

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

SPECIAL TRIBUNAL FOR LEBANON

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: 16 December 2016

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ON SALIM JAMIL AYYASH'S BMW AND MOBILE NUMBERS AND
AYYASH REQUEST REGARDING WITNESSES PRH331 AND PRH682**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Milne

Counsel for Mr Salim Jamil Ayyash:

Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair

**Legal Representatives of
Participating Victims:**

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

Counsel for Mr Hassan Habib Merhi:

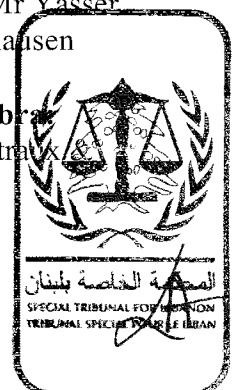
Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux
Mr Geoffrey Roberts



INTRODUCTION

1. Between 2002 and 2004, on the Prosecution's case, the Accused, Mr Salim Jamil Ayyash, owned a BMW vehicle. The Trial Chamber, on 4 November 2016,¹ decided to admit into evidence the statements of six witnesses, and ten documents relating to Mr Ayyash's ownership of the vehicle, and some mobile numbers that he allegedly used.² The Defence of Mr Ayyash did not oppose the motion and these documents have subsequently been admitted into evidence.³

2. Counsel for Mr Ayyash also did not seek to cross-examine the six witnesses, but asked the Trial Chamber to receive into evidence the statements of two other witnesses, Witnesses PRH331 and PRH682, whose evidence, they submitted, was relevant and probative, but was not included in the Prosecution's motion.⁴ The Prosecution informed counsel for Mr Ayyash that it no longer intended to call the two witnesses. Counsel for Mr Ayyash, however, considered their evidence 'integral to understanding issues surrounding the chain of ownership of the BMW, and in particular the deeds of sale'.⁵

3. The Trial Chamber then sought and received additional submissions from the Parties on this issue.⁶

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2816, Decision Admitting Documents and Statements Relating to Salim Jamil Ayyash's BMW and Mobile Numbers – Witnesses PRH385, PRH304, PRH258, PRH112, PRH034 and PRH550, 4 November 2016.

² See F2783, Prosecution motion to admit the statements PRH385, PRH304, PRH258, PRH112, PRH034 and PRH550, and to admit ten exhibits related to a BMW owned by Mr. Ayyash pursuant to Rules 154 and 155, confidential with confidential annexes A and B, 17 October 2016. The documents relate to a handset installed in the vehicle that Mr Ayyash allegedly used and mobiles that the Prosecution seeks to attribute to him, namely 'personal mobile phone' numbers 3523935 and ('PMP 935') and 3767165 ('PMP 165'), as pleaded in the amended consolidated indictment, filed 12 July 2016, paras 14-19.

³ As exhibits P1396 to P1411.

⁴ F2800, Ayyash Defence response to "Prosecution motion to admit the statements PRH385, PRH304, PRH258, PRH112, PRH034 and PRH550, and to admit ten exhibits related to a BMW owned by Mr. Ayyash pursuant to Rules 154 and 155" and Request for the admission of two witness statements pursuant to Rule 155, confidential with confidential annexes A and B, 31 October 2016.

⁵ Ayyash reponse, para. 3.

⁶ Transcript of 2 November 2016, pp 1-12; F2826, Prosecution reply to Ayyash Defence response to Prosecution motion related to Salim Ayyash's BMW and mobile phone numbers, confidential, 9 November 2016; F2835, Ayyash Defence surreply to "Prosecution reply to Ayyash Defence response to Prosecution motion related to Salim Ayyash's BMW and mobile phone numbers", confidential, 15 November 2016.

SUBMISSIONS

Prosecution's submissions

4. In its additional submissions, the Prosecution gave three reasons opposing the Ayyash request to receive the statements into evidence. First, it was unable to assess the relevance and probative value of the two statements in relation to the Ayyash Defence case and could therefore not determine whether it needed to cross-examine the witnesses. The Ayyash Defence had not yet, in accordance with the Special Tribunal's Rules of Procedure and Evidence, notified the Prosecution of its case.

