PARTIES:	JOANNE COUGHLAN
	v
	PETER MARK JOHN THOMAS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA21 of 1998 (9715192)
DELIVERED:	9 July 1998
HEARING DATES:	1 July 1998
JUDGMENT OF:	Kearney A/CJ

CATCHWORDS:

Appeal – Justices – Appeal against conviction – *Justices Act* – "unlawfully damage property" under *Criminal Code*, s251 – application of *Criminal Code*, s31(1)&(2) to s251 – character evidence in this case treated as going only to the appellant's credibility – provocation under *Criminal Code*, s34 not available where offence *not* committed upon the property of the person giving the provocation – nature of "damage" – whether too late to seek to rely on appeal on break in "chain of evidence" as to exhibit, where tender of exhibit in evidence not objected to at trial –

Criminal Code (NT), ss1, 31, 34, 251(1)&(2)(c)
Justices Act (NT), s163(1)

Vallance v The Queen (1961) 108 CLR 56, followed.
Charlie v The Queen (unreported, Court of Criminal Appeal, 15 January 1998), followed.
Melbourne v The Queen (unreported, Court of Criminal Appeal, 20 June 1997), distinguished.
Van Den Hoek v The Queen (1986) 161 CLR 158, followed.
Jabarula v Poore (1989) 96 FLR 34, referred to.
Samuels v Stubbs (1972) 4 SASR 200, referred to.
R v Ireland (1970) 126 CLR 321, referred to.

REPRESENTATION:

Counsel:

Appellant:	J. B. Lawrence
Respondent:	W. J. Karczewski

Solicitors:

Appellant:	NTLAC
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	
Judgment ID Number:	kea98013
Number of pages:	25

kea98013

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA21 of 1998 (9715192)

IN THE MATTER of the *Justices Act*

AND IN THE MATTER of an appeal from a conviction by the Court of Summary Jurisdiction at Darwin

BETWEEN:

JOANNE COUGHLAN
Appellant

AND:

PETER MARK JOHN THOMAS
Respondent

CORAM: KEARNEY A/CJ

REASONS FOR JUDGMENT

(Delivered 9 July 1998)

The appeal

The chain of events which eventually led the appellant to this Court began, according to her, when she bought a hot dog in a shop and found that it contained "a sausage cut in half in 2 pieces of crust … with no butter", and continued through an argument over 30 cents.

The appellant appeals under s163(1) of the *Justices Act* against her conviction on 16 April 1998 by the Court of Summary Jurisdiction at Darwin, on a charge that on 26 June 1997 she unlawfully damaged property – a cash register – the property of Uncle Sam's Take Away shop. That is an offence under s251(1) of the *Criminal Code*; it carries a maximum punishment of 2 years imprisonment.

The proceedings in the Court of Summary Jurisdiction

On 15 April 1998 the appellant consented to summary trial and pleaded not guilty before the Court on a charge of causing aggravated unlawful damage to the cash register. The circumstance of aggravation alleged was that the loss caused by the damage was greater than $500, namely $1325. If convicted of this aggravated offence, the appellant faced a maximum penalty of 7 years imprisonment under s251(2)(c) of the *Criminal Code*, though the maximum sentence which the Court could impose on summary trial under s121A of the *Justice Act* was 5 years imprisonment – see s122 of the *Sentencing Act*.

The prosecution case, in general terms, was that at about 4am on 26 June 1997 the appellant entered Uncle Sam's takeaway in Smith Street, Darwin. She ordered food from the counter, paid for it, and left the premises. Outside, she examined the food and found it unsatisfactory. She returned to the counter to complain. The shop attendant at the time was not the person who had served her. She argued with him about the quality of the food. He reimbursed her $2 on the basis that that was the sum she had paid for the food. There was then a

disagreement between them about the amount of the refund, the appellant claiming that she had paid $2.30. She had with her a bottle of water which she had purchased in the shop. She opened it, drank from it, and when the shop attendant stooped below the counter, she emptied some of its contents over the cash register, causing it to short circuit. This was the alleged criminal damage. She then walked out of the shop and eventually drove away.

The prosecution called 4 witnesses, 2 of the shop staff and 2 police officers. Mr Falconer was the shop attendant to whom the appellant complained. He testified that after their argument over the 30cents, he having given her $2:

> "… I bent down to pick up something and felt all water going all over my head and everything.
>
> … I felt water all over my neck and I stood up and she was walking out and there was water all over the till."

