IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an appeal under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka and under Section 331 of the Criminal Procedure Act No. 15 of 1979.

Director General,
Commission to Investigate
Allegation of Bribery or Corruption,
No.36, Malalasekera Mawatha,

Complainant

-Vs-

C.A. No.141/2013

H.C. Colombo No. B 1690/2007

Herath Mudiyanselage Bandusena
Ekanayake.
2/4/1, Maligawatta Niwasa
Colombo 10.

Accused

And Now Between

Herath Mudiyanselage Bandusena
Ekanayake.
2/4/1, Maligawatta Niwasa
Colombo 10.

Accused-Appellant

Vs.

Director General,
Commission to Investigate
Allegation of Bribery or Corruption,
No.36, Malalasekera Mawatha,

Complainant-Respondent

BEFORE	:	**DEEPALI WIJESUNDERA, J.** **ACHALA WENGAPPULI, J.**
COUNSEL	:	Neranjan Jayasinghe for the Accused-Appellant. Wasantha Perera SSC for the Complainant-Respondent
ARGUED ON	:	08th June, 2018
DECIDED ON	:	06th July,2018

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ACHALA WENGAPPULI, J.

The accused-appellant was indicted by the Director General of the Commission to investigate Bribery and Corruption under two counts of soliciting a bribe of Rs. 5000.00 on 18th May 2006 and two counts of acceptance of Rs. 1000.00 on 19th May 2006.

After trial he was convicted on all four counts and was sentenced to imprisonment of one year on each of these counts. These terms of imprisonment were suspended for a period of five years. He was also imposed a fine of Rs. 500.00 on each count, in addition to the Rs. 1000.00 he accepted as a bribe.

Being aggrieved by the said conviction and sentence, the accused-appellant seeks to set the conviction and sentences aside on the following grounds of appeal;

a. trial Court has failed to consider his statement from the dock,
b. trial Court was in error when it accepted the virtual complainant's evidence as reliable, in the absence of the evidence of the decoy to corroborate it.

According to the case presented by the prosecution, the accused-appellant is the *Grama Niladhari* of *Hunupitiya*. On 30th March 2006, *Mohammed Hussein Mohammed Thuslin*, the virtual complainant has lodged an entry at the Slave Island Police regarding his lost wallet, which contained his National Identity Card, Driver's License and Revenue License to his three-wheeler.

The virtual complainant met the accused-appellant at the latter's office on 18th May 2006 with five copies of his photograph and a copy of his Police complaint to apply for a new identity card. The accused-appellant wanted 6 copies of the photograph and a photo copy of his lost identity card. The virtual complainant said that he did not have any copies of his lost identity card with him and thereafter the accused-appellant solicited Rs. 5000.00 from him, if he wanted a new identity card without a copy of the lost card. When the virtual complainant indicated of his difficulty of finding that amount, the accused-appellant has telephoned someone and then agreed to accept Rs. 1000.00.

On 19th May 2006, the virtual complainant made a complaint to the Commission and selected officer *Kulendran* to be the decoy. They have met the accused-appellant again at his office. The accused-appellant wanted him to take a photo copy of a receipt. When he returned with the receipt and its photo copy, the accused-appellant gave him an envelope and directed to put the photocopy and Rs. 1000.00 into it. Then the accused-appellant put that envelope into his black bag. Thereafter the officers have arrested the accused-appellant who returned the envelope from his bag.

During cross examination, the virtual complainant stated that he first met the accused-appellant regarding the lost identity card on 10th May 2006 for the first time and was told that he must provide 6 copies of his photograph along with a police report. On 18th May, he returned to the accused-appellant with photos and police report. He identified his handwriting in the application to obtain an identity card marked as P2, and was emphatic that it was he who filled in his date of birth. A contradiction, V1, was marked off his statement to the Commission where he has stated that it was the accused-appellant who filled in his date of birth by examining his driver's license.

The virtual complainant maintained that he went to see the accused-appellant only on the 18th May but did not answer when the date marked as 11th May was shown to him from P2. At one point he stated that he took the application home, but later changed it by having stated that he has filled it then and there. He again said he could not remember. He was

unable to recall the date on which he returned the application to the accused-appellant. When suggested that he obtained the application on 5th April 2006, the virtual complainant replied that he could not recall. When suggested that the accused-appellant has fulfilled his obligation on the 11th May by forwarding his application to the Divisional Secretariat, the witness claimed that he was unaware of it. He admitted that his mother operated a boutique shop and denied any knowledge of receiving a letter demanding payment of taxes.

