



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKANDA**

REPORTABLE

Case no: CA 01/2021

In the matter between:

MELUMZI TOM

Appellant

AND

THE STATE

Respondent

Coram: van Zyl DJP; Malusi & Laing JJ.

Heard: 01 August 2022

Delivered: 29 November 2022

FULL COURT APPEAL JUDGMENT

D VAN ZYL DJP:

[1] This judgment deals with the probative value of deoxyribonucleic acid (DNA) evidence in satisfying the standard of proof in criminal proceedings, and how it is determined.

[2] During the night of 2 November 2015, the complainant was confronted by an intruder in her house in the Lower Gwalane administrative area in the district of Peddie. The intruder covered the complainant's head with a blanket. When she offered resistance, it was met with violence by her being hit on the head and body with a hard object. At the same time, a gunshot went off, which struck the complainant in the foot. The intruder demanded that she hand over money to him. It was known in the community that the complainant kept money that belonged to the members of, what she referred to as a "tea society". After she had handed the intruder the money, he proceeded to rape her. When the complainant questioned why, he threatened to harm her son who was at school at the time preparing for his examinations, whereafter he would be attending circumcision school. The intruder also enquired about the whereabouts of the complainant's husband.

[3] The intruder thereafter attempted to erase all evidence of the rape by washing the complainant's vagina with water that he had fetched from her kitchen. Throughout the whole ordeal the complainant's head remained covered. Consequently, she was unable to identify her attacker, and at trial, was only able

to testify to the circumstances of the incident itself, which were not placed in dispute. Despite the intruder's efforts, DNA material was extracted from what was identified as semen, found on the tights worn by the complainant at the time of the incident. Two persons in the community were eliminated as suspects after DNA testing. The case went cold until three years later when the appellant was arrested in the Western Cape on an unrelated charge(s), and a reference DNA sample taken from the appellant was found to match the DNA profile from the semen found on the complainant's clothing.

[4] The appellant was subsequently indicted in the Bhisho High Court on charges of rape, robbery with aggravated circumstances, housebreaking and a number of other related charges arising from the attack on the complainant. He pleaded not guilty and the matter went to trial. That the crimes were committed was not an issue at the trial. The issue was the identity of the perpetrator. The prosecution exclusively relied on the DNA evidence for a conviction. The appellant in turn denied that he was the one who attacked the complainant in her house, and pleaded a defence of an alibi. The trial court rejected the appellant's evidence that he was not in the Lower Gwalane area at the time, and found that the DNA evidence was sufficient to find him guilty. It proceeded to convict the appellant on several of the counts and sentenced him to life imprisonment for the rape and to varying periods of imprisonment on the other counts. Those sentences

were ordered to be served concurrently with the sentence of life imprisonment. With the leave of the trial court, the appellant has appealed his convictions.

[5] The DNA evidence provided the basis of the evidence on which the appellant was convicted. Because the probative value of DNA evidence is informed by the nature of such evidence, it is fitting to start by examining what DNA evidence is. The basis of DNA evidence is relatively straightforward. All genetic material is stored in a person's DNA. DNA evidence can be extracted from traces of bodily fluids, such as saliva, blood and seminal fluid deposited during the commission of an offence. A laboratory analysis then creates a DNA profile from these traces. A DNA profile is determined by counting the number of repeated patterns, called short tandem repeats or STR, found at particular locations in the DNA of an individual. Once a profile is created, it is then compared against the DNA profile of a suspect. A match between the DNA profile of a crime scene trace and the DNA profile of a suspect is reported if the same series of repeated patterns appear in the results of both samples. This is followed by determining the rarity of the DNA profile by stating a statistical frequency, which represents the profile's expected frequency in the target population. In this matter the science behind DNA profiling, the method of DNA profiling, and the processes involved in obtaining a result, were dealt with in the forensic report and its annexure, complimented by the oral evidence of a forensic analyst called by the State as a witness. A convenient summary of the principles

underlying DNA evidence, and the method of DNA profiling, is found in the judgment of van der Merwe JA in *S v Bokolo*.¹ (Bokolo) In light of the issues raised in the appeal, there is no need to repeat it.