5. Second, the Prosecution has the right to present its evidence without disruption, and allowing these documents into evidence now would prejudice the Prosecution. Third, trial efficiency is achieved by following the sequence for calling witnesses specified under Rule 146 (B). There is no prejudice to the Ayyash Defence in awaiting the presentation of its own case before putting the witness statements before the Trial Chamber. The circumstances do not justify the Trial Chamber using Rule 165 to order the production of additional evidence. Further, the Rule is not a means to admit evidence. The Trial Chamber would need to determine the relevance and probative value of the evidence, and to do so, would need to know the entire case of the Party seeking to rely on the evidence. Also, the request for admission should have been filed as a separate motion, and protective measures would be required for at least one witness.

Ayyash Defence submissions

6. The Ayyash Defence submits that the Prosecution was taking an unreasonable position in stating that it could not assess the probative value and relevance of the statements. The issue is not of relevance and probative value to the Ayyash Defence's case, but rather to the Prosecution's case. The Trial Chamber should receive the statements so as to make an informed decision regarding the probative value of the deeds of sale of the BMW to the Prosecution's case.

7. The Defence proposal does not disrupt the Prosecution's presentation of evidence. The Defence has demonstrated the relevance and probative value of the witness statements. The Trial Chamber should have all relevant information before it—this is consistent with the

Prosecution's duty under Rule 55 (C) to assist the Tribunal in establishing the truth.⁷ The Prosecution, here, is not assisting the Trial Chamber in this task, as this is the only evidence as to the sale of the BMW. Moreover, the Prosecution has not explained why the witnesses will not be called. The Defence is seeking to put relevant, admissible evidence before the Trial Chamber. The Ayyash Defence has proposed the admission into evidence under Rule 155, not Rule 165.

THE EVIDENCE

8. The two witness statements relate to the purchase and sale of a BMW. One relates to its importation into Lebanon and sale to Mr Ayyash in 2002, and the other to the vehicle's resale after Mr Ayyash disposed of it.

9. The main Defence submission in respect of Witness 682 is that a mobile number (personal mobile phone 'PMP' 935 allegedly attributed to Mr Ayyash) that was provided as his contact number for the purchase of the BMW in February 2002 was not in fact activated for another two years—in April 2004. The BMW's bill of sale is therefore not reliable as to the attribution of this number.

10. In respect of Witness 331, the number 935 was provided as Mr Ayyash's contact number for the BMW's sale in December 2004, but Witness 331 did not purchase the vehicle from Mr Ayyash, nor had he ever met him. At best the deed of sale could have been signed on behalf of Mr Ayyash.

11. The Prosecution did not respond to these evidentiary submissions, nor did it address the issue raised under Rule 55.

DISCUSSION

12. The Prosecution has not explained why it decided not to tender the statements of Witnesses 331 and 682 under Rule 155, or to call them to testify. The Trial Chamber, however, has actively encouraged the Prosecution to reduce the amount of documentary and witness evidence required to complete its case. The Prosecution has notified the Trial

⁷ Rule 55 (C) provides, 'In performing his functions, the Prosecutor shall assist the Tribunal in establishing the truth and protect the interests of victims and witnesses. He shall also respect the fundamental rights of suspects and accused.'

Chamber in recent case management meetings that it is significantly reducing the number of witnesses whose evidence will be heard live in the court-room, or received via Rule 155.⁸

13. Evidence relevant to attributing the personal mobile telephone 935 to Mr Ayyash is contained in the statements of Witness 304 (exhibit P1406), Witness 385 (exhibit P1408), Witness 112 (exhibit P1409), Witness 258 (exhibit P1410) and Witness 034 (exhibit P1411).

14. The Ayyash Defence has submitted that the evidence of the additional two witnesses is relevant and probative—not to any Defence case—but rather to the Trial Chamber’s assessment of the Prosecution’s evidence in relation to the BMW, and hence the Prosecution’s case. The Trial Chamber has carefully reviewed the two statements and the Ayyash submissions. It finds that the two statements could provide some context to the other relevant admitted exhibits—P1396 to P1411.

15. The Ayyash Defence seeks to tender the statements under Rule 155 without requiring the witnesses to appear for cross-examination. The information in the statements appears relevant to the issue of the attribution of mobile numbers to Mr Ayyash and may have some probative value. The Prosecution—which originally intended to call the witnesses—does not dispute this, nor explain any apparent contradictions between the evidence of these witnesses and any others. The statements are potentially admissible under Rule 155 and comply with the Rule 155 Practice Direction.⁹

16. The real issue here is the procedural route for receiving them into evidence, and when they should be received into evidence if found admissible. The Defence points to anomalies in the statements that could assist the Trial Chamber in evaluating the evidence in exhibits P1396 to P1411. Rule 155 would permit their reception into evidence without cross-examination. However, the Prosecution has stated that it cannot make a decision about whether it would submit that the witnesses should be cross-examined without knowing where the witnesses fit into the Ayyash Defence’s case. The Ayyash Defence has countered that the witnesses are not part of its case, but that the statements will assist the Trial Chamber in assessing the Prosecution’s case.

17. Rule 146 (B) provides that the Trial Chamber may, in the interests of justice, allow evidence to be presented outside the expressed ‘normal’ order of evidence called by the

⁸ The most recent, attended by Judges Re and Nosworthy, was held on Wednesday 14 December 2016.

⁹ STL, 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.

Prosecution, the Trial Chamber on behalf of the participating victims, the Defence, Prosecution rebuttal, participating victims' rebuttal and Defence rejoinder. According to the Prosecution, allowing the Defence to tender evidence under Rule 155 during the Prosecution's case could disrupt its case and cause prejudice. This Rule would be relevant if the Trial Chamber granted a Prosecution motion to cross-examine the witnesses. The Trial Chamber, however, is not convinced that it should vary the order for the sequence of calling witnesses for these two particular witnesses, and hence call Defence witnesses during the Prosecution's case. There could be circumstances justifying a departure from the sequence in Rule 146 (B) but this is not one. Given that five witnesses have provided evidence relevant to the attribution of personal mobile 935, the Trial Chamber does not see any compelling reason to vary the order of calling evidence.

18. The Trial Chamber may—under Rule 165—after hearing the Parties, *proprio motu* or at the request of a Party, order a Party or a participating victim to produce additional evidence. Similarly, it may summon witnesses and order their attendance. The Ayyash Defence, however, is not asking the Trial Chamber to use this Rule (it is using Rule 155) and the Trial Chamber is not convinced that it should do so at this stage of the proceedings.

19. As a matter of general procedural principle, there is a procedural difficulty—although not an insurmountable one—in receiving statements proposed by the Defence under Rule 155 during the Prosecution's case, over its opposition, namely, in the Prosecution being forced to elect whether to cross-examine a witness without knowing where the evidence fits into the Defence's case. It may therefore be unfair to the Prosecution to force it to elect now whether or not to seek to cross-examine a witness without the Ayyash Defence providing the relevant particulars under Rule 128¹⁰ of the witnesses they intend to call if, at the relevant time, the Defence elects to call a case. But this Rule only operates after the close of the Prosecution's case. Hence, the issue is whether the Trial Chamber can fairly receive the statements into evidence under Rule 155 in this situation.

20. In circumstances where a Party (here, the Prosecution) is resisting the submission of statements under Rule 155 during its case by the other Party (here, the Defence), it would appear that the witness statements most properly belong in the moving Party's (i.e. the Defence's) case. Parties have the right to seek to cross-examine witnesses under Rule 156.

¹⁰ Rule 128 (i) - (ii) provides that, after the close of the Prosecution's case and upon the Defence electing to present its case, the Trial Chamber 'shall order' the Defence to file its witness and exhibit list together with supporting information.

Here, procedural unfairness could result unless the Trial Chamber varied the order of receiving evidence but with appropriate disclosure orders of the Defence case to the Prosecution.

21. For these reasons, the Trial Chamber will not receive the statements into evidence under Rule 155 at this point. Before doing so it would seek further submissions from the Parties as to any relation between Rule 55 (C) and the specific Rules that allow the Trial Chamber to receive witness statements into evidence, namely Rules 155, 156 and 158.

22. The Trial Chamber has scrutinised the statements and, subject to receiving further submissions on the issues identified above, may exercise its powers under Rule 165 in relation to these statements at a suitable point in the trial, such as at the close of the Prosecution's case. If it did—and if relevant to any case called by the Accused—the Ayyash Defence may be required to provide full particulars as to how the statements are relevant to any Defence case. If the Prosecution consents to their admission into evidence without cross-examination, the Trial Chamber will admit them into evidence under Rule 155.

CONFIDENTIALITY

23. The filings in these proceedings should be made public, where necessary, in a redacted form.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the request by counsel for Salim Jamil Ayyash to admit the statements of Witnesses PRH331 and PRH682 into evidence under Rule 155 at this stage of the trial; and

ORDERS the Parties to have their filings reclassified as public or file redacted versions.

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

Leidschendam,
The Netherlands
16 December 2016

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

