

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: 8 September 2015

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**REASONS FOR DECISION NOT TO RECONSIDER THE TRIAL CHAMBER'S
'DECISION ON PROSECUTION MOTION FOR VIDEO-CONFERENCE LINK
TESTIMONY FOR WITNESSES PRH032, PRH067, PRH089, PRH090 AND PRH553'
OF 27 AUGUST 2015**

Office of the Prosecutor:

Mr Norman Farrell, Mr Graeme Cameron
& Mr Alexander Hugh 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 Hassan
Hassan & Mr Philippe Larochelle

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mett
Mr Geoffrey Roberts



INTRODUCTION

1. The Trial Chamber, in a decision issued on 27 August 2015, authorised Witness PRH553 to testify by video-conference link.¹ On 1 September 2015, counsel for the Accused, Mr Assad Hassan Sabra, filed a request before the Presiding Judge seeking leave, under Rule 140 of the Special Tribunal's Rules of Procedure and Evidence, for the Trial Chamber to reconsider its decision with respect to Witness 553.²

2. As the Prosecution had scheduled the witness to appear to testify on 8 August 2015, counsel for Mr Sabra included their substantive submissions on reconsideration along with their request for leave to the Presiding Judge.³ The Trial Chamber heard oral submissions from the Prosecution opposing the request, further submissions from counsel for Mr Sabra, and additional submissions from counsel for the Accused, Mr Mustafa Amine Badreddine, supporting the request.⁴

3. On 3 September 2015, the Presiding Judge made an oral ruling granting leave for the Trial Chamber to reconsider the decision, with written reasons to follow.⁵ The Trial Chamber then issued an oral decision declining to reconsider the decision, also with written reasons to follow.⁶ These are those reasons.

SUBMISSIONS

4. Counsel for Mr Sabra sought reconsideration because of two issues they argued constituted a change in circumstances. First, the Prosecution confirmed that Witness PRH568, the other employee at Witness 553's business, would not be testifying, meaning that he would be the only witness testifying to the purchase of the 'red' network SIM cards.⁷ Second, the

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2143, Decision on Prosecution Motion for Video-Conference Link Testimony for Witnesses PRH032, PRH067, PRH089, PRH090 and PRH553, 27 August 2015.

² F2163, Urgent Sabra Defence Request for Reconsideration of the Decision Granting Video-Conference Link for PRH553, 1 September 2015.

³ Sabra request, para. 4.

⁴ Transcript of 2 September 2015, pp 91-102.

⁵ Transcript of 3 September 2015, p. 97; F2177, Decision Granting Leave for the Trial Chamber to Reconsider 'Decision on Prosecution Motion for Video-Conference Link Testimony for Witnesses PRH032, PRH067, PRH089, PRH090 and PRH553', Issued 27 August 2015, 7 September 2015.

⁶ Transcript of 3 September 2015, pp 97-98.

⁷ The Prosecution alleges that a group of eight mobile telephones, referred to as the 'red network', were used in the surveillance of former Lebanese Prime Minister, Mr Rafik Hariri, in the months before his assassination in Beirut on 14 February 2005. F1444, Redacted Version of the Consolidated Indictment, 7 March 2014, para. 15.

Prosecution disclosed a new statement by Witness 553, in which he criticised and challenged the evidence of Witness 568.⁸

5. Counsel for Mr Sabra intend to thoroughly cross-examine Witness 553. They will put their theory of the case to him and, with the witness's new statement, test his credibility and that of Witness 568. Now that they will not be able to do so with Witness 568, Witness 553's presence in the courtroom is even more essential for the Trial Chamber to evaluate his demeanour. Having him in the courtroom is necessary for them to meaningfully and effectively cross-examine the witness.⁹

6. The Prosecution opposed reconsideration, arguing that the new circumstances had hardly changed the Defence's position or the nature of their case concerning Witness 553. According to the Prosecution, Defence counsel may have a small number of new questions to put to the witness, but he is not exponentially more important to their case. Additionally, the Trial Chamber can very effectively assess the witness's demeanour through video-conference link. The Prosecution highlighted the reasons it advanced in its motion seeking authorisation for video-conference link testimony—namely, that Witness 553 has a health condition, has concerns about the operation of his business, and does not have a passport or visa. Considering these reasons against any change in circumstance, the Prosecution argues that the interests of justice still require the Trial Chamber hearing Witness 553's evidence by video-conference link.¹⁰