[6] As in the case of any other form of evidence, the starting point is the admissibility of DNA evidence, that is, is it capable of being accepted as part of the body of evidence from which a matter in issue must be determined? Evidence is admissible if it has probative value. It will have probative value if it is relevant, that is, if it could rationally affect the assessment of the probability of the existence of a fact in issue. In the factual scenario presented by the evidence in the present matter, and the issue of identification raised thereby, the DNA evidence is highly relevant in that it may provide fact(s), the existence from which an inference(s) as to the existence of a fact in issue may be drawn. The fact in issue raised by the evidence in the present matter is the identity of the person who assaulted and raped the complainant. What the prosecution had to prove was that the appellant was the donor of the DNA material left on the tights of the complainant, and that he was the person who attacked the complainant in her home in the manner set out above.

¹ 2014 (1) SACR 66 (SCA) at paras [8] to [16].

[7] DNA evidence has two characteristics that impact upon the manner in which such evidence is to be dealt with by a trial court. The first is that because it is based on specialised knowledge, and has a technical and a scientific basis, it is regarded as expert evidence. Its admissibility is subject to there being a sufficiently reliable scientific basis for the evidence to be admitted, and to the other principles applicable to the admission of expert evidence. The evidential value of this type of evidence, in turn lies in its reliability or trustworthiness. Its reliability is determined with reference to factors which may affect the integrity of the scientific analysis, such as the proficiency of the forensic practitioner who conducted the analysis; the integrity of the crime scene; the measure of control over the DNA samples and its chain of custody; the reliability of the procedures used for its analysis; the reliability of the statistical data used; and the soundness of the deductions drawn therefrom.

[8] At the hearing of the appeal, the admissibility of the DNA evidence and its reliability was not placed in dispute. The issue raised was narrowed down to the submission that without corroborative evidence, the DNA evidence alone was insufficient to convict the appellant. This submission in essence questions the probative weight that must be accorded to DNA evidence by the court in its assessment of whether the State had discharged the onus of proving the guilt of the appellant on the required standard. DNA evidence is best described by what it is not. Where the identity of the perpetrator of a crime is in dispute in criminal

proceedings, as in the present matter, it does not provide direct proof of that fact. It can only establish that someone could be the source of a genetic sample. As stated in paragraph [5] above, whether that person could be the source, is reported by analytical evidence with reference, firstly to the similarity of the same series of repeated patterns that appear in the two DNA samples, and secondly, to the rarity of that particular DNA profile. The rarity of the particular DNA profile is stated as a probability that a randomly chosen individual might have a DNA profile that matches the genotype derived from the evidence, by statistically estimating the population frequency of the varying genetic features in a specific reference class.² The task awaiting the trial court is accordingly to determine the probative value of the results of the DNA analysis, together the statistics that have been reported therewith.

[9] The determination of the probative value of the DNA evidence is done in the context of the facts of the case, the nature of DNA evidence, and the rules of evidence which apply thereto. It is in the latter aspect that the second characteristic of the DNA evidence lies. It is, in law, regarded as circumstantial evidence.³ Circumstantial evidence is evidence of a fact or facts from which the

² Meintjes-Van der Walt, L & Dhliwayo, P .. (2021) **“DNA Evidence as the Basis for Conviction”** PER/PELJ, 24, 3 - 40.

³ Bokolo supra fn 1 at para [18].

court is asked to infer another fact in issue.⁴ The fact that DNA evidence sets out to establish is that the DNA profile of the crime scene sample matches that of the accused person, from which the court is then asked to infer that the accused was the perpetrator of the crime. The two facts may conveniently be referred to as “primary” and “secondary” facts respectively,⁵ the primary fact being used for the drawing an inference(s) as to the existence of the secondary fact. DNA evidence is consequently by its very nature indirect, or as is commonly referred to, circumstantial evidence. With regard to the degree of certainty with which the primary facts must be proved in a criminal case, it always depends on the probative value of the individual facts themselves.⁶ Where, as in the instant matter, the fact on which the prosecution relies, constitutes an indispensable link in the chain of reasoning towards the fact in issue, namely the identity of the perpetrator, that fact must be proved beyond a reasonable doubt.⁷ This is in contrast with the situation where the State places reliance on a combination of a number of facts which are not individually capable of supporting the inference, but may do so when taken together, in which event it may not be necessary to prove the existence of each fact beyond a reasonable doubt. It was explained as follows in *R v Mtembu*:⁸

⁴ Zeffert and Paizes *The South African Law of Evidence* 3rd ed at page 101.

