

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

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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 PRH081, PRH071, PRH050, PRH086, PRH312 and PRH539, and to Admit 37 Documents Related to the Insurance Policies of Salim Ayyash

Office of the Prosecutor:

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& Mr Alexander Milne

Victims' Legal Representatives:

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& Ms Nada Abdelsater-Abusamra

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

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 Khalil Jad

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yassir
Hassan & Mr Philippe Larochelle

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaël Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. The Prosecution seeks to admit into evidence 37 documents and the statements of six witnesses that assist it to prove that the Accused, Mr Salim Jamil Ayyash, used certain mobile telephones allegedly connected with the attack against the former Lebanese Prime Minister Mr Rafik Hariri, in Beirut on 14 February 2005.¹ In its consolidated indictment, the Prosecution alleges that five interconnected groups of mobile telephones were involved in the attack.²

2. While driving his BMW 523i—on 25 October 2003, in Beirut, and 20 November 2004, on the Al Rmeileh road—Mr Ayyash was allegedly involved in two car accidents. On 25 May 2005, while driving his Toyota Camry, he was involved in a third accident, in Beirut. The Prosecution's proposed evidence relates to these accidents and supports attributing two mobile telephone numbers to him—his personal mobile telephones or, as described by Prosecution, 'PMP 935' or 3523935 and 'PMP 170' or 3831170—and, additionally, attributing to him and his family, a landline telephone number.³ Call data records also connect three telephone numbers that the Prosecution attributes to Mr Ayyash with the accidents: 3523935, 3831170 and 'Yellow 294' or 3205294.⁴

3. An insurance policy for a third vehicle, a Mercedes C200, contains Mr Ayyash's name as a contact person. The Prosecution will lead evidence that the insured person was related to Mr Ayyash through marriage, and that the telephone number noted on the policy was in contact with Mr Ayyash's two personal mobile telephones 3523935 and 3831170, and personal mobile telephones 3020091 and 3767165. The Prosecution seeks to attribute the four numbers to Mr Ayyash.⁵

4. The Prosecution seeks to admit the evidence—including the statements of six witnesses, Witnesses PRH050, PRH071, PRH081, PRH086, PRH312 and PRH539—under Rules 154 and 155 of the Special Tribunal's Rules of Procedure and Evidence. The Prosecution also requested leave to

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2212, Prosecution Motion to Admit the Statements of PRH081, PRH071, PRH050, PRH086, PRH312 and PRH539, and to Admit 37 Documents Related to the Insurance Policies of Salim Ayyash, 22 September 2015; F2212, Public Redacted Version of Prosecution Motion to Admit the Statements of PRH081, PRH071, PRH050, PRH086, PRH312 and PRH539, and to Admit 37 Documents Related to the Insurance Policies of Salim Ayyash, 25 September 2015.

² F1444, Redacted Version of the Consolidated Indictment, 7 March 2014, para. 14.

³ Prosecution motion, paras 7-10.

⁴ Prosecution motion, para. 9. Paragraph 15 (a) - (e) of the consolidated indictment alleges that five color-coded groups of telephones were involved in planning and carrying out the attack. The Prosecution also attributes to Mr Ayyash telephone number 'Yellow 294' or 3205294 in relation to the attack.

⁵ Prosecution motion, paras 8, 10, 12 (c).

add 23 of the documents to its exhibit list, but submits that it is unnecessary to add the six witness statements to its exhibit list.⁶ The Trial Chamber decided this issue on 1 October 2015—unopposed by counsel for the Accused—by granting leave to add these documents to the Prosecution’s exhibit list.⁷ Only counsel for the Accused, Mr Ayyash responded to the motion, but they did not oppose it.⁸

DISCUSSION

A. Prosecution’s exhibit list

Submissions

5. The Prosecution submits that, although the statements of the six witnesses—Witnesses 050, 071, 081, 086, 312 and 539—are not on its exhibit list, their names have been on the Prosecution’s witness list since 2012, and their statements disclosed to the Defence. New statements of four, Witnesses 050, 071, 081 and 086, merely rectify departures from the relevant Practice Direction on taking witness statements for admission into evidence under Rule 155⁹ contained within their respective previous statements that are on the Prosecution’s exhibit list.¹⁰

Witness PRH312 (Erich Karnberger)

6. Mr Karnberger is a Prosecution investigator, and the Trial Chamber, in its decision of 9 July 2015, declared his earlier statement admissible under Rule 155 (C).¹¹ His new statement is dated 21 September 2015 and differs from his earlier statement in describing receiving from Witness 081 original insurance documents in relation to the accidents on 25 October 2003 and 20 November 2004, as opposed to receiving copies of the documents in relation to the accident on 20 November 2004 from Witness 071. Additionally, the original documents contain nine additional pages that were

⁶ Prosecution motion, paras 22-25.

