

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: 2 October 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING MERHI DEFENCE APPLICATION TO RECONSIDER
'DECISION CLARIFYING MR GARY PLATT'S AREA OF EXPERTISE'**

Office of the Prosecutor:Mr Norman Farrell & Mr Alexander Hugh
Milne**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &
Mr Chad Mair**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothee 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

1. Counsel for the Accused, Mr Hassan Habib Merhi, request the Trial Chamber to reconsider a decision permitting a Prosecution investigator, Mr Gary Platt,¹ to give expert opinion on the nature of the so-called ‘purple phones’.²

2. The Prosecution case concerns five interconnected mobile telephone groups, colour coded as ‘red’, ‘green’, ‘blue’ and ‘yellow’, operating in four closed networks, and one group of ‘purple’ mobiles. These mobiles were allegedly involved in planning, preparing and executing the attack that resulted in former Prime Minister of Lebanon Mr Rafik Hariri’s death, and the death and injury of many others in Beirut on 14 February 2005. The three ‘purple phones’ were allegedly used to coordinate the making of a video falsely claiming responsibility for the attack. Network mobiles communicated almost exclusively with each other and almost never used short message service (SMS). The ‘purple phones’, however, were personal mobile phones and, in addition to communicating with each other, also communicated with others outside the group. The Prosecution attributes the ‘purple phones’ to three of the Accused, Mr Merhi, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra.³

3. On 4 and 5 April 2016, the Trial Chamber held *voir dire* hearings as to Mr Platt’s qualifications. On 6 April 2016, in a decision delivered in court, the Trial Chamber declared Mr Platt qualified to give expert opinion in two limited areas: ‘matters connected with (1) the surveillance of criminal networks; and (2) the identification and organization of covert communications networks’. It provided written reasons for this decision on 13 April 2016.⁴ Mr Platt testified in April and July 2016, and returned in January 2017 to complete his testimony. The Trial Chamber received into evidence his report on the analysis of the network mobiles, and marked for identification his report on the communications evidence, which includes analysis of the activities of the ‘purple phones’. Mr Platt’s PowerPoint presentations were also admitted into evidence or marked for identification as visual aids.⁵

¹ Witness PRH147.

² STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3095, Merhi Defence Request for the Reconsideration of the Decision of 25 January 2017 Clarifying the Area of Expertise of the Witness Gary Platt, 20 April 2017 (public with public annexes A and B) (‘Application’).

³ F2720, Amended Consolidated Indictment, 12 July 2016, paras 14-15, 18-19.

⁴ Decision on Expert Witness Mr Gary Platt (PRH147) under Rule 161, delivered in court, *see* transcript of 6 April 2016, p. 2; F2549, Decision Allowing Mr Gary Platt (Witness PRH147) to Give Expert Opinion Evidence, 13 April 2016.

⁵ Reports: exhibit P796, Network Analysis Report: Red, Green, Blue and Yellow Phones, by Gary Platt, updated on 11 April 2016, with further agreed redactions on 20 April 2017; exhibit P1783 MFI, Communications

4. On 25 January 2017, the Trial Chamber clarified its decision explaining that Mr Platt's expertise extends to providing expert opinion evidence on the group of 'purple phones'. Specifically, the Trial Chamber held that Mr Platt's expertise lies in analysing many pieces of evidence, explaining their significance, and identifying covert telecommunications networks and their organisation.

5. The Trial Chamber explained that even if the decision does not explicitly state this, it allows Mr Platt to provide relevant expert opinion—within his declared area of expertise—in relation to mobiles that communicated with the Accused using closed network mobiles in so far as they have been part of the conspiracy against the four Accused as the Prosecution pleads in the amended consolidated indictment. The Trial Chamber has heard evidence relevant to the material fact pleaded in the amended consolidated indictment that the 'purple phones' have been used to coordinate the false claim of responsibility for the attack. The Trial Chamber held that 'the difference between accepting Mr Platt's opinion as an expert witness or as an investigator who has not been qualified as an expert is merely a matter of weight in assessing the evidence. This of itself cannot prejudice Defence preparations for trial.'⁶

6. On 6 February 2017, the Trial Chamber dismissed a motion filed by counsel for Mr Oneissi, joined by counsel for Mr Merhi, seeking certification to appeal the decision clarifying Mr Platt's area of expertise. It provided written reasons for this decision on 14 February 2017.⁷