⁵ As it is referred to in Zeffert and Paizes *op cit* at page 104.

⁶ *R v Sibanda and Others* 1965 (4) SA 241 (RA) at 246 B.

⁷ *S v Mahlalela* (396/16) [2016] ZASCA 181 (28 November 2016) at para [15].

⁸ *R v Mthembu* 1950 (1) SA 670 (A) at 679.

“Circumstantial evidence, of course, rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work. But the border-line between proof and probability is largely a matter of degree, as is the line between proof by a balance of probabilities and proof beyond reasonable doubt. Just as a number of lines of inference, none of them in itself decisive, may in their total effect lead to a moral certainty (*Rex v de Villiers* (1944, A.D. 493 at p. 508)) so, it may fairly be reasoned, a number of probabilities as to the existence of the facts from which inferences are to be drawn may suffice, provided in the result there is no reasonable doubt as to the accused’s guilt. That was the view, I think, which underlay the use of the words “either proved or *shown to be probable*” in *Rex v Mthlongo* (1949 (2), S.A.L.R. 552 at p. 558 (A.D)) and see Wigmore on *Evidence* secs. 216 and 2497.”⁹

[10] The principles in relation to inferential reasoning are well established. The standard of proof beyond a reasonable doubt in criminal proceedings requires the application of, what the court in the oft-quoted case of *R v Blom*¹⁰ (*Blom*) referred to, as the two “cardinal rules of logic”:

⁹ At 680. See also *R v De Villiers* 1944 AD 493 at 508; *S v Sibanda* supra fn 6 at 246 B – H; *S v Morgan and Others* 1993 (2) SACR 134 (A) at 172 i – 173 a; *S v Smith en Andere* 1978 (3) SA 749 (A) at 755 A – B; and *S v Ntsele* 1998 (2) SACR 178 (SCA) at 189 c – d.

¹⁰ 1939 AD 188.

“In reasoning by inference there are two cardinal orders of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.**

- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”¹¹**

[11] Some of the key principles underlying the test in *Blom*,¹² as amplified in *R v De Villiers*¹³ are the following: the facts from which the prosecution seeks to draw the inference of guilt must not also be reasonably consistent with a hypothesis other than the one relied upon, in other words, the inference of guilt must be the only reasonable inference; there must be some evidential foundation to support the inference to be drawn, and speculation, conjecture or a bare possibility will not be sufficient; as the inferential conclusion sought to be drawn

¹¹ At 202 - 203.

¹² *Blom* supra fn 7.

¹³ *De Villiers* supra fn 8.

is determined against the strength of the factual premise provided by the context of the facts of the case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether the inference is consistent with the proved facts. The evidence must be considered as a whole, and not by a piece-meal approach;¹⁴ and, following from the fact that the burden of proof rests on the State throughout criminal proceedings to prove the guilt of the accused beyond a reasonable doubt, the accused person is not required to establish that some other inference should be drawn, or to prove particular facts which are to support such other inference.

[12] Circumstantial evidence is not considered to be inherently less reliable than direct evidence.¹⁵ Wigmore laments the use of the term “circumstantial” to denote evidence that does not in any way derogate in value from direct evidence.¹⁶ In *R v Taylor Weaver and Donovan*¹⁷ Hewart LCJ appositely said the following about the value of circumstantial evidence:

¹⁴ S v Reddy 1996 (2) SACR 1 (A) at 8 c-d:

“In assessing circumstantial evidence, one needs to be careful no to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality.”

¹⁵ Musingadi and Others v S 2005 (1) SACR 395 (SCA) at para [20].

¹⁶ See Wigmore The Law of Evidence 3rd ed Vol 1 para [25] at page 400.

¹⁷ 21 CR App R20 at 21.

“It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

[13] The fact is that the law draws no distinction between circumstantial evidence and direct evidence in terms of its weight or its importance. Either type of evidence or a combination of both may be sufficient to meet the required standard of proof in the factual context of a particular case. There is no reason, and none was advanced, for treating DNA evidence any differently from any other form of circumstantial evidence. There is accordingly, in my view, no room for any suggestion, either that (i) DNA evidence must as a rule be corroborated by other evidence, in the sense in which that term is understood,¹⁸ namely the presentation of evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable on the issues in dispute; or, (ii) as it was argued in this matter, that it can only serve as evidence that corroborates other evidence of the commission of the crime. There is no evidential or legal principle which prevents a case from being decided solely on

¹⁸ S v Gentle 2005 (1) SACR 420 (SCA) at 430 j – 431 a. See also S v Heslop 2007 (1) (a) SACR 461 (SCA) at para [12].

