

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: 29 October 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 FOR THE ADMISSION INTO
EVIDENCE UNDER RULE 155 OF THE STATEMENTS OF WITNESSES
PRH078, PRH550 (TOBY SMITH) AND PRH678**

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 Iain Edwards &
Ms Mylène Dimitri

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,
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Me
Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks, under Rule 155 of the Special Tribunal’s Rules of Procedure and Evidence, the admission into evidence of three witness statements of Witnesses PRH078, PRH678 and PRH550 (Mr Toby Smith), and one accompanying document—the documentary record of Witness 078’s original interview. The statements are relevant to attributing telephones to the Accused, Mr Salim Jamil Ayyash.¹ Counsel for the Accused, Mr Ayyash and Mr Mustafa Amine Badreddine, responded to the motion, and the Prosecution filed a reply.²

SUBMISSIONS

Prosecution submissions

2. The Prosecution submits that the statements are relevant, probative and reliable, and none of the statements go to the acts and conduct of the Accused as charged in the consolidated indictment.³

a. Witness 078

3. Witness 078 is a professional who had a relative of the Accused, Mr Ayyash, as a client and provides evidence about two telephone numbers that the Prosecution seeks to attribute to Mr Ayyash. The Prosecution submits these numbers are Mr Ayyash’s Beirut landline and one of his personal mobile telephones. Call data records will show contacts between Witness 078’s business landline and these two telephones.⁴

4. Witness 078’s evidence provides several dates during 2004 and 2005 on which the witness had appointments with Mr Ayyash’s relative. The Prosecution submits that call data records will show that three personal mobile telephones and one ‘blue network’ telephone attributable to Mr Ayyash activated the cell tower providing coverage near Witness 078’s

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2168, Public Redacted version of Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155, 3 September 2015, paras 1-4.

² F2205, Public Redacted Version of: Ayyash Defence Response to the Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155, 18 September 2015; F2204, Badreddine Defence Response to “Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155”, 17 September 2015; F2220, Prosecution Reply to Ayyash and Badreddine Defence Responses to “Prosecution Motion for Admission of Statements Pursuant to Rule 155” dated 3 September 2015, 25 September 2015.

³ Prosecution motion, paras 10 and 20-21.

⁴ Prosecution motion, paras 2-3, 11-12, 14.

place of business. Witness 078's evidence is therefore relevant to attributing those telephone numbers to Mr Ayyash.⁵

5. Witness 078's statement of 20 March 2015 incorporates the transcript of an audio-recorded interview with Prosecution investigators taken on 17 May 2010. Witness 078 did not initial every page of the 66-page transcript, but the Prosecution submits that this minor omission does not diminish the reliability of the statement because the witness acknowledges the original interview and affirms its contents. The Prosecution submits that the original interview is reliable, notwithstanding that it does not itself comply with the relevant Practice Direction on taking witness statements for admission into evidence under Rule 155,⁶ because Witness 078 signed a witness acknowledgement, gave the interview voluntarily, was aware that it could be used as evidence before the Special Tribunal, and was aware that giving false testimony could result in prosecution.⁷

6. The Prosecution requests the admission into evidence, as an integral part of Witness 078's statement, of a documentary record of the original 2010 interview. This includes a copy of an evidence envelope containing the audio recording, the original acknowledgement signed by Witness 078, a print-out of the electronic information provided by Witness 078 at that interview, and a handwritten page shown to the witness during the interview.⁸

7. Counsel for Mr Badreddine oppose the admission into evidence of Witness 078's statement under Rule 155 because the statement does not appear on the Prosecution's exhibit list, filed under Rule 91, which they submit is a prerequisite for admission.⁹ Counsel for Mr Ayyash specifically takes no position on this issue because the original audio transcript appears on the Prosecution's exhibit list.¹⁰

8. Counsel for Mr Ayyash and Mr Badreddine submit that Witness 078's statement cannot be admitted under Rule 155 because it attributes a telephone number to an Accused, and therefore goes to the acts and conduct of the Accused.¹¹ Furthermore, counsel for Mr Ayyash assert their right to cross-examine Witnesses 078, submitting that no other witnesses

⁵ Prosecution motion, paras 2-3, 13-14.

⁶ 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.

⁷ Prosecution motion, paras 6-7, 22-26, 36-38.

⁸ Prosecution motion, paras 34-35.

⁹ Badreddine response, para. 3.

¹⁰ Ayyash response, paras 9-10.

¹¹ Ayyash response, paras 2-5; Badreddine response, paras 2-5.

will be called to testify about similar facts.¹² Counsel for Mr Badreddine take no position on the admissibility of the associated exhibit, and counsel for Mr Ayyash, in the event that Witness 078 is called for cross-examination, do not oppose to its admission into evidence after the witness appears.¹³

b. Witness 550—Toby Smith

9. Mr Toby Smith, a Prosecution investigator, appeared as a witness on 27 October 2015.¹⁴ He interviewed Witness 078 in 2010 and created an investigator's note about that interview on 18 May 2010. On 19 July 2013, he recorded a witness statement incorporating that note to make it compliant with Rule 155. He obtained an electronic copy of the appointments described in paragraph 4, above. His statement also contains other procedural details about his interview with Witness 078 and confirms the landline telephone number of Witness 078's place of business.¹⁵

10. The Prosecution submits that Mr Smith's statement is reliable, despite his not signing each page of his prior statement, because he expressly acknowledged the investigator's note and met every other requirement under the Practice Direction.¹⁶

11. Counsel for Mr Badreddine take no position on the admissibility of Mr Smith's statement.¹⁷ Counsel for Mr Ayyash, on the basis that Witness 078 will be required to appear for cross-examination, do not oppose admitting his statement under Rule 155 after Witness 078 appears.¹⁸

c. Witness 678

12. Witness 678 provides evidence that corroborates Witness 078's personal mobile telephone number and business landline telephone number. The Prosecution submits that the statement is reliable—even though the witness was not provided with a copy of the Special Tribunal's Rules—because the statement demonstrates awareness that the witness could be prosecuted for contempt for false testimony. Similarly, even though the witness's statement lacks Mr Smith's express acknowledgement that he was the interviewer, Mr Smith signed

¹² Ayyash response, paras 6-8, 10-12.