⁷ Transcript of hearing on 1 October 2015, p. 31; Annex D to the Prosecution motion lists the 23 documents.

⁸ F2251, Ayyash Defence Response to Prosecution Motion to Admit the Statements of PRH081, PRH071, PRH050, PRH086, PRH312 and PRH539, and to Admit 37 Documents Related to the Insurance Policies of Salim Ayyash, 6 October 2015.

⁹ STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions under Rule 123 and 157, and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010.

¹⁰ Prosecution motion, para. 22.

¹¹ F2062, Decision on ‘Prosecution Motion for the Admission of Locations Related Evidence’, 9 July 2015, para. 16.

not in the copies attached to Mr Karnberger's first statement. Annex B to this motion lists the documents and the corresponding copy in Mr Karnberger's first statement.¹²

7. The Prosecution submits that, though its practice has been to seek leave to add new witness statements to its exhibit list when it seeks to admit those statements under Rule 155, it had no legal obligation to do so. That a witness appears on its witness list is sufficient notice to the Defence that it intends to rely on that witness's evidence. New statements of that witness, such as those obtained by the Prosecution when preparing a witness for testimony, need only be disclosed to the Defence.¹³

Decision

8. The Trial Chamber has previously decided that a witness statement need not necessarily be on a Party's exhibit list for admission into evidence, as long as the witness appears on the Party's witness list. The essential procedural point is ensuring that the opposing Party has notice of the intended evidence. The Trial Chamber does not consider that every statement need be on the calling Party's exhibit list if the other Parties have notice of the scope of the witness's evidence.¹⁴

9. Here, the Defence has had adequate notice of the evidence in the statements of Witnesses 050, 071, 081, 086, 312 and 539. The Trial Chamber, therefore, considers that the statements of these six witnesses can be admitted without their being on the Prosecution's exhibit list.

B. Admission of witness statements into evidence under Rule 155

10. The Prosecution requests the admission into evidence the statements of six witnesses—four non-Prosecution staff and two Prosecution staff—in lieu of examination in chief, under Rule 155.

Statements by non-Prosecution staff

11. Three witnesses are employees of insurance companies who handled the insurance documents in relation to Mr Ayyash's three car accidents. The fourth provides evidence relevant to

¹² Prosecution motion, para. 17 and Annex B (second section) to the Prosecution motion.

¹³ Prosecution motion, paras 23-25.

¹⁴ 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.

one of the accidents involving Mr Ayyash's BMW. Statements in this category do not go to acts or conduct of the Accused.

a) Witness 081 is a senior representative of a Lebanese insurance company. He gave Prosecution investigators four sets of insurance documents—containing Mr Ayyash's name—relating to the car accidents on 25 October 2003 and 20 November 2004. Some documents contain telephone numbers that the Prosecution seeks to attribute to Mr Ayyash. The witness also provided computer print-outs of (i) the insurance policy for the Mercedes C200 (containing Mr Ayyash's name as the contact person); and (ii) the insurance policy for Mr Ayyash's Toyota Camry. Witness 081 retrieved these documents from the insurance company's records.¹⁵

b) Witness 071 is an employee of the same insurance company. She gave Prosecution investigators two sets of insurance documents containing Mr Ayyash's name and his telephone numbers. The first is of original insurance documents for the Toyota Camry relating to the car accident on 25 May 2005 (including a copy of its vehicle registration containing Mr Ayyash's telephone number, 03831170, handwritten on the back). The second is copies of the BMW's insurance documents, relating to the car accident on 20 November 2004. Witness 071 similarly retrieved the documents from the insurance company's records.¹⁶

c) Witness 050 provided descriptions of Mr Ayyash, his family members and acquaintances. He identified several telephone numbers, including his own and Mr Ayyash's landline telephone number. Witness 050 explains some of the insurance documents related to the car accident on 20 November 2004 and the insurance policy for the Toyota Camry. He also identified Mr Ayyash from a photograph.¹⁷

d) Witness 086 provides evidence relevant to one of the accidents involving a car owned Mr Ayyash. The Prosecution submits that his evidence is relevant because Mr Ayyash's personal

¹⁵ Prosecution motion, para. 12.

¹⁶ Prosecution motion, para. 13.