DNA evidence. As in the case of any other form of circumstantial evidence, the probative value of DNA evidence is ultimately determined on the facts, and in the circumstances of any particular case.

[14] It follows from the foregoing that the issues raised by the appeal are whether the State had succeeded in proving beyond a reasonable doubt that the DNA profile found on the clothing of the complainant matched that of the appellant, and if so, whether the only reasonable inference to be drawn therefrom, on the evidence as a whole, is that it was the appellant who left the semen sample on the clothing of the appellant when he raped her on the night in question. Both issues are determined by evaluating the evidential weight of the DNA evidence in the context of the all of the evidence at hand, inclusive of the appellant's alibi evidence.¹⁹ A court of appeal is in as good a position to draw inferences of fact.

“Where a finding of fact does not essentially depend on the personal impression made by a witness’s demeanour but predominantly upon inferences from other facts and upon probabilities ... a Court of appeal with the benefit of an overall conspectus of the full record may often be in a better

¹⁹ S v Mbuli 2003 (1) SACR 97 (SCA) at para [57]. See also S v Sithole (868/2011) [2012] ZASCA 85 (31 May 2012).

position to draw inferences, particularly in regard to secondary facts.”²⁰

[15] The primary fact will essentially be decided on the reliability of the expert evidence tendered with regard to the existence of a match, or the absence thereof, between the DNA profile of an accused person and that of the crime scene sample. The focus will accordingly be on matters such as the integrity of the scientific analysis; the soundness of the inferences drawn therefrom; the integrity of the crime scene; the measure of control over the DNA samples and its chain of custody; and the resolution of any conflict that may exist in opposing expert opinions when presented in evidence.²¹

[16] The determination of the secondary fact is, as mentioned, a matter of inferential reasoning, premised on the primary fact and such other facts as may be found to have been proved. By reason of the nature of DNA evidence, the focus of the enquiry will be on the weight to be given thereto in the wider factual context of the matter in determining the soundness of the inference to be drawn from the primary fact. In *Bokolo* the court pointed to a few factors which it considered relevant in determining the weight of DNA evidence:

²⁰ Union Spinning Mills (Pty) Ltd v Paltex Dye House and Another 2002 (4) SA 408 (SCA) at para [24], quoted with approval by Ponnann JA in Crossberg v S [2008] 3 All SA 329 (SCA) at para [149].

²¹ Bokolo supra fn 1 at para [19]. See also the authorities referred to in JA obo DMA v The Member of the Executive Council for Health, Eastern Cape (8/2021) [2022] ZAECHC 1 (21 January 2022) at para [17].

- “(i) the establishment of the chain evidence, ie that the respective samples were properly taken and safeguarded until they were tested in the laboratory;**
- (ii) the proper functioning of the machines and equipment used to produce the electropherograms;**
- (iii) the acceptability of the interpretation of the electropherograms;**
- (iv) the probability of such a match or inclusion in the particular circumstances;**
- (v) the other evidence in the case.”²²**

[17] It is evident that this was by no means intended to be an exhaustive list. The reason is simply that each case must inevitably be assessed on its own facts. In the factual context of the present matter, the factors of relevance with regard to determining the weight of the DNA evidence, are as follows. The first is that the evidence did not provide any reason to doubt the reliability of either the matching data or the statistical conclusion based upon it. The reliability of this evidence must be assessed, as stated in *Bokolo*, by having regard to the integrity of the DNA sample from the time of its collection at the crime scene, until its analysis in the laboratory. A change in the condition of the sample by contamination may impact on the reliability of the analytical data derived

²² Bokolo fn 1 at para [18].

therefrom. As stated earlier, the reliability of the DNA analysis was not placed in dispute in the appeal, and on the evidence itself, there is nothing obvious which detracts from either the soundness of the conclusion reached by the trial court that the DNA sample was not compromised during the different stages, or from the prudence of the decision by the appellant not to raise it as an issue in the appeal.