Then follows:

> Q: "Did you notice anything about the till?
>
> A: Yes, it ended up switching off and it had water on it."

He said that before this occurred he had opened the till "to give her her $2 back", and the till was then "functioning". Then follows:

> Q: "When did you next use the cash register?
>
> A: I couldn't because it blew up.
>
> Q: When you say it blew up, can you describe that please?
>
> A: It shorted out".

He said that the cash register after the incident "wasn't making any sound or anything. When you press the buttons it usually makes a beeping sound". He had not given anyone permission to damage it.

In cross-examination Mr Falconer agreed that both he and the appellant had become "heated"; the appellant had had a bottle of water. He was not cross-examined on his evidence about the condition of the cash register before and after he saw the water on it.

The second shop attendant to testify was the employee in charge at that time, Mr Lay. Clearly, English is a second language for him, and his evidence was somewhat difficult to follow, as will appear. He said that he was sitting at a table inside the shop at the time, talking to a friend during his break. He said that after hearing the argument about the amount of money which the appellant sought, the appellant, about whose identity in Court he was "not sure" -

> "… just grab the water … just throw it to the register … They just dropped it over the register and the register automatic off, so the water everyone because [Mr Falconer] turned around, so the water dropped to the register … Usually the register have a cover so if the water going through and the register automatic off, so we saw the water everywhere …"

He said that the water "just dropped" onto the cash register, making at the time what his Worship described as a "tipping motion". He was then asked about the register, viz:

Q: "Did you have a good look at the cash register after the lady left?

A: No, the lady still there, we looked at the register straight away, because we still changed some of the money, some still use it, and the water automatic come to the floor, everywhere floor, and the register.

Q: Did the cash register work after that?

A: No, not working.

Q: Was it working before that?

A: Yeah, before that."

In cross-examination Mr Lay said that he was not sure whether the lady used her left or right hand – "… but I know that she dropped the water. But we got a video camera and everything there." He was not cross-examined on his evidence that the register was "not working" after the water was dropped on it, and that it had been working before that occurred.

In re-examination the prosecutor took Mr Lay further on the question of the video camera. He said that a camera had recorded what happened, and that later on the same day he had given the Police a video tape. He agreed that a video tape shown to him and marked MFI 1 was "familiar".

Constable Strohfeldt was on duty at the time; he was one of the police officers who attended the scene, after being notified at 4.25am. He said that later he had obtained a security video tape from the shop; he identified the tape MFI 1 as that video tape. The tape was then received into evidence, without objection, as Exhibit P1, and played to the Court.

He formally interviewed the appellant a week later on 2 July 1997, for about 18 minutes; Exhibit P2 is the audio tape of that interview. It was also played.

In that interview the appellant said that she went into Uncle Sam's takeaway about 3.30am or 4am on 26 June 1997, and bought a bottle of water and some food. She then found that the food was "disgusting". She recounted her dispute with the shop attendant as to whether her refund should be $2 or the $2.30 which she claimed she had paid. She said:

> "So I requested the amount in a heated way, I was angry and he said "no, that was all." I um threw the bottle of water – ah not the bottle, only water."

Later she said that she "threw the bottle of water like that"; it landed "on the cash register … like that, not intentionally"; she had thrown the water "at the um the attendant, the serving", while holding the bottle in her hand, and then left the shop. She denied upending the bottle of water on the till, and said "my intention was to get him".

Constable Strohfeldt then referred her to what he said the security video showed of the incident; the appellant responded –

"A: "But a video doesn't show every incident, that doesn't show what was happening at the time. All that does is the picture.

Q: Mm. It shows you up ending the bottle directly onto the register, not throwing it in a motion that will cause the water to spray out towards the attendant?

A: Well, that was unintentional on my behalf."

Later in the interview the other police officer Senior Constable Agnew said that the security video tape showed the appellant "picking up your bottle of water"; he continued:

Q: "But at no time does it show you attempting or trying to spray water at anyone?

A: Mm.

Q: What have you got to say about that?

A: Oh, my intention wasn't to damage the cash register."

Senior Constable Agnew testified that when he went to Uncle Sam's on 26 June 1997 he observed that the cash register "was an electronic cash register."

After the prosecution had closed its case Mr Brown, then of counsel for the appellant, submitted that she had no case to answer on the charge.