¹⁷ Prosecution motion, para. 14.

mobile telephone, 3523935, contacted Witness 086's telephone number on the day of the accident.¹⁸

Statements by Prosecution staff

12. The statements of the two Prosecution investigators do not go to acts or conduct of the Accused.

a) Mr Karnberger describes receiving from Witness 081 the original insurance documents in relation to the accidents on 20 November 2004 and 25 October 2003.¹⁹

b) Witness 539 describes contacting an individual in relation to one of the accidents involving a car owned by Mr Ayyash. His statement is relevant because he contacted an individual using the same telephone number that was in contact with Mr Ayyash's personal mobile telephone 3523935, on the day of the accident.²⁰

13. The Prosecution argues that the interests of justice and the demands of a fair and expeditious trial warrant the admission of the five statements by Witnesses 050, 071, 081, 086, and 539 without cross-examination, and there is no overriding public interest in this evidence being presented orally. In addition, parts of the evidence are cumulative to the evidence of Mr Mahmoud Assi (Witness PRH030) who testified on 1 October 2015. Further, these witnesses provide evidence regarding records made and kept 'in the ordinary course of business'.²¹ With regard to Mr Karnberger, the Prosecution submits that, as the Trial Chamber ordered him to attend for cross-examination, he can be questioned on his new statement, dated 21 September 2015, when he testifies.²²

Decision

14. In earlier decisions, the Trial Chamber determined the procedural safeguards for admitting statements into evidence under Rule 155. 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

¹⁸ Prosecution motion, para. 15.

¹⁹ Prosecution motion, paras 16-17.

²⁰ Prosecution motion, para. 18.

²¹ Prosecution motion, para. 20.

²² Decision of 9 July 2015, paras 14-16; Prosecution motion, para. 21.

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.²³ These principles are applicable here.

15. The Trial Chamber considers the statements of Witnesses 050, 071, 081, 086, 312, and 539 relevant and probative of the Prosecution's attempt to attribute certain telephone numbers to Mr Ayyash. Parts of the proposed evidence are cumulative to the evidence of Mr Assi. The statements also conform to Rule 155 and the Practice Direction, and do not go to the acts and conduct of the Accused. The Trial Chamber accordingly finds these statements admissible under Rule 155 without cross-examination. With respect to Mr Karnberger, Defence counsel may question him on his statement of 21 September 2015 when he appears for cross-examination—as ordered by the Trial Chamber in its decision of 9 July 2015.

C. Admission of exhibits into evidence under Rule 154

Submissions

16. In addition to the witness statements tendered under Rule 155, the Prosecution requests the admission into evidence of 37 documents, under Rule 154. The Prosecution will rely on these exhibits to attribute certain telephone numbers to Mr Ayyash and telephone numbers in contact with telephone numbers that the Prosecution seeks to attribute to Mr Ayyash. The Prosecution describes these exhibits in its motion as:

(a) Accident on 25 October 2003;²⁴

(b) Accident on 20 November 2004;²⁵

(c) Accident on 25 May 2005;²⁶ and

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.

²⁴ Annex B to Prosecution motion, rows 1-9.

²⁵ Annex B to Prosecution motion, rows 10-33.

²⁶ Annex B to Prosecution motion, row 34.

(d) Tow service record in relation to the accident on 20 November 2004 and two applications for identity cards with photographs.²⁷

17. The Prosecution explains that copies of some of the 34 out of the 37 documents are attached to the statements of Witnesses 081, 071 and 050, and are listed in Annex B to the motion. High quality electronic versions of these documents are provided to give the Trial Chamber and the Parties clearer copies than those attached to the relevant witness statements.²⁸

(a) Accident on 25 October 2003

18. The BMW involved in the accident was insured in the name of ‘Salim Jamil Ayache’.²⁹ To establish his ownership, the Prosecution seeks to tender into evidence nine insurance documents for the accident on 25 October 2003.³⁰ This supports the attribution to Mr Ayyash of telephone numbers listed on the insurance documents for the accident on 20 November 2004. A declaration of waiver dated 5 November 2003 and signed by Mr Ayyash records \$350 US paid ‘as compensation’ for the accident on 25 October 2003.³¹

(b) Accident on 20 November 2004

19. The Prosecution seeks to tender 24 BMW insurance documents for the accident on 20 November 2004 relevant to establishing the registration and the insurance for the vehicle in Mr Ayyash’s name, and the location of the accident. This supports attributing to Mr Ayyash two telephone numbers: personal mobile telephone 3523935, that allegedly co-located with 3205294 or ‘Yellow 294’ on 20 November 2004. The car accident declaration form records that the insured person, ‘Salim Ayach’ (with contact telephone number 03/523935), declared that the BMW that he was driving was involved in an accident on 20 November 2004 in Al Rmeileh. Mr Assi’s name is recorded on it as a car accident expert. A damage estimate request states that Mr Ayyash owns the vehicle and has the telephone number 03/523935. An invoice dated 20 December 2004 for \$1,700 US states that repairs were made to ‘a BMW car owned by Salim Ayyash’. Finally, the report of the

²⁷ Annex C to Prosecution motion.

²⁸ Prosecution motion, para. 28.

²⁹ Prosecution motion, para. 31.

³⁰ Annex B to Prosecution motion, rows 1-9.

