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ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

SHAWN CASSISTA

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE J. W. BOVARD
on February 24th, 2014, at BRAMPTON, Ontario

APPEARANCES:

G. Mathurin

T. Hicks.

Counsel for the Crown

Counsel for Shawn Cassista

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1.
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MONDAY, FEBRUARY 24, 2014

THE COURT: Hello.

MR. HICKS: Hi, good morning, Your Honour.

THE COURT: Are you prepared to do the,
receive to judgment?

MR. HICKS: Yes, thank you. And so, Tom
Hicks. I appear as counsel for Mr. Cassista
who is sitting beside me, if that's
acceptable?

THE COURT: Okay.

MS MATHURIN: Good morning, Your Honour. For
the record, it's Mathurin, M-A-T-H-U-R-I-N,
first initial J. Your Honour, I'm here to
receive the judgment, Your Honour.

THE COURT: Thank you very much for coming.

R E A S O N S F O R J U D G M E N T

BOVARD, J. (Orally):

All right, these are the court's reasons for
judgment after the trial of Shawn Cassista on
the charge that, on November 29, 2012, he
assaulted a peace officer with intent to
resist the lawful arrest of himself.

This incident arose out of a situation where
Officer Bowen was participating in the
seasonal RIDE program. He was parked across
the street from a drinking establishment
called the Old Stable, observing people who
were leaving the establishment.

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He saw Mr. Cassista leave and he followed him to check his sobriety. He reported in his evidence that Mr. Cassista was speeding and took a hard right turn and squealed his tires and slammed on his brakes and he got out of his car and started running away. Mr. Cassista denies this. However, out of this incident the officer wound up arresting Mr. Cassista for impaired driving and eventually charged him with assault to resist arrest. Mr. Cassista denies that he was impaired and also that he assaulted the officer. So that's the background to the case.

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The issues are whether or not Officer Bowen's arrest of Mr. Cassista for impaired driving was legal and whether or not Mr. Cassista assaulted Officer Bowen with the intention to resist his arrest.

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The evidence was as follows: Officer Bowen said that he was working at around 11:20 on the evening of the day in question in the seasonal RIDE Program. He said that he was more or less parked across the street from an establishment called the Old Stable which has a liquor licence and he was observing patrons leaving the establishment. He saw a patron leave the establishment that turned out to be Mr. Cassista. It was at about 11:22 p.m.

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He said that Mr. Cassista turned onto Lakeshore Boulevard and speeded down the street. He was driving a 2001 Pontiac Montana van. The officer said the speed limit on that street was 50 kilometres an hour. He estimated Mr. Cassista was going approximately 80 to 100 kilometres an hour. He didn't have radar or anything. This was just his estimate.

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The Officer said that he followed Mr. Cassista because he wanted to check his sobriety. He turned his emergency lights on and he said perhaps his siren, as well, and when Mr. Cassista saw him, he made a hard right turn onto Stavebank Street and slammed on his brakes and during the turn he squealed his tires. The officer could not estimate how far Mr. Cassista had driven up to that point. He could only say that it was, "not a far drive," and that it was not more than 200 meters.

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Officer Bowen disagreed with the defence that it would not have been possible for Mr. Cassista to have speeded up to between 80 and 100 kilometres per hour over this distance in the type of vehicle that he was driving considering that he had four passengers. The officer said that he did not examine Mr. Cassista's engine, but he did not believe that the vehicle had been, "scouped up".

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The officer could not recall if there was a bank on the corner of Stavebank Street and Lakeshore Boulevard where Mr. Cassista stopped his vehicle. He said that as soon as he stopped the vehicle, Mr. Cassista jumped out of the car and ran about 10 to 15 feet across the road. Defence counsel asked him if he was going towards a bank. Officer Bowen said that he ran in that direction and that he chased him. He said that if he yelled at Mr. Cassista at that point, it was just to tell him to stop.

Officer Bowen disagreed that Mr. Cassista just walked a couple of steps towards the bank and then turned around and walked back towards him when he yelled at him to get his attention. He said that Mr. Cassista started yelling at him and that he did not have the right to stop him and that he was above the law and the courts. He said that the Highway Traffic Act and the Criminal Code did not affect him. He has sovereignty over all laws.

