

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

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THE PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION TO ADMIT THE STATEMENTS
OF WITNESSES PRH402 AND PRH636**

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 Dorothee Le Fraper
du Hellen & Mr Khalil Jad

Counsel for Mr Hussein Hassan Oneissi:

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

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaël Mettraux
& Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks to admit into evidence, under Rules 149 (C) and 158 of the Special Tribunal's Rules of Procedure and Evidence, a statement by Witness PRH402 and two statements by Mr Abu Adass (Witness PRH636).¹ Counsel for the Accused, Mr Mustafa Amine Badreddine and Mr Assad Hassan Sabra, responded to the motion.² The Prosecution replied to the Defence responses.³

SUBMISSIONS

A. Prosecution submissions

2. The Prosecution argues that the written statements of Witness 402 and Mr Abu Adass are relevant, reliable, and have probative value.⁴ The evidence in the statements goes to proof of matters other than the acts and conduct of the accused as charged in the indictment; it concerns injuries suffered during the explosion that killed the former Lebanese Prime Minister, Mr Rafik Hariri, on 14 February 2005 in Beirut, and Ahmad Abu Adass, whom the Prosecution alleges was falsely identified as the suicide bomber.⁵

(i) Witness 402

3. Witness 402 is a Syrian who was injured in the explosion. In his statement, he describes being on the Corniche next to the Saint-Georges Hotel when the explosion occurred, falling unconscious and waking up in hospital with physical injuries.⁶

4. The Prosecution previously sought the admission into evidence of Witness 402's statement under Rule 155.⁷ The Trial Chamber, however, declined to do so, as the statement did not meet the

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1862, Prosecution Motion for Admission of the Statements of PRH402 and PRH636, 20 February 2015.

² F1874, Badreddine Defence Response to the Prosecution Motion for Admission of the Statements of PRH402 and PRH636, 6 March 2015; F1877, Sabra Defence Response to Prosecution Rule 158 Application, 9 March 2015.

³ F1881, Prosecution Reply to Sabra Defence Response to Prosecution Rule 158 Application, 13 March 2015.

⁴ Prosecution motion, para. 1.

⁵ Prosecution motion, paras 2-3.

⁶ Prosecution motion, para. 2.

⁷ STL-11-01/PT/TC, F1280, First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013, paras 30-31.

formal requirements for witness statements under the relevant Practice Direction.⁸ In particular, the witness had not acknowledged the potential consequences for providing false evidence, was not given a copy of Rules 60 *bis* and 152,⁹ as the interview had taken place before the Special Tribunal's establishment, and the statement did not include a formal declaration and a witness information sheet.¹⁰ The Trial Chamber accordingly required the Prosecution to make the witness available for cross-examination.¹¹

5. The Prosecution now submits that it has, since the Trial Chamber's decision of 20 December 2013, inquired with the Lebanese authorities about the whereabouts of Witness 402. They have informed the Prosecution that they have no information about him. The Prosecution states that it has no other means to trace the witness. For this reason, the Trial Chamber should consider him to be an unavailable person who can no longer, with reasonable diligence, be traced, in accordance with Rule 158.¹²

6. The Prosecution argues that Witness 402's statement is reliable because it was taken by two Lebanese officials and written in a language the witness spoke. The statement was read back to the witness, and both he and the officials signed it. Additionally, the Prosecution points out that the witness's identity as an injured victim is an agreed fact between the parties pursuant to Rule 122.¹³

(ii) Mr Abu Adass

7. Mr Abu Adass is the father of Ahmad Abu Adass, the man whom the Prosecution alleges falsely claimed, in a video broadcast on television, to be the suicide bomber who triggered the explosion.¹⁴ The first of two statements the Prosecution seeks to tender, dated 19 January 2005, is a missing persons' report in which Mr Abu Adass reports his son's disappearance approximately a month before Mr Hariri's assassination on 14 February 2005. In the second statement, dated 28

⁸ 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.

⁹ Respectively, 'Contempt and Obstruction of Justice' and 'False Testimony under Solemn Declaration'.

¹⁰ Decision of 20 December 2013, para. 30.

¹¹ Decision of 20 December 2013, para. 31.

¹² Prosecution motion, paras 4 and 5.

