, the court considered the established facts of violent attacks between the appellant and the deceased's village dwellers, together with the testimony of those who identified him on the night of the murder; and inferred that the appellant was a very well known person to the villagers especially to the deceased and members of his household.[64]

On this point the Supreme Court said:

> Surely, the general rule in criminal law as well as in civil cases that the evidence must be confined to the point in issue cannot be applied, where the facts which constituted the distinct offences are (at) the same time part of the transaction which is the subject of the charged. Evidence is necessarily admissible as to acts which are closely and inextricably mixed up with the history of the criminal act itself as to form part of one chain of relevant circumstances and so could not be excluded in the presentation of the case without the evidence being thereby rendered unintelligible… [65]

Accordingly, it was held that in cases of murder or culpable homicide, evidence of prior assaults, menaces by the accused towards the deceased, or irritating behaviour by the murdered to the accused, and the relationship of the deceased to his assailant so far as they may reasonably explain the conduct of the accused with the crime can be admitted to proof as integral parts of the incidence or history of the alleged crime for which the accused is on trial.[66]

Hence, in a charge for a particular crime, evidence of other facts which constitutes distinct crimes but which are at the same time part of the same transaction as the criminal act is relevant, as such evidence could not be excluded without the prosecution of the case being rendered unintelligible.[67]

VII. Concluding Remarks

The thrust of this paper has been an analysis, in Nigerian milieu, of the inclusionary exception created at Common law via the doctrine of *res gestae*. The basis of the doctrine, the conditions and numerous circumstances in which it has been applied as well as the diverse ways of classifying them has been elucidated. Not only that, an examination is

64. It was taking into account, for example that in about two years preceding the murder, there were violent disagreements involving the appellant and the deceased's village in the process of which the appellant and his 'thugs' or workmen were alleged to launch an attack on the village and; that the appellant on another occasion caused arrest and detention of some of the villagers at police station for allegedly attacking and injuring one of his workmen; and that on another occasion the accused caused one of his thugs to grasp the deceased at gun point while he went to bring some policemen who on his prompting arrested and got the deceased and some other villagers whisked away to police station for an alleged offence.

65. (n.63) 122.

66. Ibid, at 122-123.

67. Ibid

made of the application of the doctrine under s. 5(a) of the old Act *viz a viz* the effects of the provision of section 3 of the new Evidence Act, which unarguably renders the doctrine no longer, not even indirectly part of the Nigerian law of evidence. From the analysis it came into view that as opposed to the repealed Act which allowed reception of facts admissible under some other rules including the received English Common law, the new Act obviously does not accommodate importation of common law rules of admissibility. But as section 4 dealing with relevancy of facts forming part of the same transaction embraces much more fields than covered by the doctrine the purported abolishment of the doctrine is one without consequence, as the doctrine merely gave up the ghost as *res gestae* but reincarnated in a superlative form as fact admissible under section 4 in the Evidence Act 2011.