He disagreed with defence counsel's suggestion that Mr. Cassista walked back to his police car where they spoke for about two minutes before Mr. Cassista started yelling. The officer said that Mr. Cassista was very angry with him and he was swaying from side to side when he was speaking with him. He also

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observed that his eyes were red and watery and he had the odour of an alcoholic beverage on his breath.

Officer Bowen asked Mr. Cassista if he had had anything to drink and he told him that he drank a few beers and that there was nothing wrong with that.

He formed the opinion that Mr. Cassista's ability to drive a motor vehicle was impaired by alcohol. It had been about four to five minutes since he had pulled him over. Officer Bowen arrested Mr. Cassista for impaired driving. He based his decision on the following grounds:

1. He saw him leaving a liquor licensed establishment.
2. He was driving at a high rate of speed.
3. He made a hard right turn onto Stavebank street and as he did this he squealed his tires when he turned. The officer thought that he was trying to get away from him.
4. He slammed on his brakes.
5. He got out of his vehicle and ran away.
6. Once out of his vehicle, he started

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yelling at Officer Bowen in a bizarre manner that he was above the law and the courts.

7. He swayed from side to side while he was speaking with Officer Bowen. Mr. Cassista testified that he, "Might have been moving my arms around, but that was about it." He denied that he was swaying. Officer Bowen agreed that he could have been swaying due to the, "animated conversation they were having". He said, however, this was just one factor in all of the circumstances that he considered in deciding to arrest Mr. Cassista.

8. Mr. Cassista was very angry.

9. His eyes were red and watery.

10. He had a strong odour of alcohol on his breath. Mr. Cassista agreed that, "There probably was an odour coming from me, yes".

And finally,

11. He admitted to having had a few drinks.

Mr. Cassista testified that he did not accept his arrest by Officer Bowen. He said that he, "Reacted against being arrested because the officer was treating me like shit." When Officer Bowen tried to grab him by the arm to take him to his cruiser, Mr. Cassista walked

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backwards but he did not ever push him.

When he finally brought him to the rear of his cruiser, Mr. Cassista started yelling at his friends to get out of the van, according to Officer Bowen. Five persons got out and stood about 10 feet away from them, watching. This scared Officer Bowen. He disagreed that it was one of the occupants of Mr. Cassista's vehicle that got out and yelled to the others to get out to see what was happening.

The defence asked him if Mr. Cassista yelled to his friends to take his phone. Officer Bowen recalled, "Something about a phone." He did not remember that Mr. Cassista threw the phone to one of his friends. When Officer Bowen tried to put handcuffs on Mr. Cassista, the officer said that Mr. Cassista pushed him twice in the chest, and put up his hands in front of his chest in a, "fist like manner". The pushes moved him back a few feet, but he did not fall over.

Mr. Cassista continued to yell at Officer Bowen that he did not have to comply because he was not part of the Criminal Code or the Highway Traffic Act and he was above the law. Officer Bowen disagreed with the defence that Mr. Cassista did not say these things about being above the law until he was back at the police station. He also disagreed that all

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that Mr. Cassista said was that he was not getting into his cruiser and that he had no right to treat him the way that he was treating him. He denied that he was not trying to arrest him, but just trying to get him into the back of his car to administer an Approved Screening Device breath test.

In order to get control of Mr. Cassista and because he was, "in an assaultive manner," and there were, "guys all around me," Officer Bowen sprayed him in the face with pepper spray. The spray did not affect Mr. Cassista. He asked Officer Bowen what he sprayed on him and kept yelling, and he kept his fists up and wanted to fight. Officer Bowen kept telling him that he was under arrest and to get into his cruiser. Mr. Cassista continued to yell to him that he does not have to obey the law.

Officer Bowen called for back up. When other officers arrived, Mr. Cassista calmed down and peacefully got into the cruiser and let Officer Bowen handcuff him. Officer Bowen said that he arrested Mr. Cassista for assault with intent to resist arrest at this point, in addition to impaired driving. He gave him his Section 10(b) Charter rights and made a breath demand on him.

Mr. Cassista told Officer Bowen that his name was Seewhy(ph) and that he was a, "free man of

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the land." Officer Bowen admitted that in the notes that he made at the roadside, he only wrote down that he arrested Mr. Cassista for impaired driving. He did not make a note that he arrested him for assault resist arrest until after the Staff Sergeant decided that he would not be charged with impaired driving. He, he ascribed this omission to "human error." He just forgot to mention it. He stated that notwithstanding this, Mr. Cassista understood that he was being arrested for both impaired driving and assault with intent to resist arrest.