First, he submitted that there was no evidence that the alleged damage was more than $500. The prosecutor conceded this point. His Worship eventually upheld Mr Brown's submission; that left criminal damage, simpliciter, as a possible verdict on the charge.

Mr Brown also submitted that the appellant had no case to answer on the charge of unlawful damage simpliciter, because there was no evidence from which it could be inferred that the appellant either intended to damage the property or foresaw damage to it as a possible consequence of her conduct. Either intent or foresight was required by s31(1) of the *Criminal Code*. The submission was that the prosecution evidence taken at its highest, showed that the appellant deliberately poured water onto the register; water was a benign substance, not noxious per se, and so the act of pouring water onto the register could not found an inference that she intended to damage it, or that she foresaw that damage could result. This was unlike, for example, striking the register with a hammer. Mr Brown submitted that his Worship could not take into account as a matter of common knowledge that electronic instruments are likely to be damaged by water.

The prosecutor noted the definition of the verb "damages" in s1 of the *Criminal Code*. It includes "destroys". He submitted that a "temporary functional derangement" of property constituted the damage required by s251(1) of the Code. Here the evidence was that the register ceased to work - and

thus was damaged in terms of s251 - after the appellant had poured water directly onto it. He submitted that the only inference to be drawn from her doing so was that she intended to damage the register, or foresaw that damage could flow from her action. He submitted that his Worship could take judicial knowledge of the nature of electronic instruments.

His Worship held that there was a case to answer on unlawful damage simpliciter. The defence then went into evidence.

The appellant testified that she had never been in any trouble with the law before. She was a student as at 26 June 1997, and had a personal computer at her home in Wagaman. She repeated the account I have already outlined, and testified –

> "I was throwing the water at [Mr Falconer] … I didn't intend to hit the cash register."

She said that she threw the water at him because "I was angry at him and I was throwing it at him." She demonstrated that she threw the water in a casting action. She said that she did not think about the cash register at the time and "it's not like it was right in my view either." She said –

> "After that we had short words and that's when I went outside …".

She said that she had not told any lies to the Police when they interviewed her on 2 July 1997.

In cross-examination the prosecutor played the security video tape, stopping it at various points and questioning the appellant in relation to what it appeared to display. I note that the tape shows the appellant quite clearly glance over her shoulder, then reach forward and apparently briefly upturn the bottle of water in her hand over the till, and then immediately leave the shop. In cross-examination the appellant continued to describe her movement with the bottle as a "casting action", saying –

> "I was throwing the water at [Mr Falconer]. I wasn't throwing the water at the cash register."

The following then appears:

> Q: "I put it to you that you reached forward, arm extended, and then tipped the contents of the bottle on the cash register?
>
> A: No.
>
> Q: I put it to you that that's exactly what you intended to do?
>
> A: No.
>
> Q: I put it to you that you realised … ?
>
> A: That wasn't my intent.
>
> Q: I put it to you that you realised at the time that would cause damage to the machine?
>
> A: No."

The other witness called by the defence was a witness to the good character of the appellant. It is common ground that the appellant was hitherto of "impeccable" character.

When the prosecutor addressed on the nature of the appellant's action with the water, his Worship said:

> "Subject to what Mr Brown says, you don't have to take me any further at this stage. I think there was a tipping motion on the camera so – what really troubles me, if I can indicate at this stage, is the question of intent."

The prosecutor submitted that the Court should infer beyond reasonable doubt that the tipping motion "was deliberate and therefore intended", and "the event which flows from it is damage to the [register]." The intent to cause that damage should be inferred. The prosecutor submitted that if it came to a question of foresight of damage under s31(1), the appellant foresaw that damage to the register could result from her actions and, in terms of s31(2), an ordinary person similar circumstanced and with that foresight would not have acted as she had with the water.

Mr Brown noted the evidence of the appellant's good character, and agreed with his Worship that its role in the case was that it could be taken into account "to say that therefore [the appellant] is to be trusted." Mr Brown submitted that the case "hinges on my client's mental state … her state of mind, her state of belief, her intent …". He stressed that what had to be proved beyond reasonable doubt in terms of s31 was that the appellant either intended to damage the register, or foresaw damage as a possible consequence of her conduct. As to that, he submitted in effect that the appellant's account

that she did not intend to damage the register, but to throw water on Mr Falconer, should raise a reasonable doubt.