[18] Another factor which is relevant to the integrity of the DNA analysis and the statistical conclusion based on it, is the quality, or the lack thereof, of the DNA sample itself. Aspects in the evidence which support a conclusion that the condition of the DNA sample collected from the clothing of the complainant was good are the following: The item of clothing was directly associated with the rape of the complainant, as she was wearing the tights at the time she was attacked; the DNA results confirmed that the DNA sample found on the clothing came from a single source, as opposed to their having been more than one contributor of DNA material, which may have complicated the analysis of the sample by producing a mixed profile;²³ the sample was positively identified as being semen without any difficulty with regard thereto reported in the evidence which may have raised a reasonable possibility of degradation of the DNA material; and the number of repeat units at the STR locations (fifteen) which were identified for establishing a matching DNA profile.

²³ Bokolo supra fn 1 at para [21].

[19] There is further an absence of another explanation for the presence of the matching DNA on the complainant's clothing other than that it was deposited when the complainant was raped. The undisputed evidence was that immediately after her attacker had left, the complainant put her tights back on, and that she wore them until she was examined by a medical practitioner later on the same day, and received treatment for her injury at a hospital, where the item of clothing was collected from her. This serves to exclude the reasonable possibility of a secondary transfer of the kind of the DNA material onto the tights.

[20] Another aspect relevant to the weight of the DNA evidence is the fact that there is a geographical association between the appellant and the offences. The appellant's family home is in the same village. According to the complainant, it is situated within sight of her own home. He is related to the complainant by marriage. He worked in Cape Town but would return home occasionally. The appellant was seen in the village not long after the incident. The evidence of the complainant, which the trial court correctly accepted, was that she saw the appellant there in December 2015. The fact that the complainant's attacker knew that her son was to attend circumcision school in December, and that he asked about her husband, strongly suggests the person was from the same village.

[21] It was submitted in argument that the fact that the complainant did not recognise the voice of her attacker as that of the appellant, and that the person

knew that she kept water in the kitchen which he fetched to wash her with, when the complainant said the appellant had never been to her house before the incident, did not support the inference which the State sought to draw from the DNA match as being the only reasonable inference. The complainant's evidence was that she did not know the appellant personally, and that she had no active interaction with him. The complainant only knew the appellant from seeing him in the village. He had never visited her home before. There accordingly existed no reason for her to have recognised the appellant by his voice. She further testified that in a rural village with no running water, it is generally known that everyone keeps water in a container in the kitchen. It is further evident from the evidence that the complainant lived in a rural home with four rooms. There was no suggestion that the home was of a size that, unless the intruder knew the layout of the house, he would not have been able to locate the kitchen without receiving directions.

[22] A last and an important aspect is the statistical evidence which provides a probability of the specific DNA profile occurring within a given population, that is, that within the identified group of individuals, a profile occurs at a particular frequency that can be calculated mathematically. In the present matter that probability was stated as 1 in 1.6×10 to the 6th trillion, that is, the frequency with which persons in the target population might have a DNA profile that matches the DNA sample collected from the clothing of the complainant. The evidentiary

value of this evidence lies in the probability of a random individual in the target population possessing identical numbers of repeat units at all STR locations.²⁴ The lower the statistical frequency, the more discriminating the particular DNA profile is, and consequently the more probative the DNA match is. It is evident from the population frequency of the DNA profile in this matter that there is almost no measurable likelihood of a random match as it translates to a chance of 0.000000000000000000626 per cent.

[23] As mentioned, the appellant raised an alibi. His evidence was that he only returned to his family home in December 2015. It is trite that there is no onus on an accused person to prove his alibi.²⁵ The approach to such evidence is no different from any other evidence. It is not to be considered in isolation, but on a conspectus of the totality of the evidence.²⁶ As it postulates a conflict of fact, it requires a consideration of the evidence pointing to the guilt of the accused person against all the evidence indicative of his innocence, taking proper account of its inherent strengths and weaknesses, and weighing it against the probabilities

²⁴ It essentially represents the estimated rarity of the DNA profile in question, and avoiding what is referred to as “the prosecutors fallacy,” namely the assumption that the random match probability is the same as the probability that the accused person was not the source of the DNA sample. See Zeffert and Paizes *op cit* at page 124.

²⁵ R v Biya 1952 (4) SA 514 (A) and Sv Mhlongo 1991 (2) SACR 207 (A) at 210 d – f.