Officer Bowen called for a tow truck for Mr. Cassista's van and then took him to the police station for breath tests. He registered 50 and 60 milligrams of alcohol in 100 millilitres of blood. Although Officer Bowen arrested him for impaired driving, he said that he discussed the charge with the Staff Sergeant who decided, based on the breath readings, not to charge him with this offence.

Out of the nearly 200 persons that Officer Bowen has charged with drinking and driving offences, two have not gone forward as a result of his Staff Sergeant's review of the case. This includes Mr. Cassista. The other person also registered breath readings under 80. That was the case for the Crown.

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Mr. Cassista testified. He agreed that he drank two pints of beer during the two hours that he was at the Old Stable. When he left with his friends they were going to another establishment to play darts. He had to stop at the bank first, however, to deposit money for his rent. He pulled out of the parking lot onto Lakeshore Boulevard and, "sped up fairly quick just to get to speed of traffic, however, he was going approximately the speed limit, around 50 to 60 kilometres per hour". He thinks the speed limit was 50 kilometres per hour.

He noticed Officer Bowen's car, but he did not pay too much attention to it. He kept driving and looked in his mirror to see where the officer was, which indicates to me that he was interested in what the officer was doing. He turned right at Stavebank Street, but it was not a hard right and he didn't squeal his tires. He drove about 15 feet and parked. The bank was across the street. He had driven about 200 meters. He did not feel any effects from the alcohol, but he admitted that driving after having drunk alcohol was a concern. He also admitted that his friend, Jack, told him to take taxi, but he insisted that he was fine to drive.

He got out of his car and saw Officer Bowen's emergency lights flashing. He was about to

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cross the road when he heard Officer Bowen yelling to him to, "Hold it right there." Mr. Cassista told him to, "Hold on, hold on." He started walking towards Officer Bowen. Mr. Cassista walked about 20 feet and Officer Bowen took a few steps towards him. The officer raised his voice and ordered him to, "Do this and that", and before he had any contact with him or spoke to him, he told him to get in his cruiser. Those were the officer's first words to him. Mr. Cassista protested that, "You can't talk to me like that. That's, you know, inappropriate behaviour and unprofessional."

Officer Bowen continued to order him to get into his cruiser. Mr. Cassista testified that, "With his demeanour, the way he was talking to me, I basically asked him, or told him, that this is improper police protocol and I asked him if he was a rookie, because he just seemed like he was behaving like one."

Officer Bowen asked him two to three times what his problem was. He was getting rather aggressive and intimidating. Mr. Cassista told him that, "You're my problem right now." He said that, "If the officer would've approached me in a manner where he would've said, listen, excuse, sir, would you mind stepping over to the side of the road here so we can have a conversation, none of this

would've happened."

Mr. Cassista said that he was not yelling at Officer Bowen, but he raised his voice, "just to keep up to pace with him." Mr. Cassista objected to Officer Bowen telling him that he was drunk. He told him that he did not have the right to make such an, an accusation. Officer Bowen told him that he did because he was working on a RIDE Program. Officer Bowen ordered him a few times to get into his cruiser. Mr. Cassista told him that he would not, "because of the way you are talking to me." Then Officer Bowen arrested him for impaired driving.

Officer Bowen moved towards him with his hand out to grab his arm and Mr. Cassista said he moved back and told him not to touch him. They exchanged a few more words and things calmed down a little as they moved over towards the sidewalk. He thinks that he is the one that started going towards the sidewalk. He does know how it happened but he said that, "we wound up getting back to the police car, [sorry] getting to the back of the police car. He might've grabbed me and held me there or we just walked and continued to talk."

When they got to the back of the cruiser, Officer Bowen opened the door and grabbed him

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by the arm and tried to push him into the car. Mr. Cassista did not cooperate because, "it was just an inappropriate behaviour as far as I was, I was concerned. He was grabbing me."

