

THE CONTEMPT JUDGE

Case No.: STL-14-05/T/CJ
Before: Judge Nicola Lettieri, Contempt Judge
Registrar: Mr Daryl Mundis, Registrar
Date: 8 May 2015
Original language: English
Classification: Public

IN THE CASE AGAINST

AL JADEED [CO.] S.A.L./ NEW T.V. S.A.L. (N.T.V.)
KARMA MOHAMED TAHSIN AL KHAYAT

**Decision on Defence Motion for Admission of Written Statements and for Video-Link
Testimony**

***Amicus Curiae* Prosecutor:**
Mr Kenneth Scott

**Counsel for *Al Jadeed* [CO.] S.A.L./
NEW T.V. S.A.L. (N.T.V.) and
Ms Karma Khayat:**
Mr Karim A.A. Khan
Mr Rodney Dixon
Ms Maya Habli
Ms Shyamala Alagendra



INTRODUCTION

1. On 1 May 2015, the Defence requested the admission of the written statements of Defence witnesses DT09, DT15 and DT16 pursuant to Rule 155 of the Tribunal's Rules of Procedure and Evidence ("Rules"), along with associated documents.¹ Alternatively, if I reject that request and determine that the witnesses must be available for cross-examination under Rule 156, or that the full testimony of these witnesses should be heard *viva voce*, the Defence asks that I order the testimony of these witnesses to be received via video-conference link from the Tribunal's Beirut Office.² On 5 May 2015, the *Amicus Curiae* Prosecutor ("*Amicus*") filed his response, objecting to the entire Motion.³
2. Having heard the Parties and for the reasons set out below, I grant the Motion in part.

APPLICABLE LAW

3. As a general matter, pursuant to Rule 149 (C), the Contempt Judge may admit any relevant evidence which he deems to have probative value.
4. Under Rule 155 (A), the Contempt Judge may admit, in lieu of oral testimony, the evidence of a witness in the form of a written statement that goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. The Rule provides a non-exhaustive list of factors in favour of admission, as well as factors against admission. Further, Rule 155 (B) and the 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 ("Practice Direction")⁴ state technical requirements a witness statement must satisfy. Finally, pursuant to Rule 155 (C), the Contempt Judge, after hearing the parties, shall decide whether to require the witness to appear for cross-examination. The Contempt Judge may determine that the interests of justice and the demands of a fair and expeditious trial exceptionally warrant admission of the statement

¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/T/CJ, F0139, Defence Application for Admission of Statements of Three Witnesses pursuant to Rule 155 and for Video-Link Testimony, 1 May 2015 ("Motion"), para. 13. All further references to filings and decisions refer to this case number unless otherwise stated.

² Motion, para. 14.

³ F0144, *Amicus* Response to "Defence Application for Admission of Statements of Three Witnesses Pursuant to Rule 155 and for Video-Link Testimony" Dated 1 May 2015, Confidential, 5 May 2015 ("Response").

⁴ 15 January 2010, STL-PD-2010-02.

without cross-examination. However, if the Contempt Judge finds that the witness must appear for cross-examination, Rule 156 applies.

5. Under Rule 156, the Contempt Judge may admit, in lieu of examination in chief, the evidence of a witness in the form of a written statement that goes to proof of the acts and conduct of the accused as charged in the indictment, only if the following conditions are met: (1) the witness is present in court; (2) the witness is available for cross-examination and any questioning by the Contempt Judge; and (3) the witness attests that the written statement accurately reflects that witness's declaration and what the witness would say if examined.
6. Rule 124 states that the Trial Chamber may order that testimony be received via video-conference link in the interests of justice.

DISCUSSION

A. The position of the Accused

7. The Defence requests that the statements of three witnesses—DT09, DT15 and DT16—be admitted into evidence pursuant to Rules 149 and 155, along with associated exhibits.⁵
8. The Defence contends that the proposed evidence is relevant, reliable and has probative value as to the issue of the transmission and receipt of Mr Anthony Brettel Lodge's alleged email to Ms Karma Mohamed Tahsin Al Khayat on 11 August 2012 containing the Pre-Trial Judge's Order of 10 August 2012.⁶ It also submits that the statements were prepared in compliance with Rule 155 (B) and the relevant Practice Direction.⁷
9. With respect to Rule 155 (A), the Defence asserts that none of the proposed evidence goes to the acts and conduct of the Accused. The witnesses, all of whom are information technology ("IT") specialists employed by *Al Jadeed S.A.L.*, provide evidence on the issue of whether the *Amicus* can prove beyond reasonable doubt that Mr Lodge's alleged email was received by *Al Jadeed S.A.L.*'s server and, if so, whether it was then transmitted to Ms Khayat's email account inbox. The Defence argues further that none of

⁵ Motion, para. 13.

