

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: 24 July 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 PROSECUTION MOTION TO ADMIT THE STATEMENTS
OF DECEASED WITNESS PRH045**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Hugh Milne

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

Victims’ Legal Representatives:

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

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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 Jad Khalil

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 Guénaél Mettiau
& Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks to admit into evidence, under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence, two statements by deceased Witness PRH045, dated 5 August 2010 and 19 September 2011.¹ The statements relate to threats to the former Lebanese Prime Minister Rafik Hariri and the broader political context existing in Lebanon in the period before his assassination, in Beirut on 14 February 2005.²

2. Rule 158 allows the Trial Chamber to admit 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. This is, however, subject to certain conditions. In deciding whether to admit such evidence, the Trial Chamber must first, in accordance with Rule 158 (A), 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, as required by Rule 158 (B), consider whether the evidence goes to the proof of the acts or conduct of the accused.³

3. Statements and documents tendered under Rule 158 do not need to be in the form prescribed by, notably, Rules 155 and 156, which govern the admission into evidence of written statements and transcripts in lieu of oral testimony or examination in chief. In addition, 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 155⁴ does not apply to documents and statements tendered through Rule 158. Although not strictly applicable here, the Practice Direction and Rule 155 nevertheless provide useful guidance on the formal elements to consider in assessing the reliability of a statement under Rule 158 (A) (ii).

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2025, Prosecution Motion for Admission of the Statements of PRH045, 25 June 2015. On 10 June 2015, the Trial Chamber granted Witness 045 protective measures, though deceased, due to continuing security concerns to his family if his identity was revealed. Transcript of 6 June 2015, p. 76.

² Prosecution motion, para. 2.

³ F1953, Decision on Prosecution Motion to Admit the Statements of Deceased Witnesses PRH249 and PRH093, 18 May 2015; F1890, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 27 March 2015, paras 15-16; Oral Order on Prosecution Request for PRH148's Statement to be Admitted under Rule 158, Transcript no. 28 of 9 January 2014, pp 14-15.

⁴ STL-PD-2010-02, 15 January 2010.

4. Counsel for the Accused, Mr Mustafa Amine Badreddine, responded to the motion and the Prosecution replied.⁵

DISCUSSION

Submissions

5. Witness 045 died of a heart attack in 2012, shortly after giving his second statement to the Prosecution. The Prosecution has provided his death certificate from the Lebanese Ministry of the Interior's Directorate General of Personal Status.⁶

6. Witness 045 worked as a journalist in Beirut. In his statements, Witness 045 describes how he advised Mr Hariri. He provided Mr Hariri with political updates and liaised between Mr Hariri and other Lebanese political factions, including Hezbollah. The statements describe what these Lebanese political figures, such as Mr Hassan Nasrallah of Hezbollah and Mr Walid Jumblatt of the Progressive Socialist Party, thought of Mr Hariri.⁷ The statements also describe threats to Mr Hariri, who may have benefitted from his death, and the structure and membership of Hezbollah.⁸ The statements also provide a telephone number for a member of Hezbollah, that, the Prosecution submits, is relevant to identifying contact between Hezbollah liaisons and Mr Hariri to organise meetings with Mr Nasrallah in December 2004 and February 2005.⁹ The Prosecution submits that the witness's evidence does not go to the acts and conduct of the Accused, though Rule 158 does not bar statements that do.¹⁰

7. The Prosecution submits that the statements are reliable. They were taken by Prosecution investigators with approved translators. The statements were read back to Witness 045 in Arabic and he signed both, acknowledging the truth of their contents and accepting liability for prosecution by the Special Tribunal for contempt or false testimony. The Prosecution made further confidential submissions regarding evidence in Witness 045's statements to which other witnesses have testified, the absence of manifest or obvious inconsistencies in his evidence, and other corroboration of the evidence.¹¹

⁵ F2064, Badreddine Defence Response to the Prosecution Motion for the Admission of the Statements of PRH045, 9 July 2015; F2085, Prosecution Reply to "Badreddine Response to the Prosecution Motion for Admission of the Statements of PRH045", 20 July 2015.

⁶ Prosecution motion, para. 6 and Annex A.

⁷ Prosecution motion, para. 3; Witness 045's Statement of 5 August 2010, para. 18.

⁸ Prosecution motion, para. 3.

⁹ Prosecution motion, para. 5.

¹⁰ Prosecution motion, paras 10-11.

¹¹ Prosecution motion, paras 8-9 and Annex B.

8. Finally, the Prosecution requested the Trial Chamber to maintain the confidentiality of Annex B to the motion and not order that a publicly redacted version be filed. It submitted that, considering Witness 045's protective measures and the identifying nature of most of the content in Annex B, redactions would render the annex meaningless.¹²

9. Counsel for Mr Badreddine objected to the admission of Witness 045's statements as lacking probative value. They submit that admission of the statements would be prejudicial and should be excluded under Rule 149 (D).¹³ Counsel argue that, as Witness 045 admits that he never acted in an official capacity as a formal contact between Hezbollah and Mr Hariri, his evidence on Mr Hariri's relationship with Hezbollah, threats to Mr Hariri, his opinions about who may have benefitted from his death, and the structure of Hezbollah lacks probative value.¹⁴ The statements are also speculative, contain hearsay, and merely reflect the witness's non-expert and partial opinions.¹⁵

