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Reasons for Sentence - Frazer, J.

R E A S O N S F O R S E N T E N C E

FRAZER, J. (Orally):

5 INTRODUCTION:

1. On August the 28th of 1963 the Reverend Doctor Martin Luther King Junior had the following to say in what has now been recognized as his famous speech on the steps of the Lincoln Memorial in Washington, D.C., a speech that has come to be known as the *I Have a Dream* speech. And I quote in part:

15 "Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood. Now is the time to make justice a reality for all of God's children... The marvellous new militancy which has engulfed the Negro community must not lead us to a distrust of all white people, for many of our white brothers, as evidenced by their presence here today, have come to realize that their destiny is tied up with our destiny. And they have come to realize that their freedom is inextricably bound to our freedom..."

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30 I have a dream. "I have a dream that my four little children will one day live in a nation where they will not be judged by the colour of their skin but by the content of their character. I have a dream today. I have a

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dream that... little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers. I have a dream today."

5 S. 109 ORDER:

2. First of all Mr. Bradley, by virtue of the offence for which you have been convicted, and your record there will be an order pursuant to Section 109 of the *Criminal Code* prohibiting you from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance. Given the offence and your record, sir, that order will be in force for the rest of your life.

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BACKGROUND:

3. On the 15th day of July, 2006, on a beautiful summer evening the peace and quiet of Victoria Park, in the City of Kitchener, was shattered by the senseless racial attack upon a Mr. Francis Pitia by the accused, Lacie Bradley, and a group of his associates. That assault left Mr. Pitia unconscious and bleeding. The effects of that assault on Mr. Pitia have been felt not just by him, but throughout the city and the region, both in the black community, and all others regardless of colour.

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4. Mr. Bradley has pleaded guilty to the offence of assault causing bodily harm, the Crown having proceeded by indictment.

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THE FACTS:

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5. The facts agreed to are as follows: On Saturday, July the 15th Mr. Pitia had been to a function in Victoria Park, in the City of Kitchener. Victoria Park being a large park in the downtown area of the city, often referred to as the jewel of the city. He was walking with a friend. Mr. Pitia walks with crutches having been stricken as a young lad with polio in the Sudan, polio being a disease that has largely been eradicated in this country. As he approached the edge of the park at Joseph Street near his residence, he and his friend were approached by a group of several males and females shouting, "niger, niger you got to die."

6. Mr. Salah Dawoud was an acquaintance of Mr. Pitia, and was approaching him from another direction as this was occurring. After initially attacking Mr. Dawoud the group continued over a small knoll in the park, and began an attack on Mr. Pitia. His crutches were taken from him leaving him defenceless. He was pushed to the ground, and kicked, and punched. One of the group, not Mr. Bradley, used one of Mr. Pitia's crutches to strike him in a spear-like manner.

7. Residents nearby heard the commotion outside their apartments and responded to their windows to see the kicking and punching. One of those residents recognized Mr. Bradley's voice as the person uttering the racial slurs. They call 911, and as they await police, others go for help.

8. One of the attackers, according to Mr. Dawoud, appreciating the danger that Mr. Pitia was in intervened, and took away a crutch that one of the

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other attackers was using as a weapon. That was not Mr. Bradley who was using that weapon. Mr. Pitia was left bleeding and unconscious.

9. Perhaps because of a lack of communication and inexperience, police are not able to satisfactorily coordinate their initial investigation, and the attackers make good their escape. Mr. Bradley, as he flees the scene is overheard to say, "yeah we got him." Mr. Bradley himself was bloodied and injured. Within short minutes of the attack an opportunity to arrest Mr. Bradley was lost.

10. Mr. Pitia was transported by ambulance to Grand River Hospital. He required stitches to lacerations on the inside of his mouth. He had been kicked in the head. He suffered severe headaches, and pain in his shoulder, chest, and arm. An x-ray of his arm revealed that it had not been broken. His right eye was swollen and red.

11. Detective Felder of the Waterloo Regional Police was later assigned to the case, and through his efforts, it is said, evidence was gathered, and the strength of the Crown's case grew. Mr. Bradley was arrested on the 16th of July, and in the course of questioning by police absolutely denied having even been at the park, or in any way involved in this attack.

12. He professes to not being a racist, and expresses his disgust at that kind of behaviour. In that interview he equates the actions of racists to those of terrorist extremists, as being equally repugnant. He is detained at his bail hearing.

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13. Further investigation also revealed that Mr. Bradley and others had been drinking earlier in the park, and had been spoken to by police, and told to move along.