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They exchanged a few more words and things heated up again. Officer Bowen kept trying to grab him and Mr. Cassista told him to, "Hang on. Hold on. Hold on a second here." He pulled out his phone and told Officer Bowen that he wanted to record the conversation. Officer Bowen told him no and tried to grab his phone. Mr. Cassista held it away from him, he backed up a little and threw the phone towards his friends.

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They said a few more things to each other and then, "Out of the blue, Officer Bowen sprayed me with pepper spray." Mr. Cassista got angry and asked his friends if they were seeing what was happening. Then another officer arrived and Mr. Cassista said he stopped resisting. Mr. Cassista said that at the roadside he did not say anything about his rights other than something along the lines that Officer Bowen was, "infringing on my rights here".

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At the police station, when he was with, Officer Bryant, the Breathalyzer technician, he asked him, "Where is the law written that I have to blow into the Breathalyzer?" He felt that his rights, "were being infringed upon

that I had to do something like that." Officer Bryant told him that it was in the Highway Traffic Act and he told the officer that it did not apply to him. He said that he based his "assumption on some legal research that I made in the past and I stand by that research." He testified that, "it is legal. It's case law and literally dozens of principles that support that argument." He blew into the Breathalyzer anyway. However, it was under protest.

Mr. Cassista reiterated that he did not tell Officer Bowen at the roadside that the Highway Traffic Act did not apply to him. Defence counsel asked him if he knew where Officer Bowen was when he was speaking with Officer Bryant. Mr. Cassista said, "I believe he was in the room, in the same room." (See page 63, line 16 to 18 of the transcript of his evidence given on December 11, 2013).

The Crown put it to him that he was implying that Officer Bowen heard his statements to Officer Bryant about the Highway Traffic Act not applying to him because he was in the breath room when he said that to Officer Bryant. In re-examination, defence counsel asked him where Officer Bowen was when he, Mr. Cassista, was speaking with Officer Bryant. Mr. Cassista replied, "I do believe that the officer was always in the vicinity. There was

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actually a desk out there in the hallway, like, you know, about 20 feet, not even 20 feet from the door of the Breathalyzer room or he was in that, you know, like, I, I don't know if he walked in. I can't remember if he walked into the actual Breathalyzer room or not, but he was definitely in the vicinity."

One can see how his evidence changed on this point. However, I do not find that it changes his principle contention that he did not say these things until they were back at the police station.

Mr. Cassista said that he was put in the cells for two to three hours after the breath test. While there, Officer Bowen came to see him and told him that he would not be charged with impaired driving, but he was going to be charged with assault resist arrest. This was the first time that anyone told him that he would be charged with this offence. Mr. Cassista insisted that he never at any time pushed Officer Bowen.

Jason [REDACTED] testified. He said that he has known Mr. Cassista for three years. They, "hang out quite a bit." He was with Mr. Cassista at the Old Stable. He did not think that Mr. Cassista was, "impaired or drunk." When they left to go somewhere else to play darts, Mr. Cassista drove about a hundred

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meters to a bank to make a deposit for his rent. He drove 50 kilometres an hour and made a normal turn onto Stavebank Street. There was no squealing of tires. He parked, got out of the vehicle and started to walk across the street towards the bank.

As soon as Mr. Cassista got out of the car, Mr. [REDACTED] saw Officer Bowen's emergency lights. Officer Bowen got out of his cruiser and approached Mr. Cassista. Mr. [REDACTED] could not hear what they said to each other. However, he said that Officer Bowen appeared, "very hostile." Mr. Cassista was trying to calm down the situation. Mr. [REDACTED] admitted in cross-examination that since he was still in Mr. Cassista's vehicle, he could not hear what was going on at this point. He agreed with the Crown that he said that Mr. Cassista was trying to calm things down because he's Mr. Cassista's friend and that, "consciously or subconsciously," he's biased towards him and is trying to help him.

Mr. [REDACTED] told the Crown that he heard Officer Bowen arrest Mr. Cassista for impaired driving. The Crown asked him if he heard Mr. Cassista, "rejecting that, saying, no." He replied, "I heard them that when Shawn was talking about proper police procedures and stuff." Mr. Cassista did not run anywhere according to Mr. [REDACTED]. Mr. [REDACTED] got out of

the vehicle to see what was going on. Mr. Cassista continued to talk to Officer Bowen about what was happening. Officer Bowen accused him of being, "impaired" and approached him to put him under arrest. Mr. Cassista's reaction was just trying to talk to him.