10. Citing a decision of the International Criminal Court in *Prosecutor v. Bemba*, counsel argue that statements of deceased witnesses containing opinion, especially on live issues in the litigation, should be excluded as prejudicial.¹⁶ They do not accept that Hezbollah benefitted from Mr Hariri's death or was responsible for his assassination. They submit that Witness 045's evidence goes to Hezbollah's motive to attack Mr Hariri, and, if Witness 045 was present, they would seek to cross-examine him on his knowledge or understanding of relevant events and his opinions. As he is unavailable for cross-examination, admitting his statements would prejudice the Accused's right to a fair trial.¹⁷

11. The proposed statements also constitute an improper attack on the credibility of another Prosecution witness, Mr Mustafa Nasser. Witness 045's statements describe a meeting with Mr Hariri and Mr Nasser in 2005. Mr Hariri, in this instance, believed Witness 045 over Mr Nasser, accusing Mr Nasser of lying. Counsel for Mr Badreddine submit that

¹² Prosecution motion, para. 13.

¹³ Badreddine response, para. 2. Rule 149 (D) provides: '[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.'

¹⁴ Badreddine response, para. 5.

¹⁵ Badreddine response, paras 6-9.

¹⁶ Badreddine response, paras 10-11, citing ICC, *Prosecutor v. Jean Pierre Bemba Gombo*, ICC-01/05-01/08-2299-Red, Public Redacted Version of "Decision on the Prosecutor's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012, 8 October 2012, para. 135..

¹⁷ Badreddine response, para. 11.

relying on Witness 045's statements to undermine Mr Nasser's credibility would amount to an abuse of process prejudicial to a fair trial.¹⁸

12. Finally, counsel submit that Witness 045's evidence goes to acts and conduct of the Accused as charged in the consolidated indictment.¹⁹ They argue that Witness 045 describes Mr Badreddine as a ranking member of Hezbollah involved in its security missions within the context of Mr Hariri's assassination. They argue that it goes toward the allegation that Mr Badreddine is a member of Hezbollah.²⁰

13. Citing the case law of the International Criminal Tribunal for the Former Yugoslavia, the Prosecution replied that nothing in the framework of the Special Tribunal prevents a Party from introducing evidence that impeaches its own witness.²¹

Decision to admit Witness 045's statements

14. The Trial Chamber is satisfied that the death certificate provided by the Prosecution proves that Witness 045 is deceased and unavailable within the meaning of Rule 158. His evidence is relevant and probative of the political situation prevailing in Lebanon at the time of the assassination, and of contacts between Mr Hariri and Hezbollah. Witness 045 signed the statements and acknowledged the consequences of false testimony. The statements therefore contain sufficient indicia of reliability to admit into evidence under Rule 158.

15. Contrary to the submissions of counsel for Mr Badreddine, the evidence does not go to the acts and conduct of the Accused. The statement merely asserts that Mr Badreddine was a member of Hezbollah. Although this is a material fact pleaded in the consolidated indictment, it does not go toward any element of any of the charged crimes and therefore does not amount to acts and conduct of the Accused. Moreover, even if it did go toward the acts and conduct of Mr Badreddine, as the Prosecution submitted, that would not preclude the admission of the

¹⁸ Badreddine response, para. 12.

¹⁹ F1444, Redacted Version of the Consolidated Indictment, 7 March 2014.

²⁰ Badreddine response, paras 14-15; consolidated indictment, para. 49.

²¹ Prosecution reply, paras 7-12; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008; ICTY, *Popović*, IT-05-88-T, Transcript of 17 September 2007, T. 15457-15458; ICTY, *Popović*, Decision on Certification and Clarification of the Trial Chamber's Oral Decision on Impeachment of a Party's Own Witness, 21 November 2007. The Prosecution overstates the extent of the Appeals Chamber's approval of the Trial Chamber's decision. The Appeals Chamber did not 'agree with the general approach' of the Trial Chamber, as the Prosecution asserted at para. 12 of its reply. The Appeals Chamber, at paras 26-28 of its decision, found discernable error in the Trial Chamber's decision that a party did not need to seek the Trial Chamber's permission to impeach its own witness.

statements under Rule 158, but would be a factor for the Trial Chamber to consider in deciding whether to admit the statements.

16. Finally, counsel for Mr Badreddine's submission that Witness 045's statements improperly undermine the testimony of Mr Mustafa Nasser does not prevent admission of the statements. Defence counsel cited no legal authorities for this proposition. Inconsistencies in the Prosecution's evidence and witness credibility will be evaluated by the Trial Chamber when it assesses the weight to be given to evidence. The Trial Chamber may hear further submissions at the time of admission as to whether it should not receive any portions of the statements into evidence.

CONFIDENTIALITY

17. The Trial Chamber reiterates the public nature of the proceedings. The Prosecution requested that Annex B remain confidential without having to file a public redacted version. Having reviewed Annex B, the Trial Chamber agrees that the annex may remain confidential, but should be made public if circumstances permit. The Parties, though, should file public redacted versions of their confidential filings—counsel for Mr Badreddine's response and the Prosecution's reply—or move to have them reclassified as public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

GRANTS the motion;

DECLARES admissible under Rule 158 the two statements of Witness 045 dated 5 August 2010 and 19 September 2011; and

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

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

Leidschendam,
The Netherlands

24 July 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