14. Mr. Bradley was said to be the leader of the attack. Mr. Bradley, however, did not utilize a crutch as a weapon, nor take one from Mr. Pitia. He takes the position that he stopped the attack of his own accord. He denies being involved in any secondary altercation at a nearby convenience store. The fight later on that evening with Mr. Noseworthy was unrelated to this event. He stands by his comment that he finds racially motivated violence to be repulsive, and wishes to express his shame at his conduct. He says he is not a proponent of racial hatred, and does not harbour racial hatred. He has apologized to Mr. Pitia for having to endure a horrifying, humiliating, and degrading attack.

THE PLEA OF GUILTY:

15. Mr. Bradley has pleaded guilty. That of course is the traditional expression of remorse and acceptance of responsibility. In this case however, it is more than that. A plea of not guilty and a trial in this case would not only cause everyone involved to be required to relive the disturbing circumstances of this assault, but it may very well have served to heighten the tension and feelings in the black community that have resulted from this case. Having said that, it is to be remembered that the plea of guilty in this case came on the morning of trial as a result of

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which witnesses laboured under the pressures and anxieties or preparing to testify.

VICTIM IMPACT:

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16. Mr. Pitia was born in war-torn Sudan, and lived many years in refugee camps in Uganda and Kenya. At age seven he was stricken with polio causing his right leg to become paralyzed. Having learned that Canada was a safe place to live he arrived here ultimately in 2003, eventually moving to Kitchener where he found community, friends, a home, a purpose and, most of all, safety.

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17. On the evening of this incident he had been out to a ceremony at Reception House, and on his return home had stopped to speak with some friends when he was attacked by the group. In his victim impact statement he describes being beaten down, and being kicked, and hit. He was unable to protect himself. He believed he was going to die. He was rendered unconscious. He awoke in hospital confused and in disbelief.

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18. Disbelief that the colour of his skin had been used against him.

19. Disbelief that this attack was wholly unprovoked.

20. Disbelief that it had caused him to feel less than human, and alone.

21. Disbelief that human beings could treat another human being this way.

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22. Disbelief that he had been robbed of his dignity, his pride, and all that he had worked so hard to achieve.

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23. He is now afraid to go to school, go out for a walk, or go downtown. He is reminded of this incident daily. He suffers lasting fears that he will be attacked again by Mr. Bradley's friends. He fears he may have to move yet again to be safe. He and members of the black community now believe that Victoria Park is not the place to go if you are black. In Mr. Pitia's own words it is a place where danger lives.

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24. Mr. Pitia lost his schooling over the pain and the fear that he continues to experience to this day as a result of this incident. The memories of Mr. Bradley's actions remain. His faith in God has given him the strength to try and move forward in his life. To draw from the words of your victim impact statement, Mr. Pitia, may I say to you, you are a valuable member of this community. You *do* have important things to say. You are a human being.

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25. Mr. Pitia's physical injuries are detailed in his victim impact statement marked as Exhibit Number Eight. Long-term consequences of this attack linger to this day. Mr. Dawoud is as much a victim in this case. His victim impact statement sadly mirrors the sentiments of Mr. Pitia. He too suffers the nightmares, and the memories of this incident. Melanie Hogg, as a witness, was sickened by what she saw. She prays that your destructive behaviour, Mr. Bradley, can give way to promise and renewal.

COMMUNITY IMPACT:

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26. The impact of this incident has also been felt throughout the black community. Their shock, outrage, and fear are understandable. Their fear lingers that they are to be targeted because of the colour of their skin. Their memories of the death of Mr. Howard Joel Munroe have been revived. They question their safety. Many feel trapped and alone. They too feel that they have been robbed of a park that has been so much a part of their lives. They feel further marginalized, unwanted, and devalued by the wider community response, or lack of it. They feel vulnerable, and remain in fear of the day that they may be next. This crime has shattered their sense of security that they sought in coming to this country. Those sentiments are as well detailed in the community impact statement filed with the court.

27. May I say to them do not be afraid. Have hope that this insidious disease called racial hatred will one day be eradicated. Have trust in those who are responsible for enforcing and upholding the law. Have faith that your humanity, your dignity, and your community will be restored, that you will once again feel welcomed and supported by those who despise this type of brutal crime regardless of the colour of their skin.

28. May I say to the community at large we must no longer think of we and they, we all must remember that many of us are immigrants ourselves, or children, or grandchildren of immigrants from all parts of the world. We must all ensure that Canada remains a safe place for all to live. We must all

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join together to speak out against racial hatred. We must welcome and embrace our new Canadians just as many of us were welcomed to this country. We have much to learn from others, their history, their culture, their stories of life. Let this case be a statement to all that your voices have been heard.

