

THE TRIAL CHAMBER

Case No.: STL-11-01/T/TC

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

Registrar: Mr Daryl Mundis, Registrar

Date: 4 March 2015

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THE PROSECUTOR

v.

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

**DECISION AUTHORISING THE PROSECUTION TO AMEND ITS
WITNESS AND EXHIBIT LISTS RE WITNESSES PRH685 AND PRH609**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

**Legal Representatives of
Participating Victims:**

Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

Counsel for Mr Salim Jamil Ayyash:

Mr Eugene O'Sullivan, Mr Emile Aoun &
Mr Thomas Hannis

Counsel for Mr Mustafa Amine Badreddine:

Mr Antoine Korkmaz, Mr John Jones &
Mr Iain Edwards

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Khalil Jad

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaël Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks leave to amend its witness and exhibit lists, filed under Rule 91 of the Special Tribunal's Rules of Procedure and Evidence, by adding the name of Witness PRH685 to the witness list and two statements of Witnesses PRH685 and PRH609, who each made one statement, to the exhibit list.¹ Counsel for the Accused, Mr Assad Hassan Sabra responded, opposing the motion.² Counsel for the other four Accused did not respond to the motion.

SUBMISSIONS

A. Witness 685

2. Witness 685 and his family owned a store. Members of his family used the store's telephone as their family telephone and the store's customers also used it for a small fee. According to the Prosecution, Mr Sabra frequently contacted this telephone number. As the store's telephone had multiple users, it is not possible to identify a specific person who was in contact with the telephones that the Prosecution attributes to Mr Sabra.³ On 18 December 2013, the Prosecution added to the exhibit list a copy of Witness 685's identification card, which was annexed to his statement, but inadvertently omitted to add his name to the witness list and his statement to the exhibit list.⁴

3. The Prosecution submits that the proposed evidence relates to the third section of its case and is therefore being added to its lists in advance of a request for its admission.⁵ Adding Witness 685 to the witness and exhibit lists will not result in undue delay or prejudice to the Defence as the Prosecution intends to seek to have the statement—which it has disclosed to the Defence in advance of this motion—admitted pursuant to Rule 155.⁶ This Rule permits the Trial Chamber to admit into evidence, in defined circumstances, a witness statement in lieu of the witness testifying live before the Special Tribunal.

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1828, Prosecution Request to Amend its Witness and Exhibit Lists, 27 January 2015.

² F1844, Sabra Response to Prosecution Request to Amend its Witness and Exhibit Lists, 6 February 2015 (a public redacted version was filed on the same date).

³ Prosecution motion, para. 10.

⁴ Prosecution motion, para. 14.

⁵ Prosecution motion, paras 8 and 16.

⁶ Prosecution motion, para. 16.

4. Counsel for Mr Sabra object to the addition of Witness 685's name and statement to the Prosecution's witness and exhibit lists on the basis of the absence of any good cause.⁷ This is because, on 9 January 2015, upon disclosure of Witness 685's statement, dated 22 October 2013, the Defence became aware for the first time that the Prosecution had provided it with erroneous information as to the identity of the user of the telephone line.⁸ The delay in notifying them of this resulted in the Defence not investigating the multiple users of the telephone line in the store from which, the Prosecution alleges, Mr Sabra was contacted on a mobile telephone attributed to him.⁹ The Prosecution also repeatedly failed to exercise due diligence when Witness 685's name and statement were part of the litigation related to the Defence motions seeking a stay of proceedings and orders against Lebanon for not cooperating with the Defence and the Special Tribunal.¹⁰

5. Counsel submit that the Prosecution's failure to add the witness's name and statement to its witness and exhibit lists and to correct an error contained in the disclosure record has resulted in unfairness and prejudice that requires the exclusion of this witness and his statement from the witness and exhibit lists.¹¹ Consequently, the Trial Chamber should order the Prosecution to fully review its 'case file' and to certify that everything on its witness and exhibit lists has been disclosed.¹²

6. Defence counsel also argue that adding Witness 685's name and statement to the witness and exhibit lists is unduly burdensome when considered in combination with the five motions related to the telecommunication section of the case that the Prosecution filed in the same week.¹³

⁷ Sabra response, para. 13.

⁸ Sabra response, para. 11.

⁹ Sabra response, paras 15-16.