His Worship then indicated that his present thinking was that the appellant poured the water onto the register; from the way that she did it, she "must have known at least that the water would be likely to strike the cash register". He said that there were then "the intent issues … under s31."

Mr Brown submitted that there was no evidence that the appellant foresaw damage by way of the register "shorting out" as a possible consequence of her act, and such foresight could not be inferred beyond reasonable doubt. Mr Brown also submitted, though he did not "press it as a matter of any great moment", that provocation under s34 of the Code had been properly raised on the evidence, and the prosecution had not negated it. His Worship made it clear immediately that he saw no substance in that submission.

The decision of the Court

On 16 April 1998 his Worship delivered, orally, a reasoned decision. He said, inter alia –

> "… the elements of this offence … appear … to be that the [appellant] unlawfully, secondly damaged, and thirdly property. I am of the view that there is no evidence indicating any authorisation or otherwise as suggested by the definition of the word 'unlawfully' [in s1 of the Code]. There is evidence from the Crown, and no evidence to the contrary, that the goods involved, namely the cash register, was damaged and indeed the cash register is 'property' within the meaning of the [definition of that word in s1 of the] *Criminal Code*.

So the three elements of the offence appear to me to have been made out."

As expressed in these terms, thus far there may be some quarrel with this analysis although Mr Lawrence of counsel for the appellant on the appeal expressly took no point on his Worship's approach to s31 in its application to the charge, and to the evidence. The offence before the Court at this stage was that in s251(1) of the Code, which provides simply :

> "Any person who unlawfully damages any property is guilty of an offence and is liable to imprisonment for 2 years."

Section 251(1) makes no explicit reference to any mental element of this offence. The reference to "unlawfully", however, brings in the definition of that term in s1 of the Code, and requires that the damage must be proved to have been done without "authorisation, justification or *excuse*" (emphasis added). As his Worship rightly pointed out, there was no suggestion of authorisation in this case; that is provided for in s26. Nor was there any suggestion of justification, provided for in ss27-29. The topic of 'Excuse' is dealt with in Division 4 (ss30-43) of Part II of the Code (ss22-43), which deals with 'Criminal Responsibility'. The requirement that the damage be proved to have been done without excuse therefore attracts the provisions of s31 of the Code which provides:

> "(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, a reasonable person similarly circumstanced and having such foresight would have proceeded with that conduct.

(3) This section does not apply to the offences defined by Division 2 of Part VI."

Despite the fact that s31 appears in Division 4 dealing with 'Excuse', it is clear from authority that its requirements constitute part of the complete definition of certain offences in the Code; see *Vallance v The Queen* (1961) 108 CLR 56 at 60 per Dixon CJ. It is clear beyond question that s251 of the Code is one of those offences; I adhere generally to what I said in *Charlie v The Queen* (unreported, Court of Criminal Appeal, 15 January 1998) at pp25-33.

It follows that it could not be said that the elements of s251 had "been made out" (p13), *until* the requirements of s31 had been established beyond reasonable doubt. However, his Worship was fully aware of the need that this be done, as appears from his very next remarks:

> "Therefore, but for section 31, the defendant would be found guilty of the offence. Section 31 is an excusing provision …".

His Worship then went on to consider and apply s31, citing the views of Nader J on that provision in *Pregelj v Manison* (1987) 57 NTR1 at 17, and continued:

> "The question, it seems to me … is: in these circumstances was the damage intended or foreseen? I accept that the onus is on the Crown to prove all of the elements of the offence, including those elements necessary for the purpose of section 31."

I interpose that this is clearly the correct approach. His Worship continued:

