In most criminal prosecutions where DNA evidence is utilized, the evidence serves to corroborate, in a powerful manner, other circumstances pointing to the guilt of the accused. But should DNA evidence alone be sufficient to convict when there is no corroborative evidence, except of the most generalized and non specific nature?

A recent U.K. decision held that DNA evidence, without corroborating evidence, was not sufficient evidence to convict under the particular circumstances of the case:

R. v. Watters
COURT OF APPEAL (CRIMINAL DIVISION)
October 19, 2000

PANEL: KAY LJ, SILBER J, JUDGE MELLOR

JUDGMENT BY: KAY LJ

JUDGMENT-1:

KAY LJ (reading the judgment of the court): On 18 October 1999 in the Crown Court at Birmingham before Mr. Recorder Mainds and a jury, the appellant was convicted of four counts of burglary and sentenced to a total of six years' imprisonment. On a further charge of burglary he was found not guilty and discharged. There were two further counts, 6 and 7, of attempted burglary and going equipped to steal in respect of which the learned judge directed the jury to bring in not guilty verdicts, and they did.

There was a co-accused charged in respect of the two latter counts, a man called Gary Greatrex, and formal verdicts of not guilty were entered in his case as well.

The appellant appeals against conviction by leave of the full court.

He was arrested on 16 December 1998 in connection with the two counts on which the learned judge directed acquittal. A DNA sample was taken from him and was matched with DNA profiles taken from cigarette ends that had been found at the scene of what were described as five sophisticated burglaries of commercial premises in Birmingham which had occurred over two years before, in 1996. Those burglaries were burglaries of a warehouse, a betting shop and three post offices.

There are features of each burglary that are remarkably similar, for example as to the manner in which the premises were entered and the sophisticated attacks on safes that then took place therein.
The prosecution alleged that the appellant was part of a team responsible for each of the five burglaries. They relied solely on the DNA evidence taken from the cigarette ends found at the scene of those burglaries. In so far as that evidence may not have been strong in relation to some matters, they indicated that the jury could draw an inference from the similar features that in fact the same team had been responsible for each of the burglaries.

The appellant denied the offences and contended that the DNA evidence was relatively weak.

It is necessary to consider only the DNA evidence. Valerie Tomlinson, a forensic expert, gave evidence for the Crown. She had analyzed the cigarette ends found at the scene of the five burglaries and undertaken STR profiling. Seven different regions of DNA were tested, including the one that indicates the sex of the person from whom the sample originated. A similar STR profile was produced relating to the appellant and was found to correspond with those taken from the cigarette ends. In relation to the first four burglaries, all seven regions of DNA matched. In her opinion the probability of a false DNA match in these circumstances based on the assumption that the appellant had no close relatives was 1 in 86 million. In relation to the cigarette end found at the fifth burglary, only a partial profile could be produced and so only five regions of DNA matched. In her opinion, the probability of a false DNA match in these circumstances, based on the assumption that the applicant had no close relatives, was 1 in 79,000.

Under cross-examination she conceded that if the appellant had two brothers the probabilities involved would reduce to 1 in 267 and 1 in 32 respectively. She agreed that the results do not mean that the cellular material actually did come from the appellant. She said that it was not, from the prosecution's point of view, as good as that. She also confirmed that DNA evidence should not be used in isolation and without other supporting evidence, however tenuous. DNA evidence in itself was not proof.

The prosecution relied upon some matters as providing support: firstly, that the applicant was a smoker or, more accurately, that he had admitted in interview that he had been on his way to purchase a packet of cigarettes; secondly, the Crown said it was relevant that the applicant lived in the general locality of the burglaries; and thirdly, that the appellant was a man and most safe crackers were male.

There was evidence from the police officer in the case, Detective Constable Piggott, that the appellant had two adult brothers and that one of them had been arrested and released without charge in connection with these offences. DNA samples had not been taken from him, nor had they been taken from the brother who had not been arrested. No other evidence was called which in any way eliminated the brothers from the enquiry.

A submission was made at the close of the prosecution case. As already made clear, the learned judge found no case to answer on counts 6 and 7 on other grounds. He rejected the appellant's submission that 1 in 267 was too great a margin of error for any jury to be satisfied beyond a reasonable doubt. He did so, he said, for two reasons. There was supporting evidence of his sex and the locality, and secondly, the brother's point did not arise because the defense had not supplied the names, addresses and dates of birth of the brothers. It is submitted to us that that ruling was wrong.

The judge in due course, the appellant not having given evidence, summed the matter up to the jury and dealt at some length with the DNA evidence. It is unnecessary in order to explain our reasons for our decision, to read the whole of the passage, but we read a part on page 19 of the transcript:

"There could be all sorts of reasons, but, members of the jury, those sorts of speculations are dangerous and I direct you not to draw any inference from the non-attendance of those individuals."

We make clear that that is the brothers. Then the particularly relevant part:

"It is a matter for you to decide whether the prosecution have satisfied you so that you are sure that the possibility of a brother committing these offences has been excluded. If the prosecution have so satisfied you that the brother point has gone, then you are entitled to consider the 1 in 86 million in respect of [counts] 1 to 4 and the 1 in 79,000 in respect of count 5. If the prosecution have not excluded that, then, members of the jury, you are left with a 1 in 267 and that is also a matter obviously for you to consider."

We have to consider the evidence as it was at the end of the Crown's case, and indeed as it was at the end of the trial, and ask ourselves whether there was a prima facie case that could safely be left to the jury.