¹³ Prosecution motion, para. 9.

¹⁴ F1444, Redacted version of the consolidated indictment, 7 March 2014, para. 5; STL-11-01/PT/TC, F1077, Redacted version of the Prosecution's updated pre-trial brief, dated 23 August 2013, 31 October 2013, para. 2; STL-13-04/PT/PTJ, *Prosecutor v. Hassan Habib Merhi*, Redacted version of the Prosecution's pre-trial brief, 13 January 2014, para. 2.

February 2005, he describes his son's character, habits, employment and religious beliefs; that he did not know how to drive; and his behaviour and appearance in the video claiming responsibility for the explosion.¹⁵

8. The Prosecution explains that Mr Abu Adass died on 7 March 2005, approximately one week after his statement of 28 February 2005. As proof, it has provided the Trial Chamber with the death certificate and an earlier medical report.¹⁶

9. The Prosecution argues that Mr Abu Adass's statement of 19 January 2005 is reliable because it was taken by two Lebanese officials and written in a language the witness spoke. It was read back to him, and both he and the officials signed it.¹⁷ The statement of 28 February 2005 was made before a Lebanese Investigating Judge. The witness solemnly declared to tell the truth in accordance with Article 87 of the Lebanese Code of Criminal Procedure. The statement was written in Arabic and read back to him, after which he, the Investigating Judge and the reporting clerk signed it. Mr Abu Adass's statement confirms that he had also provided a statement on 19 January 2005.

B. Defence submissions

(i) *Badreddine Defence*

10. Counsel for Mr Badreddine take no position as to the admissibility of Mr Abu Adass's statements, and accept that he is unavailable within the meaning of Rule 158 (A) (i).¹⁸ Although they state that they are neutral as to the admissibility of Witness 402's statement, they argue that the Prosecution has not taken all reasonable steps to locate him. Since the witness is Syrian, the Prosecution should not have confined its inquiries to the Lebanese authorities but should have also contacted the relevant Syrian authorities.¹⁹

(ii) *Sabra Defence*

11. Counsel for Mr Sabra do not object to the admission of Witness 402's statement. They also do not object to the admission of Mr Abu Adass's statement, on condition, however, that the Trial

¹⁵ Prosecution motion, para. 3.

¹⁶ Prosecution motion, paras 6-7.

¹⁷ Prosecution motion, para. 10.

¹⁸ Badreddine response, paras 2-3.

¹⁹ Badreddine response, paras 4-6.

Chamber also admits other evidence they consider relevant to him.²⁰ They point out that seven other statements or records of interviews of this witness exist, in addition to the two statements the Prosecution seeks to tender, and that they provide important and relevant context. The various statements and records also appear to contradict each other or the evidence of other proposed Prosecution witnesses, and provide additional information about issues relevant to the case.²¹ Counsel for Mr Sabra ask that the Prosecution make available for examination all the other witnesses on the Prosecution's witness list who can testify to the circumstances of Ahmad Abu Adass's disappearance, and who have investigated any aspect of the evidence relating to him.²²

12. Counsel for Mr Sabra also state that they will file a 'bar table motion' relating to 'the substance of this evidence' in the near future.²³

C. Prosecution reply

13. The Prosecution asks the Trial Chamber to dismiss the Sabra Defence's requests to admit the additional documents related to Mr Abu Adass's evidence, and to hear all remaining proposed Prosecution witnesses who can give evidence regarding aspects of his account. It points out that counsel for Mr Sabra have said they will file an upcoming bar table motion relating to this witness. It also argues that the Rules impose no obligation on the Prosecution to call witnesses for the Sabra Defence case, and that counsel are free to call the witnesses they consider relevant.²⁴

DISCUSSION

Applicable law

14. Rule 158 provides:

- (A) Evidence in the form of a written statement, any other reliable record of what a person has said, written or otherwise expressed, or transcript of a statement by a person who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally may

²⁰ Sabra response, para. 1.

²¹ Sabra response, paras 14 and 15.

²² Sabra response, paras 2, 16 and 17.

²³ Sabra response, para. 3.