²⁶ S v Tshiki (358/2019) [2020] ZASCA 92 (18 August 2020).

and improbabilities on both sides.²⁷ By reason of the nature of the evidence in this matter, the assessment of the alibi evidence is made in the context of the test postulated in *Blom*. It is assessed as part of the body of evidence to determine if the inference sought to be drawn is the only reasonable inference. Should it be concluded on a consideration of all the evidence, including the evidence of the alibi, that the alibi raised is reasonably possibly true, then it must be concluded that the evidence relied on by the State does not exclude any other reasonable inference save the one sought to be drawn.

[24] By its very nature, the probative value of DNA evidence rests, to a great extent, on the probabilities raised thereby. The burden of proof beyond reasonable doubt will be satisfied if the evidence raises such a high degree of probability that the ordinary reasonable man, after mature consideration based on ordinary human knowledge and experience, comes to a conclusion that there is no reasonable doubt that the accused committed the crime(s) charged. In *S v Phallo and Others*²⁸ Oliver JA explained it as follows, after posing the question where the line between proof beyond reasonable doubt and proof on a balance of probabilities was to be drawn:

²⁷ *S v Chabalala* 2003 (1) SACR 134 (SCA) at para [15] and *S v Guess* 1976 (4) SA 715 (A) 715 (A) at 718 H – 719 A.

²⁸ 1999 (2) SACR 558 (SCA),

“In our law, the classic decision is that of Malan JA in *R v Mlambo* 1957 (4) SA 727 (A). The learned Judge deals, at 737 F – H with an argument (popular at the Bar then) that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused’s guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which “at one time found almost universal favour and which has served the purpose so successfully for generations” (at 738A). This approach was then formulated by the learned Judge as follows (at 738 A – C):

“In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused’s claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.”²⁹

²⁹ At 562 g to 563 e.

[25] The burden of proof beyond a reasonable doubt does not make it incumbent on the State to eliminate every conceivable inference or possibility which is suggested.³⁰ The proposed inference or possibility must be reasonable. Reasonableness is determined on the basis of the body of evidence and the probabilities which arise therefrom. If the proposed inference or possibility is found to be so improbable when weighed against the evidence, that it cannot be said to be reasonable, it may be rejected. As stated by Denning J in *Miller v Minister of Pensions*,³¹ the degree of cogency required in a criminal case before it can be concluded that the standard of proof beyond a reasonable doubt has been satisfied, **“need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable,’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”**

[26] I am satisfied that the trial court correctly rejected the appellant’s alibi defence when regard is had to its quality, and it is placed in the balance with the DNA evidence. A feature of the appellant’s evidence was its lack in detail, and

³⁰ S v Sauls and Others 1981 (3) SA 172 (A) at 182 G – H, quoted with approval in S v Reddy supra fn 14 at 10 b - c.

³¹ [1947] 2 All ER 372 at 373.

the trial court rightly also questioned its veracity. There is no reason to doubt either the matching data of the DNA evidence, or the statistical conclusion based thereon. The random ratio deduced from the DNA evidence, when it is evaluated in conjunction with the considerations dealt with in paragraphs [17] to [22] above, is highly probative. It is supportive of a conclusion beyond a reasonable doubt that the DNA profile of the appellant matched that of the sample collected from the complainant's clothing, and that the only reasonable inference to be drawn from that fact is that the semen was left on the complainant's clothing when the appellant entered her house, raped her, and committed the other crimes of which he has been convicted. The probative weight of the circumstantial evidence and the probabilities raised by it, when measured against the evidence as a whole is so significant and compelling, that it must leave the appellant's alibi evidence so improbable that it cannot reasonably possibly be true.³²

[27] For these reasons, I am satisfied that the State proved its case beyond reasonable doubt, and that the appeal must be dismissed.

SIGNED

D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

³² S v Shackell 2001 (2) SACR 185 (SCA) at para [30].

I agree:

SIGNED

T MALUSI
JUDGE OF THE HIGH COURT

I agree:

SIGNED

J G A LAING
JUDGE OF THE HIGH COURT

Appearances:

For Appellants: ADV J McCONNACHIE

Instructed by: THE REGISTRAR
HIGH COURT
EASTERN CAPE DIVISION
MAKANDA

For the Respondents: ADV V JODWANA-BLAYI

Instructed by: THE DIRECTOR OF PUBLIC PROSECUTIONS
BHISHO