THE ACCUSED:

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29. Mr. Bradley testified on his own behalf on sentence. He was born in Kitchener. Sadly, he has not maintained any relationship with his mother. He speaks of her as a crack addict and a prostitute. He was raised, he told the court, by a drunken father, without supervision or structure, without guidance or nurturing. As a young teenager he began his life of alcohol and drugs. He has lived a large part of that adult life on the streets. His written apology, now marked as Exhibit Number Ten, was read aloud by him in open court. He professes his disgust at his actions. He insists this crime was not racially motivated, a statement with which the court continues to struggle. Mr. Bradley, your words and actions that night speak loudly of your racial hatred, much more loudly than your hollow apology from the prisoner's box. I sincerely hope that you are true to your word when you say you must change, that you will resist peer pressure, that you will fully engage the rehabilitative programs offered to you while serving your sentence, and will emerge as a teacher to others.

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30. I fear Mr. Bradley, that although the court must be ever mindful of your ultimate rehabilitation, I do not share your optimism.

THE CRIMINAL RECORD:

5 31. Mr. Bradley has been in the criminal justice system since 1999, approaching eight years. He has since been convicted of some ten property offences, he has since been convicted of five offences of violence including assault bodily harm, the present offence, robbery, and possession of a firearm. He has been placed on probation, by my calculation, a total of twelve times, and he has been convicted of breaching bail orders eight times. He has been convicted of breaching probation six times, and at the time of this offence was bound by two probation orders. The record also includes offences directly against the police. Mr. Bradley has been sentenced by my calculation nineteen different times by this court, and has had custody imposed varying from 10 20 open custody as a youth to numerous, modest jail sentences as an adult.

15 32. His response to probation has been described as abysmal. Exhibit 12 is the brief probation report of Ms. Fenton, who describes Mr. Bradley as 25 "criminally ingrained." He is said to suffer from anger issues, and drug and alcohol dependencies. Ms. Fenton reports that counselling has been offered but rarely followed through. She describes Mr. Bradley as highly resistant to any form of 30 intervention, even to this day. Her prognosis for Mr. Bradley is gloomy.

MR. KING:

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33. This community needs more people like Mr. King. More people like the person Mr. King has now become. He is prepared to once again offer Mr. Bradley a helping hand. Mr. Bradley, the picture of you with Mr. King, marked as part of Exhibit Number Nine, demonstrates that he has been in your life for many years. His evidence suggests that he has offered to help you in the past, and you have rejected him. His fear of your certain death in the penitentiary, in my view, must be viewed in light of the fact that having served a 14 year sentence in the penitentiary himself, his appearance today, and throughout this case, in my view, is the antithesis of such a proposition.

15 PRE-SENTENCE CUSTODY:

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34. Mr. Bradley has been in custody since July the 16th, 2006, the date of his arrest. What then is the impact of that pre-sentence custody on the sentence to be imposed today. As was said in the case of *R. v. Thornton*, 2007 ONCA 366, a judgment of the Ontario Court of Appeal released on March the 26th, 2007, and I quote from paragraph 19:

“Sentencing is an exercise of judicial discretion. Section 719(3) of the *Criminal Code* confers discretion upon the court to credit an offender for time spent in pre-sentence custody. This is traditionally considered on a 2:1 basis because legislated parole eligibility and statutory release do not take pre-sentence custody into account, and local detention centres ordinarily do not

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provide educational, retraining or rehabilitative programs."

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35. As was also said in the case of *R. v. Davis*, 2007 ONCA 385, also a judgment of the Ontario Court of Appeal released on May the 14th, 2007, and I summarize: The three reasons for granting a two for one credit for pre-trial custody are: one, the usually crowded jail conditions pending trial; two, the lack of rehabilitative programs; and three, the impact on the offender's parole eligibility.

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36. The Crown argues in this case that there were three pre-trial conferences with two previous counsel, the first on August the 16th, 2006 with the assistance of a Judge of this Court. The second in September of 2006, and a third on November 29th, 2006, in which in all of these pre-trials the Crown was accepting of a plea of guilty to the offence of assault causing bodily harm. On December 18th the date was set for the trial of this matter. The court can only infer that the setting of that date was a rejection by the accused of the offer which he then accepted on the eve of trial.

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37. Having regard then for the principle set out in *Davis*, the time-honoured practice of applying 2:1 credit for pre-trial custody can, in my view, be applied up to the date of the setting of the trial. In my view however, in setting the trial date the accused's circumstances changed. He had been three times offered a plea which he rejected. In doing so he accepted that his trial would not occur until May. There is no evidence before the court that Mr. Bradley suffered crowded conditions,

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5 a lack of rehabilitative programs, although that is referred to in *Davis* as a common occurrence, or any evidence about the impact on his parole eligibility. The position of the defence is essentially that when pre-trial custody is calculated on a 2:1 basis 22 months should be credited to the accused, thereby reducing what is conceded to be an appropriate penitentiary sentence to one of a reformatory length.