At the time of the trial *Kulendran* has vacated his post and the prosecution could not call him as a witness.

The prosecution closed its case with the evidence of two official witnesses and the accused-appellant unsuccessfully made an application under Section 200 of the Code of Criminal Procedure Act No. 15 of 1979.

When the trial Court decided that he has a case to answer, the accused-appellant made a lengthy statement from the dock, narrating his version of sequence of events leading up to his arrest whilst denying the charges. In addition, he has marked two documents in support of his evidence.

In convicting the accused-appellant for the four counts of bribery, the trial Court accepted the virtual complainant's evidence as truthful and

reliable account. The trial Court, in dealing with the inconsistency of the evidence of the virtual complainant, decided that it was in relation to an insignificant factor and these infirmities are easily be attributable to lapses in memory in describing the sequence of events.

The first ground of appeal raised by the accused-appellant is in relation to the failure of the trial Court to consider his evidence.

In its judgment the trial Court has reproduced the evidence of the prosecution. Then it proceeded to analyze the prosecution evidence without referring to the contents of the dock statement. It is rather unfortunate that the trial Court, in its 17 page judgment, has failed even to mention that he made a statement from the dock.

It is the duty of the trial Court to consider the contents of the dock statement.

In ***Dharmadasa v Director General, Commission to Investigate Bribery or Corruption and Another*** (2003) 1 Sri L.R. 64, it was emphasized that "*... an impartial and adequate consideration of his case by a judge of fact is the right of every accused*" as per the judgment of ***Chandradasa v The Queen*** 72 N.L.R. 160. In the more recent judgment of ***Roshan v Attorney General*** (2011) 1 Sri L.R. 364, de Abrew J approved the observation that the trial judges are bound to make a genuine judicial analysis of its contents and

give cogent reasons for rejecting same in his endeavour to determine whether it would create a reasonable doubt in the prosecution case.

In view of these judgments, it is incumbent upon this Court to consider whether such a failure to consider the contents of a dock statement made by an accused, vitiates his conviction, as submitted by the accused-appellant.

In ***Udagama v Attorney General*** (2000) 2 Sri L.R. 103, this Court, having considered the pronouncement in ***Punchirala v The Queen*** *75 N.L.R. 174* that "*while it was necessary to point out to the jury the infirmities attaching to a statement from the dock, the only material in this case on behalf of the accused being that statement, it was the duty of the trial judge to leave the considerations of that statement, entirely to the jury untrammelled expression of opinion by him*", proceeded to hold that "*... the failure of the High Court Judge to consider the dock statement, which was the only material in this case on behalf of the accused -appellant, had caused serious prejudice ...*".

However, the failure to consider the contents of a dock statement would not result in a serious prejudice to an accused in all situations as an inflexible rule. In ***Vithana v Republic of Sri Lanka*** (2007) 1 Sri L.R. 169, this Court was of the view that even if the trial Court has failed to arrive at a conclusion whether to accept or reject the dock statement in which the accused has denied the incident, such failure has not occasioned a

miscarriage of justice in view of the evidence presented by the prosecution. A similar view was held by the apex Court in ***Dharmadasa v Director General, Commission to Investigate Bribery or Corruption and Another*** (supra) where the dock statement could not be given any credence.

This necessarily entails this Court undertakes an examination to determine the question whether the contents of the statement made by the accused-appellant from the dock is acceptable or at least could not be rejected.

Therefore, it is appropriate at this stage to consider the second ground of appeal of the accused-appellant.

It is claimed by the accused-appellant that trial Court was in error when it accepted the virtual complainant's evidence as reliable, in the absence of the evidence of the decoy to corroborate his evidence. Learned Counsel for the accused-appellant contended that in the absence of any corroboration, the trial Court should have refrained itself from acting upon the unreliable evidence of the virtual complainant which is tainted with several fundamental inconsistencies and inherent improbabilities. He contended that according to the virtual complainant, the alleged solicitation by the accused-appellant was made on the 18th May. He stressed the point that it is undisputed that the accused-appellant has tendered the perfected application of the virtual complainant requesting

the issuance of an identity card to the regional secretariat on the 11th May after issuing an acknowledgement to him and therefore the version of the prosecution becomes unreliable due to the said improbability.