> "This morning I have taken the opportunity of viewing the video again and watched through the process of the [appellant] putting the water over the cash register, and [I] watched it a number of times. As a result of doing that *I am left in no doubt that the [appellant] intentionally poured the water over the counter in such a manner as to deliberately wet the keyboard of the cash register. She held the bottle directly over the keyboard. There was no attempt by her to wet the attendant* who had by that time moved from underneath the cash register to a position just beside, and the video shows his shadow, but not his figure, where – or anywhere near where the [appellant] was pouring the water.
>
> *I therefore don't accept the [appellant's] evidence*, that was, *that the water was* – my used words were – '*cast*', or 'thrown', *so as to hit the shop attendant*. It is unlikely that she would have intended to show anger in any event against the attendant who had after all gone to some considerable trouble to find out the correct refund in the circumstances. If she was angry, one would expect her to be angry at the chef, or the cook, or the proprietor of the premises and not merely the attendant whose job it was to refund the money.
>
> *The [appellant] has strongly protested her lack of intention to harm the cash register*. She says through her counsel that she did this [that is, protested this lack of intention] when she was not judicially aware of the results of her behaviour, i.e. when she was being interviewed by the police, and did not know what she might be charged with and was led to believe that there would only be a fine.
>
> I accept this [that is, her evidence that the Police told her she was likely only to be fined] because the constables were unable to deny the fact that the conversation took place. As against this, there has been of course a massive publicity campaign regarding mandatory sentencing for property offences, including this type of offence. Whilst I don't find that she intended to mislead the police [that is, in denying that she intended to damage the register], the denial is but one of the factors I need to take into account in reaching my decision.
>
> *The most telling evidence is*, as I have referred to above, *the manner of her wetting the cash register, which is quite contrary to her denials to the*

> *police and quite contrary to her evidence in court. The [appellant]* was on her own evidence sober, and *must be taken to have intended the consequences of her act, at least to the stage that the cash register would be made wet by the water. It is known that electronic equipment is likely to be damaged by water,* indeed everyone goes to great trouble to keep all electrical equipment dry."

It appears to me that here his Worship was finding that the appellant intended to wet the register, but (despite the last sentence) was not finding any more than that. However, he went on:

> "I hold the view that the wetting of the cash register, alone, without the subsequent damage, may be enough to constitute 'damage' within the meaning of [s251(1)]."

I do not consider that the evidence was such that any such finding could be made beyond reasonable doubt. However, his Worship did not find that the wetting *was* enough to cause damage, only that it "may be enough". The matter becomes moot, because his Worship proceeded to express his alternative finding, as regards s31, viz:

> "*But I also hold that* – or am of the view – *that to wet the cash register must have carried with it a foreseeability of the electrical problems that might follow and in fact did follow.*
>
> *I therefore find that the [appellant] must have,* within the meaning of section 31(1) *intended [the damage], or at least foreseen the damage as a possible consequence of pouring the water onto the cash register.* In the circumstances, if it was only a foreseen ability, [sic, foreseeability] I do not believe that a similar person so circumstanced would have proceeded with the conduct."

Here, in the last sentence, his Worship is addressing the requirements of s31(2); see p14. He continued:

> "I say this because of the likelihood of damage, that there was no really relevant provocative behaviour on the part of the shop keeper and I note that that issue was not pursued by defence counsel. Also, as the [appellant] has agreed in her own words, her behaviour was unacceptable behaviour.
>
> I therefore find that the case under section 251(1) has been made out and in the circumstances I find the [appellant] guilty." (emphasis added)

A few minutes later when considering sentence – a brief matter because of the mandatory provisions - his Worship added:

> "I can indicate the only other issue I did consider, which I didn't mention in the judgment, is the issue of provocation. I didn't think I had to mention it because of your indication yesterday you didn't press it seriously. I did consider it this morning in considering whether any other defences were available, but I found that I couldn't accept that the provocation came within the provisions of section 32 (sic), I think it is, of the Code."

The appeal

When the appeal came on for hearing Mr Lawrence of counsel for the appellant obtained leave to rely on the following 6 substituted grounds of appeal:

1. The Learned Magistrate erred in finding beyond reasonable doubt, on all of the evidence, the mental element of unlawful criminal damage.

2. The Learned Magistrate failed to give any consideration to the evidence of the Appellant's good character.

3. The Learned Magistrate erred in his assessment and dismissal of the question of provocation.

4. The Learned Magistrate erred in finding beyond reasonable doubt, on all of the evidence, the element of damage.

5. The video tape (P1) was inadmissible and not properly identified in the "chain" of evidence.

6. By aggregation of some or all of the above grounds the Appellant did not receive a fair trial.

Mr Lawrence traversed in detail the evidence given before his Worship. He treated Mr Falconer as "the best eyewitness"; Mr Lay's evidence was significant as to "the condition of the [register]"; Mr Lawrence referred to his evidence set out earlier (p4). Senior Constable Agnew saw the register in the shop shortly after the incident, but gave no evidence as to its condition at that time; I should say that I do not infer from that, that the register was not damaged or that any such inference to that effect should have been drawn by his Worship. Mr Lawrence noted that the appellant's evidence in Court (pp9,10) was consistent with her account (pp6,7) to the Police on 2 July 1997.