Mr. [REDACTED] did not see any physical contact between Mr. Cassista and Officer Bowen. Officer Bowen was yelling at Mr. Cassista. Mr. Cassista was, "just trying to talk to him in a rational, as if you and I are speaking right now." Mr. Cassista wanted to record the conversation, but was not able to. He dropped his phone and Mr. [REDACTED] picked it up. Then he saw Officer Bowen spray Mr. Cassista with pepper spray and Mr. Cassista gave up and allowed Officer Bowen to put the handcuffs on him. The only thing that he heard Mr. Cassista say to Officer Bowen was about, "proper police procedures." He never saw Mr. Cassista push Officer Bowen.

The Crown pointed out to him that in his statement to the police he told them that, "they started scuffling. Shawn was trying pull away." He answered that he could hear them arguing when he picked up Mr. Cassista's phone. What he saw, "when Shawn pulled away was the officer making the attempt to arrest him because the whole, I could hear the

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officer trying to place him under arrest, but I did not see any physical contact." The Crown pressed him, saying that, "they started scuffling. That indicates that you saw some physical contact, doesn't it?" Mr. [REDACTED] answered, "I saw, like I said, Shawn was pulling away. I could see that part. That's how I explained to the officer."

The last witness was Jack [REDACTED]. He has known Mr. Cassista for five years. He met up with Mr. Cassista that night at the Old Stable. There were others with them there, too. They decided to go to another establishment to play darts. Mr. [REDACTED] suggested to Mr. Cassista that they take a cab because he thought, "It would be in our best interest that if we were going to go somewhere else that we can just do the cab thing. It would be a lot easier, a lot simpler. Less risk if there was to be a risk, just in case we, if we wanted to stay a bit longer, this way the car is safe and we just, we can take the cab somewhere."

Mr. Cassista did not want to take a cab, however, so they all got into his vehicle and Mr. Cassista drove to the bank to, "pick up some money." This contradicts the reason that Mr. Cassista gave for going to the bank, but I do not find it to be a significant contradiction. There's no dispute that Mr. Cassista drove to the bank. The reason for

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this is not germane. Mr. [REDACTED] said that Mr. Cassista drove at the speed limit, although he admitted that he did not know what the speed limit was. He was going with the flow of traffic, however.

He put on his directional signal and turned on Stavebank Street smoothly in a normal manner. He pulled over and parked to go to the bank. In cross-examination, he agreed that when Mr. Cassista stopped his vehicle, "he already knew, he already told them there is a police officer behind the van."

This contradicts Mr. Cassista's evidence that he did not know that Officer Bowen was there until he got out of his vehicle. Again, I do not think that this difference is significant to the issues that I have to decide.

Mr. [REDACTED] said that Mr. Cassista did not get to the bank, however, because Officer Bowen stopped him. He said that Officer Bowen stopped in the middle of the intersection and, "kind of ran after him." Mr. Cassista was walking and it startled him. Officer Bowen called him over and Mr. Cassista went to him.

Mr. [REDACTED] got out of Mr. Cassista's vehicle about 30 seconds after Mr. Cassista did. He saw Officer Bowen going towards Mr. Cassista, talking and, "being a little bit aggressive."

There was a bit of a scuffle. Officer Bowen was, "getting into Shawn's pockets and stuff." Mr. Cassista told him to, "Hold on a second. I have to get this on tape. Let me get my phone. I have to record what's going on here, because it appears that you're not, you, you, you're not, you're not doing your duty as, as you know, this is not the proper procedure as officer, kind of thing." Mr. Cassista was trying to record the event. Officer Bowen sprayed him with something and Mr. Cassista threw his phone to him.

Mr. Cassista never touched Officer Bowen. But Officer Bowen was, "patting his pockets and stuff and checking him out and coming towards him." No one else but Officer [redacted] saw this patting down. Mr. Cassista did not appear to be affected by the alcohol that he drank that night, according to Mr. [redacted]. Mr. [redacted] saw Officer Bowen arrest Mr. Cassista. When he was cross-examined, the Crown suggested to him that, "his recollection overall of that incident is not clear, then, right?" Mr. [redacted] replied, "Well, it did happen a year ago, sir, but I just, I'm just going with what the, what, what I, what I remembered it." That was all the evidence.

