



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

Case No: STL-11-01/PT/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 11 December 2013

Original language: English

Classification: Public

PROSECUTOR

v.

**SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ON THE PROSECUTION'S REQUEST FOR LEAVE TO APPEAL THE
PRE-TRIAL JUDGE'S DECISION OF 25 OCTOBER 2013 RE SMS MESSAGES**

Office of the Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan
Mr Emile Aoun

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes
Mr Mohammad F. Mattar
Ms Nada Abdelsater-Abusamra

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
Mr John Jones

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse
Mr Yasser Hassan

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaël Mettraux



INTRODUCTION

1. The Prosecution has in its possession, for investigative purposes, some Lebanese telecommunications call data records; these include some short message service, or SMS, records. Counsel for the Accused, Mr Hussein Hassan Oneissi, sought from the Prosecution the SMS messages relating to the mobile telephone of a Prosecution witness who allegedly identified Mr Oneissi. This Prosecution witness is said to be important to the Prosecution's case against Mr Oneissi.

2. In a decision on 25 October 2013, the Pre-Trial Judge ordered the Prosecution to disclose to the Defence all SMS records relating to the witness's mobile telephone.¹ The Prosecution has asked the Trial Chamber to certify this decision for interlocutory appeal; the Defence opposed the motion.² The Prosecution sought leave to reply.³ The Pre-Trial Judge also requested submissions – which the Prosecution subsequently filed – on possible redactions to his decision to allow it to be filed publicly.⁴ The Trial Chamber is now seized of this matter.

REQUEST TO CERTIFY DECISION FOR APPEAL

3. The Prosecution had sought to confine its disclosure of the SMS records to those messages sent by someone identifying themselves as 'Mohammed', and to any referring to a 'Mohammed'. The Pre-Trial Judge, however, ordered the Prosecution 'to disclose to the Oneissi Defence the material it seeks'. Neither the decision nor its disposition state precisely what this is, but from the submissions filed by counsel for Mr Oneissi,⁵ and paragraph 16 of

¹ STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, Decision on the Oneissi Defence's Request for Disclosure of SMS Content for a Telephone number, Confidential, 25 October 2013.

² STL-11-01/PT/TC, Redacted Version of the Prosecution Request for Leave to Appeal the Pre-Trial Judge's 'Decision on the Oneissi Defence's Request for Disclosure of SMS Content for a Telephone Number', 4 November 2013; The Defence for Hussein Hassan Oneissi Response to 'Prosecution Request for Leave to Appeal the Pre-Trial Judge's Decision on the Oneissi Defence's Request for Disclosure of SMS Content for a Telephone Number' filed on 4 November 2013, Confidential, 18 November 2013.

³ STL-11-01/PT/TC, Prosecution Request for Leave to Reply to the Oneissi Defence Response to 'Prosecution Request for Leave to Appeal the Pre-Trial Judge's Decision on the Oneissi Defence's Request for Disclosure of SMS Content for a Telephone Number', 21 November 2013.

⁴ STL-11-01/PT/TC, Prosecution Submissions on Proposed Redactions to the 'Decision on the Oneissi Defence's Request for Disclosure of SMS Content for a Telephone number' of 25 October 2013, Confidential with Confidential Annex A, 1 November 2013. The Pre-Trial Judge ordered the Parties to submit proposed redactions within five working days, 'failing which this decision shall be reclassified as public'. Thus, if no redactions are ordered, the decision becomes public.

⁵ STL-11-01/PT/PTJ, The Defence for Hussein Hassan Oneissi request for disclosure of SMS content for telephone number, 26 September 2013.

the decision it appears that this is *all* SMS records of the witness's mobile telephone that the Prosecution holds. That is, between 2005 and 2010.

4. In paragraph 18 of his decision, the Pre-Trial Judge found that the SMS records were material to Defence preparations under Rule 110 (B) of the Rules of Procedure and Evidence. However, he did not define which were material, nor why. The Defence submissions stated why they were material, but the decision did not.

5. The Prosecution sought certification to appeal the decision, arguing that it was based on a factual misinterpretation of its case against Mr Oneissi, namely that,⁶

‘all the SMS content related to the Witness’s phone number in the possession of the Prosecution is *prima facie* material to the preparation of the Defence case. This determination was based in part on the Pre-Trial Judge’s mistaken determination that the Prosecution’s allegations against the accused Oneissi are supported by this material’.