¹⁰ Sabra response, paras 10-11 and 14-15. *See, e.g.*, STL-11-01/PT/PTJ, F702, Second Sabra Defence Motion Seeking the Cooperation of Lebanon - Telecommunications Information, 4 February 2013; F834, Third Sabra Defence Motion Seeking the Cooperation of Lebanon - Terrorist Groups, 4 April 2013; F835, Fourth Sabra Defence Motion Seeking the Cooperation of Lebanon - Information on Mr. Sabra, 4 April 2013; F1079, Fifth Sabra Defence Motion Seeking the Cooperation of Lebanon, 28 August 2013; Sixth Sabra Defence Motion Seeking the Cooperation of Lebanon, 28 August 2013; STL-11-01/PT/T, F1142, Sabra Defence Motion for Stay of Proceedings due to Lebanon's Failure to Cooperate with the Defence, 11 October 2013; F1148, Prosecution Response to the Sabra Motion for Stay of Proceedings, 28 October 2013.

¹¹ Sabra response, para. 13.

¹² Sabra response, para. 19.

¹³ Sabra response, para. 17; F1831, Prosecution Motion for the Admission of Red Network-Related Call Sequence Tables and Related Statement, 28 January 2015; F1832, Prosecution Motion for the Admission of Green Network Related Call Sequence Tables and Related Statement, 29 January 2015; F1836, Prosecution Motion for the Admission of Purple Phone Related Call Sequence Tables, 30 January 2015; F1837, Prosecution Motion for the Admission of Blue Network-

B. Witness 609

7. Witness 609, formerly a forensic expert working for the Special Tribunal's Prosecution, wrote a forensic report relating to the search of a storage room in the Farez Farah Building in Sahel Alma, Jounieh, Lebanon.¹⁴ This address is linked to Mr Sami Issa whom the Prosecution alleges is actually Mr Mustafa Amine Badreddine. According to the Prosecution, this location, in combination with cell site coverage, is relevant to the attribution of mobile telephone usage to Mr Badreddine.¹⁵

8. Witness 609's statement adopts her forensic report, including photographs, thereby making it compliant with the formal requirements for admitting written statements into evidence under Rule 155, as set out in the relevant Practice Direction.¹⁶ According to the Prosecution, Witness 609's statement provides context to the forensic report and the photographs. On 10 September 2013, the Prosecution inadvertently withdrew the report and the photographs which had been on the exhibit list since 15 November 2012.¹⁷ The proposed evidence relates to the third section of its case and, according to the Prosecution, is being added to the exhibit list in advance of its intended admission into evidence.¹⁸ Adding Witness 609's statement to the exhibit list will not result in undue delay or prejudice to the Defence as the Prosecution intends to seek to have the statement—disclosed to the Defence in advance of this motion—admitted pursuant to Rule 155.¹⁹

9. Counsel for Mr Sabra do not oppose the Prosecution adding Witness 609's statement to its exhibit list.²⁰

DISCUSSION

10. The Trial Chamber may, in the interests of justice, allow a party to amend its witness and exhibit lists. In doing so it must balance the Prosecution's interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for trial. The evidence must be *prima facie* relevant and probative, and the Trial Chamber may consider, among

Related Call Sequence Tables and Related Statements, 2 February 2015; F1840, Prosecution Motion for the Admission of Yellow Phone Related Call Sequence Tables and Related Statement, 3 February 2015.

¹⁴ Prosecution motion, para. 3.

¹⁵ Prosecution motion, paras 3 and 11.

¹⁶ Prosecution motion, para. 3; STL, Practice Direction on the Procedure for Taking Depositions under Rules 123 and 157, and for Taking Witness Statements for Admission in Court under Rule 155, STL-PD-2010-02, 15 January 2010.

¹⁷ Prosecution motion, para. 3.

¹⁸ Prosecution motion, para. 4.

¹⁹ Prosecution motion, paras 4 and 15.

²⁰ Sabra response, para. 2.

other factors, i) whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage; ii) the stage of the proceedings; and, iii) whether granting the amendment would result in undue delay.²¹

A. Adding Witness 685's name and statement to the witness and exhibit lists

11. In 2013 and 2014, Witness 685's name was referred to in filings and in correspondence with the Lebanese authorities relating to the issue of Lebanon's cooperation with the Special Tribunal and a possible stay of proceedings (sought by counsel for Mr Sabra). On 18 December 2013, the Prosecution added to the exhibit list a copy of Witness 685's identification card, which was annexed to his statement.²² The Prosecution, however, took another fifteen months to seek to add his name to its witness list and his statement to the exhibit list. The Trial Chamber has carefully reviewed Witness 685's statement, and it is, as is submitted by the Prosecution, and as conceded by Defence counsel in their submissions, *prima facie* relevant and probative.