I directed myself according to the Supreme Court of Canada's decision in D.W. v. The

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Queen, 63 CCC 3rd, 397, at 409 that,

If I believe the evidence of the accused, obviously, I must acquit. If I do not believe the testimony of the accused, but I'm left in reasonable doubt by it, I must acquit. And even if I'm not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I do accept, I'm convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

I will deal first with the issue of whether Mr. Cassista pushed Officer Bowen because my understanding of the Crown's case is that that is what constituted the assault on Officer Bowen that the Crown argues Mr. Cassista committed in an effort to resist his arrest.

I grant that Mr. Cassista acted in a belligerent manner with Officer Bowen, but I have a reasonable doubt that he pushed him as Officer Bowen said he did. He may have done this, but I am not convinced beyond a reasonable doubt that he did. My reasons are that, although his attitude towards the situation and toward Officer Bowen leave a lot to be desired, and his evidence was not

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without flaws, Mr. Cassista's testimony was credible and plausible. I find that the flaws in it did not detract from his credibility because they were not sufficiently important or germane to the issue of whether or not he assaulted Officer Bowen, or to his credibility. His credibility is obviously germane, but I find that the flaws in Mr. Cassista's evidence do not detract from his credibility.

Mr. Cassista admitted things that could've put him in a bad light and I think that that supports my view that he was testifying in an honest and credible way. He admitted that he had serious problems with how Officer Bowen was treating him and he was quite vocal about it. He admitted that he believes that certain laws do not apply to him. But in the circumstances of this case, I do not think that these factors damage his credibility regarding the issue of whether he assaulted Officer Bowen. But they do show that Mr. Cassista was not trying to paint himself in, you know, in sort of a rosy, perfect picture.

I believe that he was verbally resisting Officer Bowen's attempts to deal with him and that he tried to back away from him when Officer Bowen reached out to grab him, but the evidence on the whole raises a reasonable doubt in my mind that he assaulted him by

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pushing him, as Officer Bowen said that he did, or in any other way. I grant that Mr. Cassista's friends' testimony is suspect in the sense that Mr. [REDACTED] admitted that he is biased in Mr. Cassista's favour because they're friends and Mr. [REDACTED] said that he doesn't really have a clear recollection of all the events. I took this into consideration.

Mr. [REDACTED] told the police in his statement that there was a scuffle. But he was adamant that Mr. Cassista did not push Officer Bowen. Mr. [REDACTED] did not explain how there could be a scuffle without some physical contact. However, telling the police in his statement that there was a scuffle does not inextricably lead to the conclusion that Mr. Cassista pushed Officer Bowen. A scuffle does not have to include such a push. Mr. Cassista steadfastly denied that he pushed Officer Bowen and, although I acknowledge the limitations of Mr. [REDACTED] recollection, I give some weight to his testimony that he did not see Mr. Cassista push Officer Bowen. This would've been a major event that he would probably remember.

I did not find that Officer Bowen's testimony was credible with regard to whether or not Mr. Cassista pushed him and with regard to his contention that Mr. Cassista told him at the

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roadside that the Highway Traffic Act and Criminal Code and the courts, etcetera, do not apply to him and also, with his testimony that he arrested Mr. Cassista for assault with the intent to resist arrest at the roadside.

First of all, he did not note this in his notes that he made at the roadside. I find that this is a glaring omission and it is hard to believe that he would not put in his notes until later that he arrested Mr. Cassista at the roadside for assault with intent to resist arrest, because in his notes that he made at the roadside, he did say that he arrested him for impaired driving. So why would he leave the other offence out? It doesn't make any sense to me.

Officer Bowen is an experienced officer. He said he's done at least 200 arrests for impaired or drinking and driving offences. So he is not somebody that is not accustomed to taking notes.

Mr. Cassista's opinions that the law does not apply to him are a bizarre notion that I'm sure Officer Bowen does not encounter very often. How could he not include this in his notes that he made at the roadside as he is noting down all the other important things that happened? That didn't make any sense to me.