6. The Prosecution also argued that the decision expanded the Prosecution’s disclosure obligations beyond the strict requirements of the Rules, thus affecting the fair conduct of the proceedings. This, it is argued, will divert Prosecution resources and thus impact the expeditiousness of the proceedings. The decision will have a further impact on the fairness of the proceedings as it raises privacy concerns for all Prosecution witnesses and third parties in relation to SMS messages in the Prosecution’s possession. Certification for appeal is therefore necessary.

7. The Defence responded that the decision was not based on any misunderstanding of the case against Mr Oneissi, but rather on the need for Defence preparations in investigating, interviewing and then cross-examining the witness, as set out in the Defence submissions supporting the motion. The decision, moreover, does not expand the Prosecution’s disclosure obligations, and any ‘privacy concerns’ raised by the Prosecution are addressed by the Code of Professional Conduct for Counsel appearing before the Tribunal which imposes duties of confidentiality on counsel.

8. In their response, Defence counsel also sought an order that the Prosecution disclose the information to them *before* the Trial Chamber had decided whether to certify the decision

⁶ Prosecution Request, para. 9.

for appeal. The Prosecution sought leave to reply, arguing that this exceeded the scope of a response. The Trial Chamber orally informed the Prosecution at a pre-trial conference on 2 December 2013 that a reply was unnecessary. It was not going to make the order, as to do so would render meaningless an application to appeal against a decision to disclose something.⁷ The request for leave to file a reply is thus redundant.

9. Under Rule 126 (C) a decision may be certified for an interlocutory appeal only if it ‘involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceeding’. There is, however, no issue arising from the decision that could significantly affect the ‘fair and expeditious conduct of the proceedings or the outcome of the trial’.

10. The Pre-Trial Judge may have erred in not defining what was material to the Defence preparations under Rule 110 (B), in not explaining why *all* SMS records between 2005 and 2010 were material to Defence preparations. In that respect, his reasoning is implicit, as he noted,⁸

‘that the Prosecution’s allegations against Oneissi are supported by this content and that this material will be necessary for the Defence investigation on [the witness], for the preparation of its interview and for the preparation of the witness’s cross-examination’.

11. However, even if that aspect of his decision is legally flawed, the Trial Chamber’s role is not to consider the correctness of the decision, but rather to determine whether any issue falls within Rule 126 (C) requiring certification for an appeal.⁹

12. Here, the disclosure order is confined to disclosing the SMS records of *one* witness. The decision goes no further than that single witness, and that witness’s SMS records. It has no wider implications. Ordering *the entirety* of the SMS records relating to this witness – rightly or wrongly – be disclosed to the Defence, would not affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Prosecution’s arguments that it could be unfounded, because, paradoxically, a more restricted disclosure order could actually

⁷ Holding, that the ‘status quo must be preserved pending the Trial Chamber ruling on whether or not the Trial Chamber will allow certification for appeal’, Transcript of the Pre-Trial Conference of 2 December 2013, p.39.

⁸ Decision, para. 18.

⁹ See e.g. STL-11-01/PT/AC/AR126.2, Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr. Badreddine Alleging the Absence of Authority of Prosecutor, 13 November 2012, para. 13.

fall within the test. If the undisclosed records contained information that was material to the Defence, restricting access to them is what could cause an unfair trial or affect its outcome, rather than the converse situation of providing more.

13. Widening such a disclosure order – but for a solitary witness – logically therefore could not ‘affect the fair and expeditious conduct of the proceedings or the outcome of the trial’. The disclosure ordered by the Pre-Trial Judge will not make the trial less fair or slower. Moreover, as Defence counsel point out, they are bound by the Code of Professional Conduct for Counsel, and numerous other records of personal information have been provided to them. The request for certification to appeal the decision is accordingly dismissed.

Redactions to the Pre-Trial Judge’s decision

14. The Prosecution sought to make several minor redactions to paragraphs 15 and 16 of the decision. That information, however, is already public, so redacting it would be pointless. The Trial Chamber will therefore make no order for redactions. In the absence of an order for redactions, the decision becomes public.

Confidentiality of filings

15. The proceedings should be public and no reason exists for the filings of the Parties to be confidential. Public versions of any remaining confidential submissions should be filed as soon as practicable.

FOR THESE REASONS

THE TRIAL CHAMBER,

DISMISSES the Prosecution’s request for certification to appeal the Pre-Trial Judge’s decision;

DISMISSES the Prosecution’s request for redactions to the decision; and

ORDERS the Parties to file public redacted versions of any confidential filings as soon as practicable.

Done in Arabic, English and French, the English version being authoritative.

11 December 2013
Leidschendam
The Netherlands

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

