

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: 11 July 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING CERTIFICATION TO APPEAL THE ‘DECISION ON THE
ADMISSION OF 27 DOCUMENTS AND ONE WITNESS STATEMENT RELATING
TO THE ATTRIBUTION OF TELEPHONE NUMBERS TO MR HASSAN HABIB
MERHI’**

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Hugh
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 Youssef 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 Geoffrey Roberts
Ms Sarah Bafadhel



INTRODUCTION AND BACKGROUND

1. The Trial Chamber, on 29 June 2017, issued a decision on a Prosecution motion to admit into evidence 27 documents and one witness statement relating to the attribution of mobile numbers to the Accused, Mr Hassan Habib Merhi.¹ Relevantly, at paragraph 28 of the decision, the Trial Chamber noted that the Prosecution had withdrawn some of the documents from its exhibit list, although a Prosecution analyst, Mr Andrew Donaldson (Witness PRH230), had relied upon them in a report, but, additionally, the Defence had not objected to their relevance or probative value, nor, apparently, made relevant inquiries of the Prosecution as to their status despite the Prosecution's continued reliance on the report.

2. The decision also admitted documents obtained from a medical practitioner, through the Lebanese Order of Physicians following a Prosecution request for assistance to the Government of Lebanon, relating to the Merhi family's contact details, including a mobile telephone, as the Prosecution seeks to use this information to assist in the attribution of mobile numbers to Mr Merhi. Relevantly, at paragraph 33 of the decision, the Trial Chamber held that even if a medical doctor-patient privilege had been violated, the documents would not be excluded under Rule 149 (D) or Rule 162 (A) of the Special Tribunal's Rules of Procedure and Evidence.² The Merhi Defence had not argued for exclusion under Rule 162.

3. Counsel for Mr Merhi now seek certification for an interlocutory appeal under Rule 126 (C) of the following two issues:

1. Did the Chamber err in finding that the Defence had an obligation to object or seek clarification in order to ensure compliance with a decision of the Chamber concerning the withdrawal of a document from the Prosecution's exhibit list?

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3202, Decision on the Admission of 27 Documents and One Witness Statement Relating to the Attribution of Mobile Numbers to Hassan Habib Merhi, 29 June 2017 ('Decision').

² Under Rule 149 (D) a chamber 'may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'. Under Rule 162, 'Exclusion of Certain Evidence', (A) 'No evidence shall be admissible if obtained by methods which cast substantial doubts on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings'.

2. Did the Chamber err in basing its finding on the breach of medical confidentiality upon just one of the alternative conditions of Rule 162 of the Rules, without analysing the second?³

LEGAL PRINCIPLES AND DISCUSSION

Certification standard

4. Rule 126 (C), ‘Motion Requiring Certification’, permits the Trial Chamber to certify for interlocutory appeal decisions that involve:

an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. The Trial Chamber must ensure that the issue meets the rule’s strict requirements: leave to appeal is exceptional; the issue must be precise and have an adequate legal or factual basis; and certification is concerned not with whether a decision was correctly reasoned but solely on whether the rule is satisfied. Once the requirements of Rule 126 (C) have been met, the Trial Chamber does not have the discretion to refuse certification.⁴

Discussion

6. Both questions posed for certification misstate the Trial Chamber’s decision and thus cannot be certified for interlocutory appeal. But, in any event, the findings underlying the misstated issues could affect neither the fair and expeditious conduct of the proceedings nor the outcome of the trial.

³ F3213, Requête de la Défense de Merhi en certification de la « Decision on the Admission of 27 Documents and One Witness Statement Relating to the Attribution of Mobile Numbers to Hassan Habib Merhi », 6 July 2017, para. 2.

⁴ STL-11-01/PT/AC/AR126.1, F0012, Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial *In Absentia* Decision, 1 November 2012, para. 8; STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal Against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, paras 11-15; STL-11-01/PT/AC/AR126.5, F0003, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judge’s “Decision on Sabra’s Tenth and Eleventh Motions for Disclosure”, 6 November 2013, para. 7; STL-11-01/T/AC/AR126.6, F0003, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge’s “Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer”, 12 May 2014, paras 19-21, 23; F1798, Decision on Application for Certification of Decision Regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, paras 12-13; STL-11-01/PT/AC/AR126.5, F1841, Decision on ‘The Defence for Hussein Hasan Oneissi Request for Certification of the “Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events” of 30 December 2014’, 3 February 2015, paras 5-6; F2069, Decision Denying Certification to Appeal the Trial Chamber’s Decision on Issuing a Summons to Witness 012, 10 July 2015, paras 4-5.

7. The first issue relating to the exhibit list misconstrues the decision. The Trial Chamber did not state that the Defence had an obligation to do anything; it merely noted that it had seen nothing revealing that the Merhi Defence had objected to the documents until May 2017 nor made any inquiries of the Prosecution as to their status.⁵ But, even if this is what the Trial Chamber had held—and it did not—it would be too trivial to satisfy the standard for certification.

8. The second issue also misstates the decision. Defence counsel state that the Trial Chamber should have analysed Rule 162 (B) as a basis for exclusion of information in medical records. This provides, ‘In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture’. But the Trial Chamber did in fact refer to Rule 162 (B).⁶ And, further, it is Rule 162 (A) that mandates the exclusion of offending evidence, not Rule 162 (B). Rule 162 (B) is a merely exemplary, as is obvious from the words ‘*In particular*’. Finally, the Merhi Defence did not even argue exclusion under Rule 162 in its response to the Prosecution’s motion.⁷

9. This motion for certification for interlocutory appeal should not have been filed; it comes nowhere near the standard for granting certification and borders on the frivolous. For this reason, the Trial Chamber has denied the motion without awaiting a Prosecution response.

⁵ Decision, para. 28.

⁶ Decision, para. 33.

⁷ See F3113, Réponse de la Défense de Merhi à la « Prosecution Motion to Admit 27 Documentary Exhibits and 1 Witness Statement Relating to the Attribution of Telephone Numbers to Hassan Habib Merhi », 2 May 2017, para. 20.

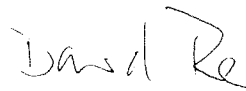
DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DENIES the Merhi Defence request.

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

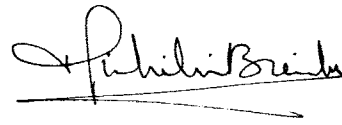
Leidschendam,
The Netherlands
11 July 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