As to ground no.1 (p17), Mr Lawrence stressed that the 'most telling evidence' for his Worship was the appellant's manner of wetting the register, as shown on Exhibit P1. I accept that; see pp15,16. It was from viewing that tape that his Worship inferred that her act was a deliberate act and she either intended to damage the register or foresaw the possibility that her act of pouring water on it would do so. The appellant's consistent account – see pp6, 7 and 9, 10 – had been that she did *not* intend to damage the register. I note that his Worship disbelieved her (p15); I consider that clearly he was entitled to do so, on the evidence. Indeed, Mr Lawrence did not attack that conclusion. More subtly, he submitted that the appellant had told an initial lie (pp6, 7) as to her action with the water, and was then 'stuck with it' (pp9, 10);

nevertheless, he submitted that she was truthful as to not having an intent to damage the register.

I consider that his Worship was entitled on the facts to reach a common sense conclusion beyond reasonable doubt – as he did (p16) – that the appellant foresaw the possibility that throwing water onto the register could damage it. He did *not* have to draw that vital inference, but I consider that it was open to him to do so, and to do so beyond reasonable doubt. It was also open to him to draw the conclusion he drew in relation to the 'ordinary person' point under s31(2) of the Code (pp16, 17). I consider that his Worship was entitled to treat the register as a piece of electrical equipment on the facts, and further to treat the appellant as being aware that it was of that nature.

As to Ground no.2 (p17) the question of good character was particularly relevant when it came to his Worship considering whether the appellant intended to damage the register, or foresaw that damage could flow from her action with the water. Mr Lawrence submitted that on this point her previous good character should have been given weight, and it was not. I do not consider, however, that it could be said that his Worship failed to take into account the appellant's previous good character. His task was to weigh that up, as one factor to be taken into account. I am satisfied that he did weigh up all relevant matters, but disbelieved the appellant because of the effect of the security video tape evidence (pp15, 16). Further, his disbelief extended to her

statement as to her intent (p16). I consider that his Worship was entitled to treat the aspect of character evidence as going only to the credibility of the appellant, in view of the way Mr Brown had approached the matter (p11).

Mr Karczewski took the point that the evidence given by the appellant's character witness was not in fact proper character evidence. Strictly, that appears to be correct, but it is too late to take that point now.

Mr Lawrence relied on *Melbourne v The Queen* (unreported, Court of Criminal Appeal, 20 June 1997). In that case the learned trial Judge had directed the jury that when it was considering evidence as to good character it was entitled to consider that it tended to show that it was improbable that the accused had committed the subject offence. On appeal, the accused contended that the jury should *also* have been directed that evidence of good character could be used with reference to the credibility of the accused in denying the charge, as well as directly towards the unlikelihood of his being guilty. *Melbourne* (supra) is accordingly distinguishable on the facts from the present case, in light of what Mr Brown said (p11). In any event, it is clear that the effect of the good character evidence in both its aspects, was clearly outweighed by what his Worship saw on the video security tape, and legitimately inferred from that (pp15,16).

As to Ground 3 (p17), Mr Lawrence referred to his Worship's remarks (p15) setting out his reasons for not accepting the appellant's evidence that she threw the water at the shop attendant. Although the defence at trial had not pressed provocation (p12), Mr Lawrence submitted that it was raised on the evidence, and his Worship was therefore bound to deal with it. He pointed to the fact that there was no real dispute that there had been a "heated argument" between the appellant and Mr Falconer (pp4,9); the appellant was clearly angry with him for various reasons.

As Mr Karczewski conceded, it is clear from authority such as *Van Den Hoek v The Queen* (1986) 161 CLR 158 that where there is evidence of provocation fit to be left to the jury, it should be left to the jury. However he pointed to the lack of evidence in this case on the point of provocation. There is a lack of evidence of the 'wrongful act' complained of; and of loss of self-control. There was certainly an exchange of words, a heated discussion. Mr Karczewski submitted in effect that the thrust of the evidence supported his Worship's finding (p17) that there was 'no really relevant provocative behaviour' on the part of the shop attendant.