⁶ *Id.* at paras 2, 7.

⁷ *Id.* at paras 3, 7.

the witnesses are eyewitnesses to any of the events alleged in the Order in Lieu of an Indictment.⁸

10. In regard to Rule 155 (A) (i)-(ii)'s factors for and against admitting evidence in written form, the Defence reiterates that the witnesses' evidence goes to a discrete issue and that they are not eyewitnesses. In view of the nature of the testimony, there is no overriding public interest in the evidence proposed being presented orally.⁹
11. As for Rule 155 (C), the Defence avers that any need for cross-examination is outweighed by the interests in an efficient and expeditious trial, reducing the burden on witnesses and time and cost savings for the Tribunal.¹⁰
12. With respect to the materials accompanying the witness statements, the Defence asserts that they are associated with and referred to by the witnesses in their respective statements. As such, they are intrinsically linked to the statements. The Defence argues that this material is relevant and probative and should be admitted into evidence in conjunction with the witness statements pursuant to Rule 155.¹¹
13. If I deny admission of the statements under Rule 155, the Defence submits that it is in the interests of justice to allow the witnesses to testify via video-conference link from the Tribunal's Beirut office. This is because of the nature of their testimony, they are not eyewitnesses, doing so would be less burdensome on them and such remote testimony saves resources.¹²

B. The position of the Amicus

14. The *Amicus* objects to the Motion. He asks that the evidence be excluded. If allowed, he seeks appropriate disclosure, technical resources and access to *Al Jadeed S.A.L.*'s system to review and respond to the evidence. He also requests that the witnesses be ordered to appear *viva voce* at the Tribunal.¹³

⁸ *Id.* at para. 6.

⁹ Motion, para. 8.

¹⁰ *Id.* at para. 9.

¹¹ *Id.* at para. 10.

¹² *Id.* at paras 11-12.

¹³ *Id.* at para. 34.

15. The *Amicus* avers that the witnesses concerned are not fact witnesses but rather supposed IT experts called to testify on the service and notice of the 10 August 2012 Order. He contends that the Defence has not complied with the requirements of Rule 161 because it did not provide the *Amicus* with the required notice, information on the witnesses' expert qualifications or their expert reports.¹⁴
16. The *Amicus* argues that, because he never received appropriate disclosure, he has been unable to adequately prepare to test the purported evidence. He asserts that this evidence is complex and technical and dealing with it would require the assistance of a prosecution expert.¹⁵ The *Amicus* submits that to properly assess the relevance and probative value of the evidence submitted, a prosecution expert should have had access to *Al Jadeed S.A.L.*'s system.¹⁶
17. The *Amicus* argues further that the statements are inadmissible under Rule 155 because they go to acts and conduct of the Accused in that they go to proof of the Accused's knowledge of the 10 August 2012 Order.¹⁷ The *Amicus* recalls that I found that evidence going to proof of the Accused's awareness of the 10 August 2012 Order relates to the Accused's acts and conduct.¹⁸ Moreover, he claims that none of the factors in favour of the admission of written statements apply, whereas all of the factors against admission do apply.¹⁹
18. The *Amicus* also submits that the relevance and probative value of the evidence cannot be established because he was not afforded the opportunity to test this evidence with his own expert nor was he granted access to *Al Jadeed S.A.L.*'s system.²⁰ The *Amicus* avers that the Defence has no good reason for not having disclosed the evidence earlier and points out that witness DT09 was interviewed in June 2014.²¹

¹⁴ Response, para. 11.

¹⁵ Response, paras 12-19.

¹⁶ *Id.* at para. 16.

¹⁷ *Id.* at para. 21.

¹⁸ *Id.* at para. 22.

¹⁹ *Id.* at para. 23.

²⁰ *Id.* at paras 24-29.

²¹ *Id.* at para. 30.

19. With respect to the request for video-conference link, the *Amicus* asserts that the Defence does not allege that the witnesses have compelling reasons for this modality.²² He further argues that this modality is not appropriate because the complex and controversial nature of the evidence is likely to bring many procedural objections during the witnesses' testimony.²³ Moreover, he contends that permitting the witnesses to testify via video-conference link might require the Registry and the Parties to travel to Lebanon at the expense of the Tribunal and of the *Amicus*'s human resources.²⁴

C. Discussion

1. Status of the witnesses

20. The *Amicus* contends that the witnesses are in fact experts in the field of IT, called to give expert testimony. Accordingly, he submits that their evidence had to be disclosed in compliance with Rule 161.

21. However, I note that the witnesses will give factual evidence based on their knowledge of *Al Jadeed* S.A.L.'s IT system, which they acquired through their first-hand experience working with the company.

22. Witnesses DT09 and DT16 have respectively been systems administrators at *Al Jadeed* S.A.L. since 2008 and 2010. They will purportedly testify about the state of the IT system and technical difficulties related to the delivery of email messages within the company at times relevant to the charges.²⁵

23. Witness DT15 has been the Head of the IT Department of *Al Jadeed* S.A.L. since March 2013. He will provide information concerning the problems he faced on his arrival at the company with the old IT system and the steps that he took to improve it.²⁶

24. I am therefore satisfied that these witnesses are not expert witnesses, but fact witnesses. Accordingly, Rule 161 does not apply to the disclosure and admission of this evidence.

²² *Id.* at para. 31.

²³ *Id.* at para. 32.

²⁴ *Id.* at para. 33.

²⁵ 1D1405-638-EN-05634-05639 and 1D1405-638-EN-05640-05647.

²⁶ 1D1405-638-EN-05621-05626.

2. Admissibility of the witness statements in lieu of oral testimony

25. I agree with the *Amicus* that the purported evidence goes to proof of the acts and conduct of the Accused and is therefore not admissible under Rule 155.
26. Through these witnesses, the Defence intends to raise reasonable doubt as to the transmission and receipt of Mr Lodge's alleged email to Ms Khayat attaching a copy of the Order of 10 August 2012.²⁷ It thus relates to Ms Khayat's awareness of the Order, which, as I previously determined, goes to the acts and conduct of the Accused.²⁸
27. I thus cannot admit the statements of these witnesses and the associated documents in lieu of oral testimony.
28. I further find that, due to the highly technical nature of the evidence, I will not be in a position to assess the probative value of the written statements and associated documents before I have heard the witnesses in court. Therefore, I will not admit the evidence under Rule 156.

3. Testimony via video-conference link

29. Contrary to the assertion of the *Amicus* and in keeping with the practice of the Trial Chamber, the Defence does not need to show "compelling" reasons for video-conference link testimony.²⁹
30. Moreover, the *Amicus* will have the opportunity to cross-examine the witness in the same conditions as the examination-in-chief. He will therefore suffer no prejudice from this modality of testimony. In addition, permitting this modality of testimony will substantially conserve the resources of the Tribunal because it will save the costs of travel, accommodation and visa for three witnesses.
31. I therefore conclude that it is in the interests of justice to allow the witnesses to appear via video-conference link.

²⁷ Motion, paras 3, 6.

²⁸ F0090, Decision on Two Motions for Admission of Written Statements, 28 November 2014, para. 19.

²⁹ STL, *The Prosecutor v. Ayyash et al.* STL-11-01/T/TC, General Decision on Video-Conference Link Testimony and Reasons for Decision on Video-Conference Link Testimony of Witness PRH128, 25 February 2014, para. 26.

D. Confidentiality

32. The *Amicus* has filed his submission in this matter confidentially. Though there may be information in the filing that should remain confidential, it should be made public with appropriate redactions. I therefore order the *Amicus* to file, as appropriate, a public redacted version of his submission. I encourage him to verify the redactions with the Defence before filing his redacted submission.

DISPOSITION**FOR THESE REASONS;****PURSUANT** to Rules 60 *bis* (H), 149 (C), 124, 154, 155 and 156;**I GRANT** the Motion in part;**REJECT** the admission of the written statements of witnesses DT09, DT15 and DT16 and the associated evidence;**AUTHORISE** witnesses DT09, DT15 and DT16 to testify via video-conference link, and**ORDER** the *Amicus* to file a public redacted version of his submission in this matter.

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

Dated 8 May 2014

Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