The evidence of a virtual complainant need not be corroborated by the evidence of the decoy as per the judgments of ***Gunasekera v The Attorney General*** 79(I) N.L.R. 348 and ***Sunil v Attorney General***(1999) 3 Sri L.R. 191. However, ***Gunasekera v The Attorney General,*** the then Supreme Court recognized the principle that a trial Court could act on uncorroborated testimony of a complainant provided that the trial Court found it to be "cogent and convincing".

As already noted, in the instant appeal, the trial Court has decided to accept the evidence of the virtual complainant despite its proved inconsistency in V1 and other infirmities. It decided to accept his evidence attributing the infirmities to mere lapses in memory. The virtual complainant has given evidence before the learned trial Judge who delivered the judgment. Therefore, she has had the opportunity of observing demeanour and deportment of the witness in coming to the conclusion that he is a truthful and reliable witness.

In ***Ariyadasa v Attorney General*** (2012) 1 Sri L.R. 84 it was re-emphasized in view of several precedents on the point that;

"Court of Appeal will not lightly disturb a finding of a trial Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the trial Judge has taken such a decision after observing the demeanour and deportment of a witness."

This being the general approach the Court of Appeal would adopt, it also has recognized situations where there should be a departure from this approach. In delivering the judgment of ***Wijeratne v Attorney General*** (1998) 3 Sri L.R. 98, this Court has decided to allow the appeal before it, in view of judicial precedents of ***King v Gunaratne*** 14 C.L.R. 174 and ***Fernando v Inspector of Police, Minuwangoda*** 46 N.L.R. 210.

In ***King v Gunaratne,*** it was held that the following three tests would apply in such circumstances;

"1. Was the verdict of the Judge unreasonably against the weight of the evidence ?

2. Was there a misdirection either on law or evidence ?

3. Has the Court of trial drawn the wrong inferences from matters in evidence ?"

The judgment of ***Fernando v Inspector of Police, Minuwangoda*** adopted the view that;

"... an appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically although the decision of the Magistrate on question of fact based on demeanour and credibility of a witness carries great weight. Where a close examination of the evidence raises a strong doubt

as to the guilt of the accused, he should be given the benefit of the doubt."

This principle of law was consistently followed by this Court in ***Jagathsena and Others v Perera and Others*** (1982) 1 Sri L.R. 371 and ***Kumara de Silva and Others v Attorney General*** (2010) 2 Sri L.R. 169. In the Supreme Court judgment of ***Dharmadasa v Director General, Commission to Investigate Bribery or Corruption and Another*** (supra) this principle was again highlighted.

Thus, in the light of these judgments, this Court should venture to consider the uncorroborated testimony of the virtual complainant for its truthfulness and reliability by adopting the universally accepted tests in evaluation of the testimonial trustworthiness of a witness.

It is already noted that the accused-appellant challenged the credibility of the virtual complainant on the basis of his complaint, that the trial Court was in error when it accepted the virtual complainant's evidence as cogent, in the absence of any corroboration.

The contradiction marked V1 refers as to who filled the NIC number in the application for a new identity card. At the trial, the virtual complainant in his examination in chief emphatically claimed that it was he who wrote down his NIC number in the application with his own

handwriting. He maintained the same stance during his cross examination. However, in answering to Court, he said he could not remember. When V1 was marked where he has stated that it was the accused-appellant who copied his NIC number after examining his driver's license he admitted that it was the accused-appellant who filled in that detail.

In addition to this proved inconsistency, the virtual complainant was inconsistent as to when he returned to accused-appellant with his application. He could not recall whether he took the application home. He could not recall whether the application was given to him on the 10th May or 18th May. He could not recall when the application was filled in. He could not remember when he placed his signature to his application either.

The virtual complainant claimed that he went to meet the accused-appellant for the first time on the 10th May. He then stated in cross examination that he has handed over an application to the accused-appellant on the 10th May. When it was suggested to him that he has met the accused-appellant and obtained an application on 5th April, he said he could not remember. Then in answering to the suggestion put to him immediately after this answer, he admitted that he handed over his application on 10th May, having kept it for over one month with him. This is contrary to his own evidence that it was handed over on the 18th May.

His evidence of handing over the application on the 18th May to the accused-appellant is contradicted by another prosecution witness. Witness *Premanath* of the Divisional Secretariat confirmed that the application of the virtual complainant was received by his office on the 11th May with eight other applications and with that the accused-appellant has fulfilled his official obligation in respect of the application.