7. Counsel for Mr Merhi now request the Trial Chamber to reconsider its clarification decision of 25 January 2017, under Rule 140 of the Special Tribunal's Rules of Procedure and Evidence, and to exclude specific passages of Mr Platt's testimony in which he offers an

Evidence Concerning the Assassination of Rafik Hariri: Chronology Report, by Gary Platt, dated 20 February 2014, updated in July 2017. PowerPoint presentations: exhibit P795, Network Analysis Presentation, dated 5 April 2016; Chronology PowerPoint presentations: exhibits P1781 MFI, P1784, P1787, P1793, P1807, P1889, P1902, P1907, P1916, P1923. Mr Platt testified before the Trial Chamber on 4-6, 14-15 April, 26-27 July 2016, 17-19, 24-27 January, 6-9, 13-16, 21-24 February, 6-10, 13-17, 21-24 March, 4-7, 19 April 2017.

⁶ Decision Clarifying Mr Gary Platt's Area of Expertise, delivered in court, *see* transcript of 25 January 2017, pp 36-41 ('Clarification decision').

⁷ Decision Denying Oneissi Defence's Request for Certification of the Trial Chamber's Decision Clarifying Mr Gary Platt's Area of Expertise, delivered in court, *see* transcript of 6 February 2017, p. 49; F2987, Written Reasons for Decision Denying Certification to Appeal the "Decision Clarifying Mr Gary Platt's Area of Expertise" dated 25 January 2017, 14 February 2017 ('Decision of 14 February 2017').

opinion regarding the nature and role of the ‘purple phones’ and how they worked. The Prosecution responded, opposing the application.⁸

LEGAL PRINCIPLES

8. A Chamber may, under Rule 140, ‘*proprio motu* or at the request of a Party, reconsider a decision, other than a judgement or sentence, if necessary to avoid injustice’. Reconsideration is an exceptional remedy, and the Rule must not be used to redress ‘imperfections in a decision or to circumvent the unfavourable consequences of a ruling’. The party seeking reconsideration must demonstrate on specific grounds an injustice that involves prejudice.⁹ If prejudice or 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 the circumstances.¹⁰

SUBMISSIONS

Merhi Defence application

9. Counsel for Mr Merhi submit that Mr Platt’s testimony of 7 and 15 February 2017 regarding the ‘purple phones’ contradicts and undermines the premise of the Trial Chamber’s clarification decision. In that decision, the Trial Chamber allowed Mr Platt to give an expert opinion on the ‘purple phones’ only because it held that they were covert and part of a criminal network ‘in the sense that their users did not want their alleged criminal activities discovered’.

10. Counsel argue that this contradiction constitutes an injustice and causes prejudice. As Mr Platt testified that the ‘purple phones’ were not covert and not part of a network, expert opinion is not required to understand how these mobiles operate. The only question before the Trial Chamber with respect to the ‘purple phones’ is whether their call data records establish that they were used to organise the false claim of responsibility. Only the Trial Chamber may draw such a conclusion, and allowing Mr Platt to make a ‘judgement’ on this issue (in the form of his opinion and conclusions regarding the use of the ‘purple phones’) usurps the Trial

⁸ F3122, Prosecution Response to Merhi Defence Motion for Reconsideration of the Trial Chamber’s Decision of 25 January 2017 Clarifying Mr Gary Platt’s Area of Expertise, 5 May 2017 (‘Prosecution response’).

⁹ STL-11-01/PT/AC/R176bis, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0327, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012, paras 22-26.

¹⁰ F2719, Decision on Ayyash Defence Motion for ‘Reissuance’ and Oneissi Defence Motion for Reconsideration of the Trial Chamber’s Decision of 29 July 2016, 14 September 2016, para. 10.

Chamber's power. Mr Platt's opinion ought to have no bearing on the guilt of the Accused and the weight to be given to circumstantial evidence regarding the use of the 'purple phones'. But, given his status as an expert, it 'may be foreseen' that the Trial Chamber will give more weight to his opinion as to the reasons for certain calls made on the 'purple phones'.