7. In response, counsel for Mr Sabra reiterated their desire to cross-examine Witness 553 on his credibility and his differences from Witness 568's statement, and again noted that he is the only witness to whom they can put their theory about the purchase of the 'red' network SIM cards. Counsel disagreed that seeing the witness on a screen, as opposed to his presence in court, assists in assessing his credibility. There is a difference between being asked questions over a video screen and before a Chamber.¹¹

8. Counsel for Mr Badreddine also submitted that there is a psychological advantage to cross-examining a witness in person and that it would aid the Trial Chamber in determining a witness's credibility. Moreover, the importance of a witness to the Prosecution or a Defence

⁸ Sabra request, para. 7.

⁹ Sabra request, paras 8-12.

¹⁰ Transcript of 2 September 2015, pp 91-94.

¹¹ Transcript of 2 September 2015, pp 98-100.

case should be taken into account when deciding whether it is in the interests of justice to hear a witness by video-conference link.¹²

DISCUSSION

9. A Chamber may, under Rule 140, ‘*proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice’. The Appeals Chamber emphasised that reconsideration is exceptional and that there must be an *actual* injustice. The Rule may not be used as ‘an ordinary remedy’ to redress ‘imperfections in a decision or to circumvent the unfavourable consequences of a ruling’.¹³ The party seeking reconsideration must show an injustice that ‘involves prejudice’ and is ‘demonstrated on specific grounds’.¹⁴ If prejudice or ‘an injustice’ is shown, reconsideration may be granted on grounds that include an error of law, abuse of discretion, or the existence of new facts or a material change in circumstances.¹⁵

10. Here, the relevant legal test is whether—based on the existence of new facts, or a material change in circumstances—the Defence has demonstrated on specific grounds that leaving the decision standing would show an injustice involving prejudice.¹⁶

11. The Trial Chamber is satisfied that counsel for Mr Sabra has demonstrated new facts. If they had been known at the time, the Trial Chamber would have considered them in its decision authorising video-conference link testimony. However, as the Prosecution submitted, the effect of these new facts is minimal. Counsel may have some additional questions to put to the witness.

12. Counsel have not shown any prejudice or an injustice meriting reconsidering the decision. The reasons originally advanced by the Prosecution—namely, the witness’s health and business concerns and his lack of travel documents—weigh in favour of video-conference

¹² Transcript of 2 September 2015, pp 100-102.

¹³ STL-11-01/PT/AC/R176bis, *Prosecutor v. Ayyash, Badreddine, Oneissi, and Sabra*, F0325, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012 (Applicable Law Reconsideration Decision), paras 22-23. See also STL-11-01/PT/TC, F0320, Decision on Reconsideration of the Trial *In Absentia* Decision, 11 July 2012, para. 7.

¹⁴ Applicable Law Reconsideration Decision, paras 24-25. See also, STL-11-01/PT/AC, F1258, Decision on Request by Counsel for Messrs Badreddine and Oneissi for Reconsideration of the Appeals Chamber’s Decision of 25 October 2013, 10 December 2013, para. 10.

¹⁵ Applicable Law Reconsideration Decision, para. 25; F1608, Corrected version of “Decision on Merhi Defence Motion for Reconsideration of Decision of 22 May 2014 on Alleged Defects in the Form of the Indictment” of 3 July 2014, 21 August 2014, para. 8.

¹⁶ F1875, Decision Reconsidering ‘Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance’, 7 November 2014, 6 March 2015, para. 17.

link testimony. The Trial Chamber appreciates that Witness 553 is important to the Defence's case and that counsel will rigorously test his credibility. However, as testimony by video-conference link preserves the right of counsel for the Accused to cross-examine witnesses and allows the Trial Chamber to effectively assess witness credibility and reliability,¹⁷ it is still in the interests of justice to hear Witness 553 by video-conference link. Therefore, the Trial Chamber can see no prejudice to counsel for Mr Sabra and will, consequently, not reconsider its decision.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLINES to reconsider its decision of 27 August 2015.

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

Leidschendam,
The Netherlands

8 September 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



¹⁷ F1425, General Decision on Video-Conference Link Testimony and Reasons for Decision on Video-Conference Link Testimony of Witness PRH128, 25 February 2014, paras 21-24.