These inconsistencies in the virtual complainant's does not satisfy the test of consistency and the test of probability. If he met the accused-appellant on the 10th for the first time and handed over his application on the 2nd day, i.e. 18th May, then there is a vital contradiction and improbability regarding the sequence of events as narrated by the virtual complainant, since the perfected application was already received by the Divisional Secretariat on 11th May. If the application was received on 11th May, then the accused-appellant has forwarded the application either on the 10th May or on 11th May. However, the virtual complainant was emphatic that he met the accused-appellant for the first time on 10th May and only at the 2nd meeting which took place on 18th May, did he hand over the application?

Then why did the virtual complainant wanted to change the dates on which he went to see the accused-appellant, by shifting the entire episode by one full week ? His evidence does not provide an answer to this question.

This inconsistency coupled with the accused-appellant's suggestion and the consequent admission that the application was in fact issued to him on 5th April, seriously challenged the truthfulness and reliability of the evidence of virtual complainant. Clearly this inconsistency could not be ignored on the witness's failing memory. The virtual complainant was giving evidence only after a mere two years.

In addition, the accused-appellant claims that on 18th May, the virtual complainant came to see him to get the receipt of the application and a photograph certified by him so that he could cast his vote. There is undisputed evidence that there was an election scheduled for the 19th of May and the accused-appellant was making necessary preparations for it. The accused-appellant claimed in his dock statement that since he was busy with some wiring, he wanted the virtual complainant to place his receipt in an envelope and to leave it with his office bag.

The virtual complainant's waiting for over two months to obtain an application to apply for the lost identity card seemed an improbable claim. He has promptly lodged a complaint with the Police concerning lost documents on 30th March and has already obtained a duplicate revenue license to his three-wheeler to the lost one. He has also obtained a duplicate driver's license. All these points to support the fact that the virtual complainant may have obtained an application for a new identity card on 5th April as the accused-appellant suggested.

If that is the case, when he returned to the accused-appellant on the 10th May, the application must have been accepted by the accused-appellant since it has satisfied all the necessary requirements. This seems to be the case since the perfected application was received by the Divisional Secretariat on the 11th May. The virtual complainant was issued an acknowledgment by the accused-appellant that his application was received by him. The virtual complainant's claim that he handed over his application on 18th May is an impossibility since the accused-appellant has already forwarded it to Divisional Secretariat on the 11th May.

In the indictment filed by the Commissioner General, it is alleged that the accused-appellant solicited a bribe on the 18th May and accepted it on the 19th May for the issuance of a new identity card. If the application was received on 11th May by the Divisional Secretariat, then the alleged solicitation on 18th May is clearly a false allegation.

Then, in relation V1, the virtual complainant either lied to trial Court when he said it was his own handwriting the NIC number was filled in, or to the Commission when he stated that it was the accused-appellant who filled it in.

These irreconcilable inconsistencies of the evidence of the virtual complainant referred to above could not be attributable to his "defective memory or to limitation of his power of observation" as per the judgment

of ***Jagathsena v Bandaranaike*** (1984) 2 Sri L.R. 397 nor it could be considered as a "trifling contradiction" as per the judgment of ***State of Uttar Pradesh v Anthony*** 1985 AIR (SC) 48.

All these inconsistencies and improbabilities raises the important issue as to why the complainant places such an inconsistent and improbable version before the trial Court?

The accused-appellant sought to provide an answer when he stated in his statement from the dock that the virtual complainant wanted a letter from him over a tax issue with the Municipal authorities, which he refused to oblige and that had angered the virtual complainant and prompted him to lodge a complaint with the Commission.

In ***Gunasekera v The Attorney General*** (supra) it was observed that;

> *"The witnesses particularly in a "trap case" come with a prepared story and with the specific purpose of saying that the accused solicited the illegal gratification and that he accepted it. Even the most skilful cross-examination will find it well-nigh impossible to obtain contradictions on "matters material to the issue to be tried by the Court."*

When the inconsistencies and improbabilities of the version of the virtual complainant are viewed in the light of these judgments, it is our

considered view that his evidence could not be accepted as "cogent and convincing" as required by the judgment of ***Gunasekera v The Attorney General*** (supra) in the absence of any corroboration as to solicitation and acceptance of bribery.

We further hold that there is merit in the two grounds of appeal as raised by the accused-appellant and accordingly his appeal should succeed.

In the circumstances we set aside the judgment of the High Court dated 31st May 2013 and the sentence imposed on the accused-appellant.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL