

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

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

Date: 19 June 2015

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION ON ONEISSI DEFENCE REQUEST TO INTERVIEW AND
PROSECUTION MOTION TO ADMIT THE STATEMENT OF WITNESS PRH662**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Milne

Counsel for Mr Salim Jamil Ayyash:

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

Victims' Legal Representatives:

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

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 Jad Khalil

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 Guénaél Mettraux
& Mr Geoffrey Roberts



INTRODUCTION

1. Witness PRH662 was an investigator working for the Special Tribunal's Prosecutor who, in March 2010, prepared two photo boards for identification purposes during the investigation into the explosion that killed former Lebanese Prime Minister Mr Rafik Hariri on 14 February 2005, in Beirut. Two motions have been filed before the Trial Chamber. In the first, counsel for the Accused, Mr Hussein Hassan Oneissi, requested the Trial Chamber to issue an order, under Rules 77 (A), 78 (B) and 130 (A) and (B) of the Special Tribunal's Rules of Procedure and Evidence, directing the witness's attendance for interview by the Defence.¹ The Prosecution responded and counsel for Mr Oneissi replied.² In the second motion, the Prosecution sought to admit into evidence, under Rule 155, one statement from Witness 662.³ Counsel for Mr Oneissi and for Mr Mustafa Amine Badreddine objected to the motion.⁴

REQUEST TO INTERVIEW WITNESS 662

2. Counsel for Mr Oneissi contacted Witness 662 and asked him to meet them, but the witness was unwilling. Defence counsel believed that they needed to question him to obtain essential evidence, and to ask him about the rules relating to the photo boards' creation, and the rules relating to identification parades.⁵ After the motion was filed, Defence counsel informed the Trial Chamber that the witness had agreed to meet them.⁶ The Trial Chamber asked counsel to withdraw the motion, but they declined to do this, expressing fear that the witness may not answer counsel's questions.⁷

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1929, 'Corrected version of Request to Interview PRH662' of 24 April 2015, 28 April 2015. The motion asked the Trial Chamber to note that it was necessary for the Defence to hear Witness PRH662 regarding all his statements at the earliest opportunity and order any appropriate administrative and judicial measure so as to ensure the appearance of Witness 662, and his interview by the Defence. Rules 130 (B) permits the Trial Chamber to issue, under Rule 77 (A) a summons to appear to a witness, or at the request of the Defence under Rule 78 (B).

² F1941, Corrected Version of "Prosecution Response to Oneissi Defence Request to Interview PRH662", dated 8 May 2015, 13 May 2015; F1948, Oneissi Defence Reply to the Prosecution Response to Oneissi Defence Request to Interview PRH662, 14 May 2015.

³ F1956, Prosecution Motion to Admit the Statement of PRH662, 21 May 2015.

⁴ F1983, Oneissi Defence Response to 'Prosecution Motion to Admit the Statement of PRH662' dated 21 May 2015, 1 June 2015; F1985, Badreddine Defence Response to "Prosecution Motion to Admit the Statement of PRH662", 2 June 2015 The Victims' Legal Representatives stated in an email they would not file a response to the Prosecution motion to admit the statement, Email from Victims' Legal Representatives Legal Officer to Trial Chamber's Senior Legal Officer, 28 May 2015.

⁵ Oneissi request, paras 6-7, 10.

⁶ Email from counsel for Mr Oneissi to Trial Chamber's Senior Legal Officer, 22 May 2015.

⁷ Email from Trial Chamber's Senior Legal Officer to counsel for Mr Oneissi, 22 May 2015; Transcript of 4 June 2015, pp 40, 43-44.

3. This motion is connected to the motion to admit the statement of Witness 662. If the Trial Chamber directs Witness 662 to attend an interview with Defence counsel, they may not need to cross-examine him.

4. On 4 June 2015, the Trial Chamber invited Defence counsel to withdraw their request to interview the witness. Counsel argued that they had not withdrawn the request for fear that the witness would not answer their questions. The motion, however, requested the Trial Chamber to ‘order any appropriate administrative and judicial measure so as to ensure the appearance of PRH662 and his interview by the Defence’, rather than to answer any specific questions.⁸ As the witness has agreed to meet counsel for Mr Oneissi,⁹ the motion is now moot, and it is therefore dismissed.

RULE 155 MOTION

5. The Prosecution seeks to admit Witness 662’s statement into evidence. The statement describes how the witness compiled two photo boards containing, among other photographs, those of the Accused, Mr Assad Hassan Sabra, and Mr Oneissi. One of the photo boards was shown to another witness for identification purposes.¹⁰ The Prosecution does not seek to admit the entire statement of the witness, but only its redacted portion.¹¹ It also seeks to further redact the statement of the witness.¹²

6. The Prosecution submits that Witness 662’s statement proves matters other than the acts and conduct of the Accused as charged in the consolidated indictment. It provides background evidence for the expected evidence of another witness who was shown one of the photo boards.¹³ The witness statement also contains the necessary indicia of reliability for admission under Rule 155, notwithstanding some minor departures from the Practice Direction.¹⁴ Specifically, the statement does not contain an interviewer’s certificate, and it is

⁸ Oneissi request, para. 13.

⁹ Transcript of 4 June 2015, p. 42.

¹⁰ Prosecution motion, para. 2; STL-11-01/PT/TC, F1228, Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, 19 November 2013, para. 7.

¹¹ Prosecution motion, para. 6.

¹² Prosecution motion, para. 8.

¹³ Prosecution motion, paras 3, 7.

¹⁴ STL-PD-2010-02, 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, 15 January 2010.

unclear if the witness was provided with Rules 60 *bis* and 152.¹⁵ The Prosecution also argues that it is in the interests of justice and of a fair and expeditious trial to admit Witness 662's statement without cross-examination, and that substantiated reasons are necessary to warrant the attendance of witnesses for cross-examination.¹⁶

7. Counsel for Mr Oneissi request Witness 662's attendance for cross-examination. The Prosecution relies upon another witness selecting Mr Oneissi's photograph to support the allegation that Mr Oneissi is 'Mohammad', the person who allegedly identified and manipulated Mr Ahmad Abu Adass to make a false claim of responsibility for the explosion, as pleaded in the consolidated indictment.¹⁷ According to Defence counsel, the selection of Mr Oneissi as 'Mohammad' is inconclusive, and they need to cross-examine Witness 662 to ascertain whether the photo board creation process was flawed.¹⁸ A flawed photo board creation process will diminish the evidentiary value of the selection of Mr Oneissi's photograph.

8. Counsel for Mr Badreddine object to the request to admit the statement. Counsel do not wish to cross-examine Witness 662, but submit that he may be unwilling to testify and that refusing to be questioned casts doubt on a witness's reliability or credibility. Rule 155 should not be used to permit the Prosecution to circumvent difficulties with unwilling witnesses.¹⁹

Decision

9. The Trial Chamber is satisfied that Witness 662's statement is relevant and probative under Rule 149 (C).²⁰ It concerns the compiling of photo boards containing photographs of two of the Accused. The selection by another witness of Mr Oneissi's photograph may support Prosecution allegations pleaded in the consolidated indictment.

¹⁵ Prosecution motion, paras 4-5. Rule 60 *bis* allows the Special Tribunal to hold in contempt those who knowingly and wilfully makes a statement which the person knows is false, and may be used as evidence in proceedings before the Tribunal, and, under Rule 152, those who give false testimony under solemn declaration.

¹⁶ Prosecution motion, para. 7.

¹⁷ F1444, Consolidated Indictment of 7 March 2014, para. 44 (e).

¹⁸ Oneissi response, paras 1-3.

¹⁹ Badreddine response, paras 2-4.

²⁰ Rule 149 (C) states "[a] Chamber may admit any relevant evidence which it deems to have probative value".

10. The statement contains evidence going to proof of matters other than the acts and conduct of the Accused as charged in the consolidated indictment. The preparation of the photo boards, rather than the purported identification of Mr Oneissi, is background investigative evidence.

11. The statement has sufficient indicia of reliability under both Rule 155 (B) and the Practice Direction, although there are slight deviations from the Practice Direction. The Trial Chamber has previously ruled upon a deviation similar to that identified in Witness 662's statement.²¹ In that decision, a statement missing an interviewer's certificate that the witness was provided with a copy of Rules 60 *bis* and 152 was deemed in minor breach of the Practice Direction, where the witness acknowledged the legal consequences for contempt and false testimony. That acknowledgement provided compelling reasons to depart from the strict application of the Practice Direction.

12. Witness 662's statement is relevant and probative, and therefore admissible. Because his proposed evidence relates to preparation of photo boards, cross-examination about their compilation and any possible flaws in that process is justified. His statement is therefore admissible under Rule 155 (C). The Trial Chamber requires the Prosecution to make the witness available for cross-examination. If, after interviewing the witness, counsel for Mr Oneissi no longer need to cross-examine him, they should immediately inform the Trial Chamber and the Prosecution.

Redaction of Witness 662's statement

13. The remaining issue is of redactions to the witness's statement. In 2013, the Prosecution disclosed to the Defence a heavily redacted version the witness's statement. Defence counsel asked the Trial Chamber to order the Prosecution to disclose the statement in an unredacted form. The Trial Chamber reviewed the redacted material and decided that the redactions at pages 2-8 of the statement were irrelevant internal Prosecution emails—that should never have been included in the statement—and thus not disclosable under Rule 111 as the internal work product of a party.²² The Prosecution subsequently disclosed to the Defence

²¹ STL-11-01/PT/TC, F1280, First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013, para. 23.

²² The redacted statement was disclosed on 20 September 2013, see STL-11-01/PT/PTJ, F1102, Second Corrigendum to Annex D to the 'Prosecution Submission Pursuant to Rules 91 (G) (ii) and (iii)' of 10 September 2013, 25 September 2013, para. 6. The redactions at pages 10-11 of the statement of witness 662 were permitted in F1228, Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, 19

other information that it had originally redacted, specifically the names of those whose faces appeared on the photo boards.

14. The Prosecution has now sought to further redact the statement of Witness 662. It states that although the witness has not sought protective measures, his statement requires redactions to protect both his personal details and those of third parties, including the photographs and names of individuals on the photo boards. This redaction should occur before its public broadcast.²³

15. Counsel for Mr Oneissi submit that redactions previously ordered to the statement of Witness 662 should be removed as this curtails their ability to effectively cross-examine Witness 662.²⁴ Counsel suggest that although the Trial Chamber decided the redactions fell under Rule 111, that Rule applies to disclosure between the Parties and not to the admission of documents into evidence and, therefore, the redactions mean that the statement is not in an admissible state.²⁵ In an oral submission to the Trial Chamber, counsel for Mr Oneissi asked it to ‘have another look at’ the existing redactions to the witness’s statement.²⁶

16. The Trial Chamber rejects counsel’s submission that the statement of Witness 662 is not in an admissible state because of the redactions. Having previously decided the issue of removing existing redactions—and in the absence of any formal reasoned motion to reconsider the decision of 28 February 2014²⁷—counsel’s new request to remove them, repeated in oral submission, is rejected.

November 2013, para. 13 and Disposition. In F1436, the ‘Second Decision on Sabra Motion to Lift Redactions and Disclose United Nations Fact-Finding Mission Documents’ of 28 February 2014, the Trial Chamber examined the unredacted statement and dismissed the motion to remove the redactions from the witness’s statement.

²³ Prosecution motion, para. 8.

²⁴ Oneissi response, para. 5.

²⁵ Oneissi response, para. 4. Rule 111 states: “[r]eports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure or notification under the Rules. For purposes of the Prosecutor, this includes reports, memoranda or other internal documents prepared by the UNIIC or its assistants or representatives in connection with its investigative work”.

²⁶ Transcript of 5 June 2015, p. 5.

²⁷

17. The Trial Chamber, however, invited the Prosecution to file a revised witness statement, removing the irrelevant redacted material. The Prosecution undertook to do so.²⁸ As the request for further redactions only relates to the public broadcast of the statement, no decision is required on this.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Motion to Request to Interview Witness PRH662;

DECLARES admissible under Rule 155 (C) the redacted statement of Witness PRH662; and

ORDERS the Prosecution to make the witness available for cross-examination.

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

Leidschendam,
The Netherlands

19 June 2015

David Re

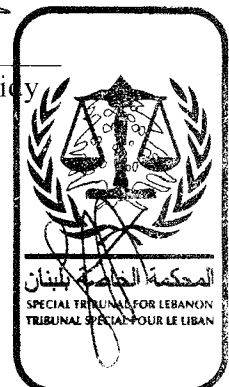
Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braide

Judge Micheline Braide



²⁸ Transcript of 5 June 2015, pp 2-3.