10 38. In the present case there is, in my view, no expectation that the accused would have availed himself of rehabilitative programs wherever he was to be sentenced, even if they were available. His record on probation speaks directly to that issue. There is no reason advanced to explain why it is that the accused waited another five months to accept the plea arrangement offered to him.

15 39. The Crown does not allege malfeasance on the part of the accused, but as was said in *Thornton* at paragraph 32:

20 "We see no reason... why it took the appellant an additional ten months to plead guilty. Indeed, given the appellant's apparent wish to obtain treatment, there was no logic, that we can see, in his postponing the sentence hearing and spending an extra ten months at the [Elgin Middlesex Detention Centre, the acronym being] EMDC. If it was his expectation (as would appear to be the case from our review of the record) that he would rack up more 'dead time' on a 2:1 basis so that he could eventually ask the trial judge to give him time served for the

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charge of 'over .80'... [in that case](thirty-six months) and a conditional sentence for the remaining crimes, his plan was ill-conceived. To give effect to it would be to turn the sentencing process on its head. It would allow accused persons to tie the hands of the trial judge and fashion their own sentences, as it were, rather than leaving it to the trial judge to craft the appropriate sentence in accordance with the principles of sentencing set forth in the *Criminal Code*."

40. Accordingly the time from July 16th, 2006 the date of his arrest to the setting of the trial date, a time during which the usual processes of the court unfolded, pre-sentence custody can, in my view, be calculated on a 2:1 basis for a credit of five months or the equivalent of a ten month sentence. For the reasons indicated, from the setting of the trial date forward on December 18th to the present time, a period of six months, it should be credited on a 1:1 basis, for a total pre-sentence credit of the equivalent of 16 months.

THE SENTENCE:

41. What then is the appropriate sentence to be imposed in this case? Counsel have each filed case briefs which will now become part of the record in this case. Madam Clerk, case brief submitted by Ms. Janzen Exhibit 13, and a case brief by Mr. Smart Exhibit 14.

CLERK OF THE COURT: Thank you.

THE MITIGATING FACTORS:

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5 THE COURT: 42. What then are the mitigating
factors? Mr. Smart urges upon the court the plea
of guilty. The court has already commented on the
significance to be given to that plea in this case.
10 Mr. Smart further argues that in mitigation Mr.
Bradley was not one who resorted to the use of a
weapon. That proposition has not been challenged
by the Crown, and the facts do not support it. Mr.
Smart further argues that globally speaking the
bodily harm was not at the higher end. Mr. Smart
15 argues as well a professed disgust by the accused
in those who are motivated by racial hatred. He
further argues that this attack was not pre-
planned, but was rather the result of significant
intoxication by the accused. Mr. Smart further
20 argues that Mr. Bradley is not a member or a leader
of any racist gang whose sole purpose is to inflict
racially motivated harm on others. He further
argues that Mr. Bradley's prospects for
rehabilitation are best served by a reformatory
sentence accompanied by lengthy probation.

THE AGGRAVATING FACTORS:

25 43. What then are the aggravating factors?
Although not the leader of any gang according to
the facts accepted on the plea, Mr. Bradley was
clearly a primary participant in this attack. The
attack occurred in a public park where persons must
be able to feel safe. The victim was a
30 defenceless, disabled man. The attack, both in
words and in deeds, was motivated by racial hatred.
In addition, the accused's apparent jubilation over
the apparent success of the attack. The accused

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fled leaving the victim bleeding and unconscious. His long record, his dismal performance on probation as a predictor of his likely response to any future probation.

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44. The court has had the benefit of the authorities submitted by counsel now marked as Exhibits 13 and 14 on sentence, and I do not intend to review them. The court expresses its thanks to both counsel for their reasoned submissions and their professionalism. The court charges itself in the language of sections 718 and following of the *Criminal Code*. In the court's view the location of this attack, the number of attackers involved, the disability of the victim, the racial hatred demonstrated by the accused, his lengthy record, and the remote prospect of his abiding by any terms of community supervision although being mindful that the court must never lose sight of the accused's prospects of rehabilitation, those factors in my view call for the court to impose a sentence that expresses this community's denunciation for this crime, and one which will demonstrate to this accused and others, that first of all Victoria Park must be safe, and racial hatred must be denounced in the strongest of terms.

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45. Stand up please Mr. Bradley. The Crown having proceeded by indictment, and having regard for the foregoing, in my view, an appropriate sentence in this case is one of five years in the penitentiary. Having regard for the pre-sentence custody calculated at the equivalent of a 16 month sentence

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the court imposes a sentence of 44 months in the penitentiary.

MR. SMART: I'm sorry. Excuse me, Your Honour, 44 months?

THE COURT: Yes.

MR. SMART: Thank you.

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