11. The Trial Chamber erred in its clarification decision when it considered the 'purple phones' to be covert, as Mr Platt was not of that view. Reconsideration of this decision with the aim of repairing this error would eliminate the injustice. The prejudice suffered may be redressed by excluding the specific transcript passages in which Mr Platt offers an opinion on the role and nature of the 'purple phones' and how they worked.¹¹

Prosecution response

12. The Prosecution submits that the request for reconsideration should be dismissed because the Merhi Defence has failed to establish that actual injustice has occurred based on specific grounds. The sole ground advanced by the Merhi Defence is that Mr Platt's assertion that the 'purple phones' were personal mobiles rather than covert network mobiles amounts to a new fact or a material change in the circumstances that invalidates the basis of the clarification decision. But the Prosecution case has never been that the 'purple phones' were covert network mobiles. The Trial Chamber's clarification decision explicitly recognised that the 'purple phones' were not covert network mobiles but rather personal mobile phones engaged in criminal activity, which accords entirely with Mr Platt's testimony. The clarification decision further noted that the distinction between covert networks and mobiles engaged in criminal activity was 'more terminological than real' and properly recognised that granting permission for expert opinion on covert network mobiles necessarily included opinion on the relevant behaviour of other types of mobiles engaged in criminal activity. As such, Mr Platt's testimony falls within his area of expertise and fully accords with the clarification decision.

13. The Merhi Defence has not demonstrated that the clarification decision caused actual injustice or prejudice. The Merhi Defence had the opportunity to cross-examine Mr Platt and did so with respect to the non-covert nature of the 'purple phones'. Mr Platt did not usurp the Trial Chamber's authority by 'giving opinion' on the ultimate issue in the case; rather, his

¹¹ Application, paras 4-7, 10-17. Annexes A and B list the specific passages for which the Merhi Defence requests exclusion.

testimony addressed the nature of relevant ‘purple phone’ activity in the context of the preparation and execution of the false claim of responsibility. The Trial Chamber is able to accord the appropriate weight to such evidence and will make such determinations at the end of the case, considering the evidence in its totality.

14. The application to exclude portions of Mr Platt’s evidence is unjustified. A significant number of the passages identified by the Merhi Defence for exclusion are purely descriptive and contain no opinion. Regardless, the Trial Chamber correctly acknowledged in the clarification decision that the difference between accepting Mr Platt’s opinion as an expert or as a lay witness is merely a matter of weight in assessing the evidence. As such, in any instances in which Mr Platt has offered an opinion beyond the scope of his expertise, the question would be one of weight rather than exclusion.¹²

DISCUSSION

15. As a preliminary matter, the Merhi Defence reargues an issue that the Trial Chamber has already determined in previous decisions. First, counsel then acting for a former Accused, Mr Mustafa Amine Badreddine,¹³ joined by counsel for Mr Oneissi, requested certification to appeal the Trial Chamber’s decision declaring Mr Platt qualified to give expert opinion, arguing that the surveillance of criminal networks and the identification and organisation of covert communications networks are ‘matters classically within the realm of non-expert triers of fact’ and not subjects for expert evidence.¹⁴ Next, counsel for Mr Oneissi, joined by counsel for Mr Mehri, requested certification to appeal the Trial Chamber’s clarification decision, repeating that Mr Platt’s alleged expertise is in fact within the realm of lay witness opinion and ‘usurps the prerogative of the trier of fact’ to determine the ultimate issue of the alleged criminal use of the ‘purple phones’.¹⁵ On both occasions, the Trial Chamber dismissed

¹² Prosecution response, paras 4-18.

¹³ The Appeals Chamber has found that the Prosecution has presented sufficient evidence to prove the death of Mr Badreddine to the requisite standard. Accordingly, the Trial Chamber terminated the proceedings against Mr Badreddine without prejudice. See STL-11-01/T/AC/AR126.11, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0019-AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the “Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of the Proceedings”, 11 July 2016; F2633, Order Terminating Proceedings against Mustafa Amine Badreddine Without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016.

¹⁴ F2559, Badreddine Defence Motion for Certification to Appeal the “Decision Allowing Mr Gary Platt (Witness PRH147) to Give Expert Opinion Evidence”, 20 April 2016, paras 11-12; F2568, Oneissi Defence Joinder to Badreddine Defence Motion for “Certification to Appeal Decision Allowing M. Gary Platt (Witness PRH147) to Give Expert Opinion Evidence”, 22 April 2016.