²⁴ Prosecution reply, paras 3-4.

be admitted, whether or not the written statement is in the form prescribed by Rules 93, 123, 155, 156 and 157 if the Trial Chamber:

- (i) is satisfied of the person's unavailability; and
 - (ii) finds that the statement, record or transcript is reliable, taking into account how it was made and maintained.
- (B) In considering the application of Rule 149 (D) to this Rule, the Chamber shall take into account whether the evidence in question goes to proof of acts and conduct of the accused as charged in the indictment.

15. The Trial Chamber has previously admitted a witness statement under Rule 158. In an oral decision issued on 9 January 2014, it found a witness who was shown to have started suffering from dementia, to be unavailable within the meaning of the Rule. The Trial Chamber found that in deciding whether to admit into evidence the statement of an unavailable person, it must first be satisfied of the person's unavailability, and second, find that the statement is reliable, taking into account how it was made and maintained. It must also consider whether the evidence goes to the proof of the acts or conduct of the accused.²⁵

16. Further, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that in assessing the reliability of proposed evidence from unavailable witnesses, a Chamber can look at the circumstances in which that evidence was obtained and recorded. These include: whether a written statement was given under oath; whether it was signed by the witness with an acknowledgement of the truth of its contents; whether it was given with the assistance of a Registry approved interpreter; and whether it has been subject to cross-examination. In addition, other factors, such as whether the evidence relates to events about which there is other evidence, or whether there is an absence of manifest or obvious inconsistencies in the evidence, may be considered. If one or more of these indicia of reliability is absent, the evidence can still be admitted, with the Trial Chamber taking this into consideration in determining the appropriate weight to be given to it, in light of the totality of the evidence in the case.²⁶

²⁵ Transcript no. 28 of 9 January 2014, pp 14-15.

²⁶ See for instance: ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *Quater*, 20 August 2009, paras 4-6; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *Quarter*, 13 April 2010, paras 7 and 25; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-

Witness 402

17. In his statement, Witness 402 explains that he lives in Beirut. This, combined with the instability in Syria, makes it reasonable for the Prosecution to have attempted to trace his whereabouts with the Lebanese authorities only. The Trial Chamber is accordingly satisfied that the Prosecution has been diligent in its efforts, and considers Witness 402 to be unavailable within the meaning of Rule 158 (A) (i).

18. In terms of its reliability, as described above, the Trial Chamber held in its decision of 20 December 2013 that Witness 402's statement does not satisfy the formal requirements for witness statements under the Special Tribunal's Rules and the relevant Practice Direction. The statement is not dated. The witness does not acknowledge the consequences for providing false evidence, and there is neither a witness information sheet, nor a formal declaration. In addition, the names of the two Lebanese officials who signed the document are not included, though they likely appear on an earlier page of the document from which Witness 402's statement was extracted.

19. Despite the statement's formal shortcomings, however, the Trial Chamber considers that the circumstances are compelling enough for it to overlook them in this particular instance. The statement is very brief, in fact less than 10 lines in its English translation, with more than half of it detailing the witness's personal background, and the rest of the statement describing that he was at the Corniche with his girlfriend, lost consciousness from the effect of the explosion, and woke up in hospital with bruises. The statement does not go to proof of the acts or conduct of any of the five Accused. The fact that this witness was a victim of the explosion, which is the main subject matter of the statement, is an agreed fact between the parties. The statement was also signed by the witness and two Lebanese officials. The Trial Chamber considers that the statement is reliable, taking into account how it was made and maintained, and accordingly finds Witness 402's statement to be admissible into evidence. As with any other evidence, its admissibility is distinct from the weight the Trial Chamber may ultimately decide to give it. The Prosecution, however, must disclose the names of the two Lebanese officials who signed the statement, if it has them in its possession.

PT, Decision on Prosecution's Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjić) Pursuant to Rule 92 *Quarter*, 23 March 2010, para. 7; ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quarter* (Herbert Okun), 22 February 2013, paras 7-8.

Mr Abu Adass

20. Mr Abu Adass gave a statement to the Lebanese Internal Security Forces on 19 January 2005—a month before the 14 February 2005 attack—in which he reported his son as missing. The statement describes his son leaving the house on the morning of ‘Sunday’ 15 January 2005,²⁷ and provides a general physical description of him. The statement also includes a note stating that the Internal Security Forces issued a missing persons alert for Ahmad Abu Adass following the interview with his father.