¹³ Badreddine response, para. 2; Ayyash response, para. 2.

¹⁴ Transcript of 27 October 2015, p. 15.

¹⁵ Prosecution motion, paras 4, 9, 17-19.

¹⁶ Prosecution motion, paras 29-30.

¹⁷ Badreddine response, para. 2.

¹⁸ Ayyash response, para. 12.

every page and signed a later statement attesting that he observed Witness 678 signing the relevant pages.¹⁹

13. Counsel for Mr Ayyash, assuming that Witness 078 would be made available for cross-examination, do not oppose admitting Witness 678's statement into evidence under Rule 155, though they request that its admission be deferred until after Witness 078 appears for cross-examination.²⁰ Counsel for Mr Badreddine take no position on the admissibility of Witness 678's statement.²¹

Prosecution reply

14. The Prosecution, in reply, submits that evidence attributing a telephone to a person, even an Accused, does not, by itself, constitute acts and conduct of the Accused. It further argues that the Rules do not require every statement of a witness to be on its exhibit list—that a witness appears on its witness list is sufficient notice that it will rely on their evidence.²²

DISCUSSION

15. In earlier decisions, the Trial Chamber determined the procedural safeguards for admitting statements into evidence under Rule 155.²³ These allow it to receive written testimony in lieu of live oral testimony in the courtroom. In particular, a statement must meet the basic requirements for admission into evidence under Rule 149 and, if going to proof of the acts or conduct of the Accused, may not be admitted without cross-examination. In addition, Rule 155 (C) states that the Trial Chamber may decide, providing reasons, that the interests of justice and the demands of a fair and expeditious trial exceptionally warrant the admission of a statement or transcript, in whole or in part, without cross-examination. These principles are applicable here.

16. The Trial Chamber, having reviewed the statements and the transcript of the audio-recorded interview, find them relevant to and probative of attributing telephone numbers to

¹⁹ Prosecution motion, paras 4, 8, 15-16, 27-28.

²⁰ Ayyash response, para. 11.

²¹ Badreddine response, para. 2.

²² Prosecution reply, paras 4-11.

²³ STL-11-01/PT/TC, F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, para. 13; F1280, First Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 20 December 2013, paras 7-14; STL-11-01/T/TC, F1785, Decision on the Prosecution Motion for Admission under Rule 155 of Written Statements in Lieu of Oral Testimony Relating to Rafik Hariri's Movements and Political Events, 11 December 2014, para. 3; F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 5.

the Accused, Mr Ayyash. Notwithstanding some minor deviations, the statements substantially comply with the relevant Practice Direction, and Defence counsel do not contest their reliability.

17. The Prosecution submits that the telephone numbers are attributed to Mr Ayyash and that the dates assist in attributing other telephones to Mr Ayyash. The Trial Chamber has held that, in principle, evidence establishing that a person used a particular telephone number does not always, of itself, go to the acts and conduct of the Accused.²⁴ Witness 078's evidence may go toward the acts and conduct of the Accused but, at best, is rather limited, providing two telephone numbers for a relative of Mr Ayyash and appointment dates for that relative. As, counsel for Mr Ayyash has provided cogent reasons for cross-examining Witness 078, the witness should be made available for questioning by the Judges and cross-examination by Defence counsel.

18. Additionally, the Trial Chamber has previously held that a witness statement does not need to be on a party's exhibit list to be admitted into evidence, as long as the opposing parties have notice of the scope of the witness's evidence.²⁵ As counsel for Mr Ayyash point out, Witness 078's statement incorporates the transcript of the 2010 interview, which appears on the Prosecution's exhibit list. The Defence, therefore, had sufficient notice that the Prosecution could rely on this evidence.

19. Furthermore, the Trial Chamber considers the documentary record of the original interview an inseparable and indispensable part of Witness 078's statement. No Defence counsel took issue with this request. It is therefore admissible as an associated exhibit.

20. Counsel for Mr Ayyash requested that the Trial Chamber defer admitting the statements of Witnesses 550 and 678 and the associated exhibit into evidence until after Witness 078 appears for cross-examination.²⁶ The Trial Chamber will provisionally admit the statements and exhibit into evidence at the next convenient court sitting, marking them for identification until Witness 078 appears for cross-examination.

²⁴ F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 39.

²⁵ F2224, Corrected Version of 'Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087' of 29 September 2015, 5 October 2015, para. 18; F2282, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH575 and PRH703, 21 October 2015, paras 17-19.

²⁶ Ayyash response, para. 2.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 155, the statements of Witnesses PRH550 (Toby Smith) and PRH678 as listed in Annex A to the motion;

DECLARES admissible, under Rule 155 (C), the statement of Witness PRH078 and, as an associated exhibit, the documentary record of Witness 078's 2010 interview as listed in Annex A to the motion, and requires the Prosecution to make the witness available for cross-examination under Rule 156; and

DECIDES that it will, at the next convenient court sitting, provisionally admit into evidence the statements of Witnesses PRH550 and PRH678 and the associated exhibit, and, at a suitable point in the proceedings, formally admit all of the statements and the exhibit into evidence.

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

Leidschendam,
The Netherlands

29 October 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