¹⁵ F2966, Defence for Hussein Hassan Oneissi Request for Certification to Appeal the “Decision Clarifying Mr Gary Platt’s Area of Expertise” dated 25 January 2017, 1 February 2017, for example at paras 16, 18-20; F2968, Merhi Defence Joinder to the “Defence for Hussein Hassan Oneissi Request for Certification to Appeal

the Defence arguments as mere disagreement with its respective decisions. It held that whether Mr Platt's testimony constitutes lay witness opinion or expert opinion goes to assessing its weight, and that the difference between the terms 'group' and 'network' is one of terminology rather than substance, as both describe actions undertaken for the same purpose, namely having the alleged criminal networks remain covert.¹⁶

16. Mr Platt did not define the 'purple phones' as 'mission phones'.¹⁷ He testified that the 'purple phones' were personal mobiles used in tandem with a criminal activity and were not covert or part of a network.¹⁸ He also stated that although no consideration had been given to covertness at the time of the coordination of the false claim of responsibility, it is not coincidental, rather a common feature that the Accused abruptly and simultaneously discarded these personal mobiles, which they had been using for a number of years, shortly after the execution of the alleged criminal activity.¹⁹

17. Mr Platt's testimony is not a new fact or a material change in the circumstances. The Trial Chamber acknowledged in the clarification decision that these mobiles were personal mobiles and described them as 'purple phones' only when engaged in the activities pleaded in the amended consolidated indictment. It explained that the difference between a 'group' of mobiles alleged to have participated in criminal network activity and 'covert' communications network is semantic. 'Both are covert in the sense that they do not want their alleged criminal activities discovered.'²⁰ To conclude, the Trial Chamber's clarification decision is not contradictory to Mr Platt's evidence.

18. The Merhi Defence has not demonstrated any actual injustice that involves prejudice. The clarification decision reiterates that the difference between accepting Mr Platt's opinion

the 'Decision Clarifying Mr Gary Platt's Area of Expertise' dated 25 January 2017" in the Case STL-11-01, 2 February 2017.

¹⁶ F2674, Decision Dismissing Application for Certification to Appeal the Trial Chamber's 'Decision on the Admission of Mr Gary Platt (Witness PRH147) as an Expert Witness, 28 July 2016, paras 8-9; Decision of 14 February 2017, paras 14-16.

¹⁷ Mr John Edward Philips (Witness PRH435), the Prosecution's expert witness in the field of telecommunications and cell site analysis described the common characteristics of 'mission phones'. These are often referred to as 'closed user group' mobiles. They are involved in the same mission and used for this purpose only; calls are retained within the group; they operate based on anonym subscriptions; and come into use and cease use around the same time. To leave no trace, it is expected that there is no text message or voicemail use and that the call forwarding option was not initiated. *See* exhibit P1117, Common Mission Phones?, by J.E. Philips, 29 June 2015, para. 5.1.3. *See also* exhibit P549, An Introduction to Cell Site Analysis as Applied to GSM Networks, by J.E. Philips, 24 September 2012, para. 10.4.13.

¹⁸ Transcripts of hearings of 7 February 2017, p. 60; 15 February 2017, p. 16.

¹⁹ Transcripts of hearings of 7 February 2017, pp 60-63; 14 February 2017, p. 90; 15 March 2017, pp 79-81; 21 March 2017, p. 33.

²⁰ Clarification decision, transcript of hearing of 25 January 2017, pp 37-39.

evidence as an expert witness or as an investigator is merely a matter of weight in assessing the evidence. The Trial Chamber will evaluate this in light of the totality of the evidence.

19. Furthermore, the application cites no legal authority for the removal of specific passages of the relevant transcripts or their exclusion from the evidence in the case. Some of the passages proposed for exclusion do not offer opinion,²¹ or concern call activities of a 'green' network mobile, Green 071, which the Prosecution also attributes to Mr Merhi.²² The Merhi Defence did not advance any arguments for their exclusion.

20. The Trial Chamber therefore finds that the application to reconsider the clarification decision and to exclude specific passages of the relevant transcripts of Mr Platt's testimony from the evidence is without merit.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the motion.

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

Leidschendam,
The Netherlands
2 October 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

²¹ See, for example, transcripts of hearings of 8 February 2017, p. 77; 9 February 2017, p. 18 (listed in Annex A, pp 11, 13).

²² See, for example, transcripts of hearings of 7 February 2017, p. 62; 8 February 2017, p. 31; 13 February 2017, p. 91; 14 February 2017, p. 23; 15 February 2017, p. 17; 6 March 2017, p. 89 (listed in Annex A, pp 6, 10, 16, 18, 25, 28).