21. Mr Abu Adass provided another statement to a Lebanese Investigating Judge on 28 February 2005. The statement was made in an entirely different context than that of 19 January 2005, and concerned Ahmad Abu Adass’s claim of responsibility for the 14 February 2005 attack.

22. The death certificate proves that Mr Abu Adass is unavailable within the meaning of Rule 158 (A) (i).

23. As with Witness 402’s statement, compelling reasons exist to overlook the two statements’ formal shortcomings. The witness died before the Special Tribunal came into existence and its Rules of Procedure and Evidence were adopted, and indeed, before even the United Nations International Independent Investigation Commission was established. The statement of 28 February 2005 was made before a magistrate, and the witness had to provide a solemn oath in accordance with Lebanese law. The statement of 19 January 2005 does not contain such an oath, but this is explicable because the witness was reporting a missing person, rather than being interviewed during a criminal investigation. The statement does not go to proof of the acts or conduct of any of the five Accused, and was signed by the witness and Lebanese officials. The Trial Chamber accordingly finds Mr Abu Adass’s statements to be reliable and admissible into evidence. The Trial Chamber will assess its weight in light of the totality of the evidence in the case, and taking into account its formal shortcomings.

24. On the basis of counsel for Mr Sabra’s arguments that other documents related to this witness should also be admitted into evidence, the Trial Chamber has carefully examined the seven

²⁷ The 15th of January in reality fell on a Saturday in 2005.

documents annexed to the Sabra Defence's response. These are the records of two interviews held on 14 February 2005 (though the documents themselves do not appear to be dated); a summary report no. 133/302 dated 14 February 2005; the record of a witness interview held by the Investigating Judge on 17 February 2005; an interrogation record by the same magistrate dated 18 February 2005; a statement taken from the witness following the unsealing of his house by the Lebanese authorities on 1 March 2005 (though again, the document does not appear to be dated); and an information summary no. 418/11 dated 3 March 2005.

25. The nine documents relevant to Mr Abu Adass are not identical, in the sense that the legal basis for each is different. The record of the witness interview of 17 February 2005, for instance, appears to have been taken when the witness was considered a suspect.²⁸ The interrogation record of 18 February 2005 quotes the Investigating Judge as telling the witness that he is charged with hiding information concerning the 14 February 2005 attack.

26. Despite these important distinctions, all nine documents mirror each other in the information that Mr Abu Adass gave about his son. The documents also have the same deviations from the requirements for witness statements under the Special Tribunal's Rules and Practice Direction. Nevertheless, the Trial Chamber is satisfied that the seven documents identified by the Sabra Defence are admissible, for the same reasons as those stated in relation to the statements of 19 January 2005 and 28 February 2005. The documents may be helpful in providing context, identifying any inconsistencies in the evidence and assessing the credibility of the witness.

27. With regard to counsel for Mr Sabra's request that the Prosecution call all remaining witnesses on its witness list who may provide evidence regarding Mr Abu Adass's account, the Trial Chamber agrees with the Prosecution's position that a Party has no obligation under the Rules to call witnesses for the sake of an opposing party's case. The Defence may interview Prosecution witnesses, and call witnesses of their choosing. Counsel for Mr Sabra's request in this regard is therefore dismissed.

²⁸ The witness had to give an oath under Article 79 of the Lebanese Code of Criminal Procedure, which deals with questioning of a defendant.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS the motion;

DECLARES admissible under Rule 158 the statement of Witness PRH402 and the statements dated 19 January 2005 and 28 February 2005 of Mr Abu Adass (PRH636);

DECLARES admissible under Rule 158 the records of the two interviews held on 14 February 2005; the summary report no. 133/302 dated 14 February 2005; the record of a witness interview held by the Investigating Judge on 17 February 2005; the interrogation record dated 18 February 2005; the statement dated 1 March 2005; and the information summary no. 418/11 dated 3 March 2005;

ORDERS the Prosecution to disclose to the Defence the names of the two Lebanese officials who signed Witness PRH402's statement, if it has them in its possession; and

DECIDES that it will, at a suitable stage in the proceedings, formally admit the statements and documents into evidence.

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

Leidschendam,
The Netherlands

27 March 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

