PROSECUTING AND DEFENDING WHEN A PROSECUTION WITNESS DOES NOT WANT TO ATTEND COURT

What happens when a witness sought to be relied on by the prosecution does not want to attend court to give evidence, but comments have been made at the time or soon after the event?

Comments made on a 999 call, captured on a police officer's body worn camera or made to the emergency services could be adduced as evidence without the witness attending court.

As these statements are not made in oral evidence, if they are to be adduced as evidence of any matter stated, such as whether an assault took place or who did it, they are hearsay. These statements are inadmissible unless an exception applies.

The prosecution are most likely to use the common law exception of *res gestae* (section 114(1)(b) of the Criminal Justice Act 2003 (the "**CJA 2003**"), preserved by section 118(1) of the CJA 2003) to adduce these comments.

The prosecution could seek to adduce the *res gestae* statement despite having a withdrawal statement from the witness, provided they are satisfied that there is enough evidence to provide a realistic prospect of conviction and that it is in the public interest to prosecute.

It is worth noting that a notice to introduce hearsay evidence under the *res gestae* exception is not required (Criminal Procedure Rules, rule 20.2).

Res gestae statements are admissible as evidence of any matter stated in three sets of circumstances:

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

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

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

Before considering admitting the *res gestae* statement, the court should, so far as possible, discover why the witness has not attended (*Edwin Wills and Stacey Wills v Crown Prosecution Service* [2016] EWHC 3779 (Admin)). So, if a complainant has unexpectedly not arrived at court to give evidence, it is inappropriate for the court to proceed to considering whether it is appropriate to admit the statement under the *res gestae* exception without first determining the reasons for the non-attendance.

Admitting statements via the *res gestae* exception without calling a witness means that the defence do not have the opportunity to cross-examine the witness and test the accuracy of their account. Consideration should be given as to why the witness is not at court, how easy it would have been to call the witness and the circumstances in which the statement was made.

The defence could seek to exclude the evidence on the basis of unfairness under section 78 of the Police and Criminal Evidence Act 1984. Alternatively, the defence could submit that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it (section 126 of the CJA 2003).

Where the maker of the statement is known but unable to attend, including through fear, the prosecution should instead seek to admit the statement under section 116 of the CJA 2003. Where the complainant does not want to give evidence in support of a prosecution through fear, the *res gestae* exception should not provide a way round the fear considerations in section 116(2)(e) of the CJA 2003. Alternatively, the prosecution might seek to adduce the evidence through the interests of justice exception (section 114 of the CJA 2003), though this is to be used with caution.

If a reluctant witness can be found and brought to court, but is still unwilling to answer questions, fairness for all parties may still be achieved if the prosecution tender the witness for cross-examination (*Attorney-General's Reference (No. 1 of 2003)* [2003] EWCA Crim 1286).