I note that his Worship had tersely rejected (p12) the excuse of provocation under s34 of the Code; not surprisingly so, in view of the fact that it was not pressed (p12). I consider that it was open to his Worship to reject it. In any event – and his Worship may have had this in mind (p17) – on the

admitted facts I consider that provocation under s34(1) of the Code was not open in this case because it is not suggested that the cash register was the property of Mr Falconer or the earlier shop attendant who had served the appellant, and accordingly her act of throwing water was *not* "committed … upon the … property of the person who gave [her] that provocation"; see *Jabarula v Poore* (1989) 96 FLR 34 at 38.

As to Ground no.4 (p17) – essentially, that the evidence of damage to the register was insufficient for a finding to that effect – Mr Lawrence submitted that no account should be taken of Constable Strohfeldt's hearsay evidence of what Mr Falconer had told him. I accept that proposition; there is no suggestion in the transcript that his Worship relied upon it. Mr Lawrence referred to Mr Lay's evidence (p4) as to the "register automatic off", and the lack of any evidence from any repair man. I accept that the appellant's answers to some of Constable Strohfeldt's and Senior Constable Agnew's questions in the interview, suggesting that the register was damaged, should carry no weight; there is no suggestion in the transcript that his Worship gave those answers any weight. I consider that for an electronic cash register to be shorted out by water thrown upon it, means that it has been damaged; see generally *Samuels v Stubbs* (1972) 4 SASR 200 at 203-4.

Mr Karczewski noted that the issue of damage had not been raised in the appellant's final submissions (pp11,12) before his Worship. Further, neither

Mr Falconer (p4) nor Mr Lay (p5) had been cross-examined on their evidence about the temporary dysfunction of the register. He submitted that the question of damage, in the end, had not been a 'live' issue before his Worship. Viewing the proceedings before his Worship, that appears to be the case.

Generally, Mr Lawrence stressed that the relevant part of the security video tape was "clearly an all-important piece of evidence". I agree. It was played before me, for some 9-10 minutes. Mr Lawrence submitted that too much weight had been given (p15) to what can be seen on that tape. I accept that obviously his Worship was persuaded by it, in reaching his conclusion as to the act done by the appellant, and in inferring what her intent was in doing that act, or what she foresaw as a possible consequence of her act.

As noted earlier, Mr Lawrence submitted that there was no sufficient evidence of the element of damage. I have mentioned his reference to Mr Lay's evidence; he also referred to Mr Falconer's evidence and the fact that there was no evidence from the 2 police officers on this point. He submitted that there was a possibility that there had been an automatic cut off, perhaps temporarily, when the water struck the register.

As to ground no.4, I consider that there were ample grounds on which his Worship could find beyond reasonable doubt that the register had been damaged by the act of the appellant in throwing water on it.

As to Ground no.5 (p17), Mr Lawrence noted that Mr Lay's evidence and Constable Strohfeldt's evidence, as regards the security tape, was the only evidence of the 'chain'. Mr Lay had failed to identify the tape as the relevant security video tape, and he constituted the first link in the 'chain'. Constable Strohfeldt did not testify that he got the tape from Mr Lay; he said he had acquired it from "management". Against that background Mr Lawrence submitted that the 'chain of evidence' as regards the tape was not complete. He conceded that it had been admitted without objection at the trial.

Mr Karczewski pointed out that the tendering of the security tape in evidence as Exhibit P1 had not been objected to at trial; I consider that in view of that it is too late for the appellant to take the 'chain of evidence' point now.

As to Ground no.6 (p18), Mr Lawrence relied on *R v Ireland* (1970) 126 CLR 321 at 331, per Barwick CJ. In this case, however, I consider that it cannot be said that by aggregation of the other grounds, or some of them, the appellant did not receive a fair trial.

I note that in general Mr Lawrence submitted that the case should be approached on the basis that because of the weight the prosecution had attributed to what was seen on the tape, it had not "presented sufficient

evidence in relation to other elements of the offence." As can be seen from the foregoing remarks, I do not accept that submission.

In the result I consider that none of the 6 Grounds of Appeal (pp17,18) have been established. Accordingly, I dismiss the appeal, and confirm the conviction. As noted earlier (p2), there is no appeal against the sentence of 14 days imprisonment, which is the minimum mandatory sentence following conviction for this offence.

Orders

Appeal dismissed; conviction confirmed.