This was a case where the principal piece of evidence, on the evidence of the expert witness, was not enough in itself for a jury to conclude with certainty that the appellant was responsible for this offence. It has to be contrasted, for example, to fingerprint evidence where the expert will say that the evidence he has found could only come from the appellant. The witness made it entirely clear that that was not this situation. Therefore it was necessary to look to see whether, firstly, the rest of the evidence in some way supported the DNA evidence so that, taken together, a proper inference of guilt could be drawn. Secondly, it is necessary to see whether in relation to the brothers the jury could ever reach the conclusion which the judge invited them to do that they could exclude the brothers from involvement.

Every case of this kind has to be judged on its own facts. There is no rule that enables the court to say, well, when a figure reaches a certain level then it is safe to leave it to the jury, but below that it is not. But in every case one has to put the DNA evidence in the context of the rest of the evidence and decide whether taken as a whole it does amount to a prima facie case.

We have endeavored to consider the evidence in this case. We have come to the conclusion that on the evidence available at the time this case should never have been left to the jury. Each of the matters to which we referred earlier was a matter upon which the jury would have difficulty in reaching a conclusion of certainty. The statistical evidence at that time, if the brothers were excluded, was high. But, there was nothing to exclude the brothers in this particular case. Indeed, one of them was, as the police officer had told the jury, suspected of being a member of this team. In those circumstances, although the odds were substantially in favor of the police having charged the right brother, one could not say for sure, as the jury was required to do, that that was the case. It seems to us in those circumstances on the particular facts in this case, where the matters relied on were at best weak, namely that the appellant was said to be a smoker, even though the evidence did not go that far, and that he lived locally - there was no evidence, for example, to exclude either brother because he was not a smoker, nor, for example, any evidence to exclude a brother because he lived in some distant part of the country, and accordingly, save that one had given a DNA sample and the others had not, there was nothing to exclude the brothers - the judge was wrong to invite the jury to consider whether they could exclude a brother.

The matter went on, in his direction to the jury:

"If the prosecution have not excluded that, then, members of the jury, you are left with a 1 in 267 and that is also a matter obviously for you to consider."

If the jury could not exclude a brother, then it seems to us there was only one thing they could do, which was to acquit. There was nothing further for them to consider. We conclude

that that direction was in fact wrong and unhelpful and, in the circumstances, would in itself cause an appeal against conviction to succeed.

We have taken care to confine our remarks to the circumstances of this case for the reason that we have already made clear: every case has to be viewed on the totality of the evidence in that case. DNA evidence may have a greater significance where there is supporting evidence, dependent, of course, on the strength of that evidence. We are not for one moment saying that merely because there was no other evidence of a cogent kind that this appeal has to be allowed. We simply conclude that on the facts of this case and the evidence that was available in this case this evidence was not strong enough to go to the jury and should not have done so. Even if we had been wrong about that, the directions given by the judge were insufficient to make clear to the jury what their consideration of the matter should be. For those reasons, we conclude that this is a matter where the points made by the appellant are valid.

Mr. Duck on behalf of the prosecution invited us to consider whether or not this matter could in any event be viewed as being a safe conviction. We take the view that no matter what evidence might now be available, this appellant faced a trial at which the evidence was that to which we have referred. In those circumstances, he was entitled with legal assistance to assess whether the Crown had made a prima facie case against him and, if not, to exercise his right and not to give evidence. If the evidence before the jury had been stronger, then his decision might have been different in that regard. Accordingly, we do not consider that one could ever conclude in circumstances such as these that the verdicts were safe verdicts, having regard to any extraneous material.

The further way in which extraneous material may be relevant is when the Court comes, as it must in this case, to consider whether or not it should order a retrial.

The other evidence results from more stringent tests that have been done on the DNA material that was available in this case. That is partly as a result of a case in which a 6 point match was found to produce two possible suspects, one of whom had been charged despite living at the other end of the country and had to be acquitted when it was appreciated that the DNA matched a second person. As a result, this case, and others, have been subjected to the more stringent enquiry to which we have referred. That has produced stronger evidence, which the Crown would wish to call if there was a retrial. It is unnecessary to recite it all. The crucial aspect of it, in our judgment, is the following sentence from the same witness, Valerie Tomlinson, which reads:

"I estimated the chance that a brother of Robert Watters would share the same DNA profile as him is about 1 in 29,000."

That means, as we understand it, that the odds are considerably more than was thought to be the case at the time of the trial in favor of the police having charged the right man. However, at the end of the day, greater though those odds are, they do nothing to eliminate the possible brother. They certainly make it unlikely, perhaps unlikely in the extreme, that it was the brother, but they are not sufficient, taken on their own, to enable one to be sure that it could not be the brother in the circumstances of this case. We do not think that that would be a sound basis for ordering a retrial.

It was submitted to us that it might be possible if the matter is sent back for retrial for evidence to be gathered which would exclude the brothers. The time for such an exercise was

before now and to invite the Court to say that somebody should have a charge still hanging over them on the basis of what might be found is clearly wrong.

The final matter in this regard to which we make reference is that Mr. Gottlieb on behalf of the appellant submits that this is a case where, if the first trial had been conducted properly and a proper ruling had been given, the appellant would then have been acquitted and no possibility of retrial could have followed.

We can see the force of such an argument. Because we have already reached a conclusion that the evidence is not strong enough to merit a retrial we find it unnecessary to consider whether that further ground might have caused us to take a different view if we had reached a different conclusion about the strength of the case. It is sufficient, therefore, to say that we have concluded that this is not a case in which we can properly order a retrial.

For those reasons, we allow this appeal. We quash each of the convictions and we make no order as retrial.

DISPOSITION:
Appeal allowed

We would appreciate hearing from our readers about similar cases, where despite the high statistical probabilities of random "matching" in the general population, it has been shown that a defendant whose DNA profile "matched" the crime scene biological evidence in the tested alleles did not or could not have committed the crime.