³¹ Annex B to Prosecution motion, row 2.

car accident expert, in addition to his own telephone numbers, recorded 03/523935 as Mr Ayyash's telephone number and as the BMW's owner and driver.³²

(c) Accident on 25 May 2005

20. On 25 May 2005, a Toyota Camry—registered and insured in Mr Ayyash's name—was involved in an accident in Beirut.³³ This supports the attribution to Mr Ayyash of the personal telephone mobile, 03/831170, that was handwritten on the registration document.³⁴ Mr Ayyash's name also appears on a payment order dated 23 June 2005 recording that \$550 US was paid for the repairs, and the policy number.

(d) Tow service record in relation to the accident on 20 November 2004 and two applications for identity cards with photographs

21. A vehicle towing service record for a navy blue 1997 BMW—in Mr Ayyash's name—on 20 November 2004, is relevant to the BMW accident and supports the attribution of telephone numbers to Mr Ayyash. It contains the name 'Salim Ayach' and the telephone number 03/523935.

22. Witness 050 also identified two photographs, one of which was of Mr Ayyash. The Prosecution will lead evidence that telephone numbers associated with the person in the other photograph were in contact with those that the Prosecution seeks to attribute to Mr Ayyash.³⁵

23. The Prosecution argues that the 34 insurance documents are reliable as they are electronic versions of the original insurance documents obtained from a Lebanese insurance company and created 'in the ordinary course of business'. The tow service record was extracted from a database received from the towing company's owner during an interview conducted by the Department of the Public Prosecutor of the State of Qatar. The two photographs were received from the Lebanese Ministry of the Interior and are attached to applications for identity cards submitted to the Ministry by Mr Ayyash and another individual.³⁶

³² Prosecution motion, para. 30.

³³ Annex B to the Prosecution motion, row 34.

³⁴ Prosecution motion, para. 32.

³⁵ Prosecution motion, para. 34.

³⁶ Prosecution motion, paras 35-36.

24. Finally, with regard to the relevance and probative value of the 34 insurance documents, the Prosecution submits that each of them was described or commented upon by at least one of Witnesses 081, 071, 312, and 050 in their respective statements. As a result, these documents are relevant to the issues described in paragraphs 11-12 above, as argued by the Prosecution.

Decision

25. The Trial Chamber has previously acknowledged that admitting evidence ‘from the bar table’, under Rule 154, without requiring a witness to produce or to identify it, is a well-established practice before international courts and tribunals.³⁷ Material tendered in this manner—like any other evidentiary material—must meet the basic requirements for the admission of evidence in Rule 149 (C) and (D), in that it must be relevant and probative, and its probative value must not be outweighed by its prejudicial effect.³⁸ Only *prima facie*—rather than definite—reliability and probative value is required at this stage. Probative value, in this sense, is distinct from the weight that the Trial Chamber may ultimately give to a document or record. The tendering party must also demonstrate, with clarity and specificity, where and how each document or record fits into its case.³⁹

26. The Trial Chamber is satisfied of the relevance and probative value to the Prosecution’s case of the 37 documents, in particular, in relation to attributing telephones to Mr Ayyash. The Trial Chamber has reviewed the six statements and is also satisfied of the provenance and reliability of the 35 documents as business records, and of the provenance and reliability of the two applications for identity cards containing the two photographs. The Prosecution has demonstrated how and where the information in these documents fit into its case. The proposed documents are accordingly admissible into evidence under Rule 154.

³⁷ F1876, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, para. 33; F1781, Decision on Prosecution Motion to Admit into Evidence Geographic Documents, 8 December 2014, para. 4; F1350, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, para. 5-7; STL-11-01/PT/TC, F1308, Decision on Prosecution’s Motion to Admit into Evidence Photographs, Videos, Maps and 3-D Models, 13 January 2014, para. 4.

³⁸ F1781, Corrected version of ‘Decision on Prosecution Motion to Admit into Evidence Geographic Documents’ of 8 December 2014, 10 December 2014, para. 4.

³⁹ Decision of 28 January 2014, para. 7; Decision of 13 January 2014, paras 4-6 and 8.

CONFIDENTIALITY

27. The Prosecution filed public redacted versions of the motion and Annexes B, C and D on 25 September 2015. The Prosecution proposes to file a public redacted version of Annex A after public summaries of the witness statements have been read in court or the witness has testified if required.⁴⁰ The Trial Chamber agrees with this course.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible under Rule 155 the statements of Witnesses PRH081, PRH071, PRH050, PRH086, PRH312 and PRH539 listed in Annex A to its motion;

DECLARES admissible under Rule 154 the 37 exhibits listed at Annexes B and C to its motion; and

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

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

Leidschendam, the Netherlands

4 November 2015

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



⁴⁰ Prosecution motion, para. 41.