12. The Prosecution should have made its application in a more timely fashion. Despite this delay, however—and the absence of any real explanation for it—the evidence sought to be added to the exhibit list appears to be an attempt to clarify the use of telephones allegedly attributed to Mr Sabra. A clear understanding of the attribution of telephones to the five Accused who allegedly used them in the surveillance and assassination of the former Lebanese Prime Minister, Mr Rafik Hariri, will assist the Parties and Trial Chamber, and facilitate the conduct of the proceedings. Moreover, the Prosecution has not yet scheduled the testimony of the witnesses related to the relevant section of its case and the Defence should therefore have the necessary preparation time to deal with this relatively discrete issue. Further, the statement was disclosed to the Defence in January 2015, and the Prosecution intends to seek to have his statement admitted into evidence pursuant to Rule 155.

13. The combination of these circumstances satisfies the Trial Chamber that adding Witness 685's name to the witness list and statement to the exhibit list now will neither delay the proceedings nor prejudice the preparation of the Defence for trial. Moreover, adding this statement to the exhibit list does not mean that it will be admitted into evidence, rather, it merely signifies that it can be added to

²¹ F1484, Decision on Prosecution request on a Consolidated Indictment and Amending Witness and Exhibit Lists, 4 April 2014, para. 15; STL-11-01/T/TC, F1308, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, para. 3; F1280, First Decision on the Prosecution request for Admission of Written Statements under Rule 155, 20 December 2013, para. 5; F1228, Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, 19 November 2013, para. 4.

²² Prosecution motion, para. 14.

the exhibit list now. In this *particular case* the Trial Chamber is therefore satisfied that good cause exists to amend the witness and exhibit lists.

14. The Trial Chamber, however, has some sympathy with the Defence submissions in respect of the volume and burdensome nature of the five contemporaneous motions relating to the third section of the Prosecution case—in combination with the omission and delay in notifying the Defence about the multiple users of the telephone line in Witness 685’s store.²³

15. Consequently, counsel for Mr Sabra ask the Trial Chamber to order the Prosecution to fully review its ‘case file’ and to certify that everything on its witness and exhibit lists has been disclosed. While the Trial Chamber sympathises with the sentiments relating to the volume and complexity of these five motions, it is not persuaded that it would be appropriate to order the Prosecution to fully review its ‘case file’ and to certify that everything on its witness and exhibit lists has been disclosed. The Prosecution’s failure to file this motion in a more timely fashion does not reveal a systemic deficiency in how it complies with its disclosure obligations under the Rules.

B. Adding Witness 609’s statement to the exhibit list

16. The Trial Chamber is satisfied that Witness 609’s statement is *prima facie* relevant and probative. The statement contains no new evidence and is relevant as it describes the search of a storage room allegedly linked to Mr Badreddine, and relates to mobile telephones that the Prosecution attributes to him. Further, Defence counsel have had the forensic report and photographs since 15 November 2012. The proposed evidence also relates to the third section of the Prosecution case. And the application to add the statement to the exhibit list is unopposed. Adding the proposed statement to the Prosecution’s exhibit list will thus neither delay the proceedings nor prejudice the preparation of the Defence for trial and, consequently, the Trial Chamber will grant the application.

C. Confidentiality

17. Because they contain confidential witness information, the Prosecution seeks to keep confidential the annexes to its motion. Witness 685 will be seeking protective measures, and the Prosecution is still in the process of ascertaining whether Witness 609 will be requesting protective measures.²⁴ The Prosecution must either file a public redacted version of the annexes or have them reclassified as

²³ Sabra response, paras 16-18.

²⁴ Prosecution motion, para. 17.

public; this may await the formal admission into evidence of the statements of the two witnesses, or alternatively, their live testimony.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

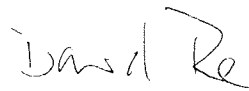
ALLOWS the Prosecution to:

- (1) amend its witness list by adding the name of Witness PRH685, and
- (2) amend its exhibit list by adding the statements of Witness PRH685 and Witness PRH609, as specified in Annex B to the motion.

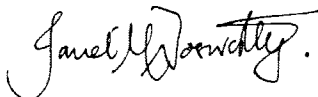
Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,
The Netherlands


4 March 2015



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