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More over, the fact that he made his notes that Mr. Cassista said these things at the roadside, after he said them to Officer Bryant, and after his decision to proceed with the impaired charge had been overruled by the Staff Sergeant, raises a suspicion in my mind that he was just trying to find a charge that he could make stick to Mr. Cassista. Officer Bowen clearly stated that he didn't write in his notes all the things that Mr. Cassista was saying about the law not applying to him until after he had been told that the impaired driving charge would not be laid.

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Officer Bowen admitted that in his notes that he made at the roadside he only wrote down that he arrested Mr. Cassista for impaired driving. He didn't make the note that he arrested him for assault resist arrest until after the Staff Sergeant decided that he would not be charged with impaired driving.

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As I said, Officer Bowen ascribed this omission to, "human error." He just forgot to mention it. I find it hard to believe that Officer Bowen would not write this in his notes that he made at the roadside. The assault on him is a serious charge and I'm not persuaded by his evidence that he just forgot to mention until later.

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This view is supported by the fact that, coincidentally, he did not note down that he arrested Mr. Cassista for the charge until after the Staff Sergeant overruled him with regard to the impaired driving charge; a factor which in itself raises a suspicion in my mind that he charged Mr. Cassista with the assault charge because he did not want him to get away scot free.

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Given Mr. Cassista's views on his legal immunity, I think that he would clearly remember when he was charged with the offences with which Officer Bowen charged him. He testified that Officer Bowen did not tell him that he would be charged with the assault offence until he was in the cells at the police station and he had finished his Breathalyzer test. I accept his evidence in this regard and I find as a fact that Officer Bowen did not charge him with the assault charge until he was overruled by his Staff Sergeant regarding the impaired driving charge.

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In addition, Officer Bowen's evidence about Mr. Cassista jumping out of his car and running away did not make any sense to me because there is no apparent reason for this behaviour. In these circumstances, any effort to get away would've been futile. I also find it implausible that in these circumstances Mr.

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Cassista would have done such a dramatic and futile thing as to run away when Officer Bowen was so close at hand. Officer Bowen would have obviously chased him and enlisted the assistance of other officers in the pursuit. Officer Bowen knew that Mr. Cassista was driving his van and it would have been easy to identify him by checking the registration of the vehicle.

Also, Mr. Cassista's friends were all in the van, so I'm sure that it's reasonable to infer that Mr. Cassista would have known that trying to hide his identity by fleeing at that point would have been, indeed, a futile gesture and I seriously question that he did that.

The defence evidence that Mr. Cassista only had two beers within the last two hours was not undermined. I accept it. Mr. Cassista testified that he did not think that his ability to drive was impaired. The defence evidence on this point was not undermined in anyway. His readings on the Breathalyzer support the defence evidence that Mr. Cassista was not affected very much by the alcohol that he drank that night. It is not believable that in these circumstances Mr. Cassista would bolt from the scene as Officer Bowen said that he did.

Therefore, for these reasons, I do not accept

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Officer Bowen 's evidence that Mr. Cassista assaulted him with intent to resist arrest or assaulted him in anyway. Given this finding, I do not have to decide whether Officer Bowen's arrest of Mr. Cassista for impaired driving was a legal arrest, because I find that there was no assault anyway. So consequently, I find Mr. Cassista not guilty of the charge.

MR. HICKS: Thank you, Your Honour.

THE COURT: Thank you very much.

MR. HICKS: I just want to thank my friend who, in the situation where there was no Crown assigned to this brief, agreed to come down and, and sit in. I appreciate her doing that.

THE COURT: Thank you. I do too, as well.

MS MATHURIN: No problem, Your Honour. No problem.

...WHEREUPON THESE PROCEEDINGS WERE CONCLUDED

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Certification

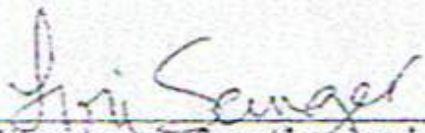
FORM 2

Certificate of Transcript
Evidence Act, Subsection 5(2)

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I, Lori Sanger, certify that this document is a true and accurate transcription of the recording of R. v. S. Cassista, in the Ontario Court of Justice held at 7755 Hurontario Street, Brampton, Ontario taken from Recording(s) No. 3111 201 20140224 094205, which has been certified in Form 1.

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April 7, 2014

(Date)


Lori Sanger
(Signature of authorized person)

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This certification does not apply to Reasons for Judgment, which were judicially edited.

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