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18 MAY 2005

**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**Lord Osborne  
Lady Paton  
CG B Nicholson, QC**

**KJ943/04**

**OPINION OF THE COURT**

delivered by

**THE RIGHT HONOURABLE  
LORD OSBORNE**

in

**Appeal against a Decision on the  
Competency and Relevancy**

by

**AMANDA FLEMING**

Appellant

against

**HER MAJESTY'S ADVOCATE**

Respondent

4 May 2005

[1] This is an appeal under section 174 of the 1995 Act by Amanda Fleming against a decision of the sheriff in Dundee of 1 December 2004, repelling a plea to the competency of these proceedings, which are a summary prosecution under section

27(1) of the 1995 Act, by refusal of the Devolution Minute which was lodged in this case. The Devolution Minute is reproduced in full in the appeal print. It is contended there that it would be incompetent for the procurator fiscal, as the representative of the Lord Advocate, to continue with the present proceedings upon the basis that they are incompatible with Article 6(3) of the European Convention on Human Rights. The way the matter is put in the Devolution Minute is this. In paragraph (i) it is said: "The refusal of legal advice and assistance or criminal legal aid in these proceedings is incompatible with Article 6(3) of the European Convention...."

[2] As the discussion before us proceeded it became evident that the summary of the situation in the Devolution Minute did not in fact represent the true issue. What was indicated in the course of the argument was that there was a contention, in the circumstances of this case, that the effect of the application of regulation 3 of the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 3) Regulations 2004 had been to bring about a breach of Article 6(3). The regulation in question amends regulation 4 of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. The effect is to provide that, except where proceedings have been brought under section 185 of the 1995 Act, for the purposes of the reference to summary proceedings in the regulations, "the following are to be treated as a single matter - (a) a single summary complaint or complaints which arise out of the same incident; and (b) proceedings under section 27(1)(a) and 28 of the 1995 Act (breach of bail conditions) arising out of the complaint or complaints referred to in subparagraph (a)."

[3] In the circumstances of the present case, a complaint alleging theft was brought against the appellant. In due course legal aid was granted in relation to that complaint, which made available a fixed sum or sums to provide for legal assistance.

Later, the Crown accepted a plea of not guilty to that complaint. Thereafter summary proceedings were commenced under section 27 of the 1995 Act arising out of an alleged failure on the part of the appellant to appear on a specified occasion at court. Under the Regulations of 2004, the legal aid certificate granted in respect of the first complaint must be seen as covering, as a "single matter", the proceedings under the second complaint. The true criticism advanced on behalf of the complainer was not as stated in the Devolution Minute that criminal legal aid was not available; rather it was that the funds available under the legal aid certificate were inadequate properly to enable representation in the second set of proceedings to be afforded.

[4] In practical terms, what was said to the sheriff was that the firm, in whose name the legal aid certificate had been issued in respect of the first proceedings, while prepared to argue the Devolution Minute, were not prepared to represent the appellant in relation to the section 27 proceedings. It appears to us that the question which is raised, whether there has been or would be, by the continuance of the proceedings under section 27, a breach of Article 6(3) will be likely to depend on whether it can be shown that no effective legal assistance is available in the circumstances to the appellant. In our opinion that has not been demonstrated. It is accepted that no attempt has been made to discover whether fresh solicitors would be prepared to act, so far as necessary, for the appellant in relation to the complaint under section 27 of the 1995 Act, under the existing legal aid certificate. We cannot speculate as to whether or not solicitors would be prepared to act in that way, but the fact that the matter has not been investigated in our view is fatal to the present appeal. Accordingly we shall affirm the decision of the sheriff.