



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: 23 November 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 ‘DECISION GRANTING, IN PART, SABRA DEFENCE MOTION FOR THE ADMISSION OF DOCUMENTS RELATING TO MR AHMED ABU ADASS – CHARACTER, RELIGIOUS BELIEFS AND ASSOCIATES’

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 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

1. On 25 September 2017, the Trial Chamber, in the exercise of its discretion, rejected the admission into evidence of 67 witness statements of 45 witnesses, which counsel for the Accused, Mr Assad Hassan Sabra tendered under Rule 154¹ of the Special Tribunal’s Rules of Procedure and Evidence and held that it would not vary the sequence under Rule 146 (B)² for presenting evidence.³

2. The statements related to the character, religious beliefs and associates of Mr Ahmed Abu Adass. The amended consolidated indictment alleges that he appeared—at the behest of the Accused—in a video claiming responsibility for the attack of 14 February 2005 that killed the former Lebanese Prime Minister Mr Rafik Hariri and 21 others. It also pleads that Mr Sabra participated in identifying Mr Abu Adass, disseminated statements falsely attributing responsibility for the attack, delivered the video and ensured that it would be broadcast.⁴ The Sabra Defence filed a motion requesting certification to appeal this decision, which the Prosecution opposed.⁵

THE LEGAL PRINCIPLES: CERTIFICATION

3. The Trial Chamber, under Rule 126 (C), will certify a decision for interlocutory appeal if:

the decision involves 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.

4. 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

¹ Rule 154 provides that the Trial Chamber may admit evidence in the form of a document or other records subject to Rules 155, 156 and 158. Rules 155 and 156 cover the admission of witness statements into evidence—either with or without cross-examination—while Rule 158 allows a Chamber to receive the statement of witness who is ‘unavailable’.

² Rule 146 (B) provides that, unless otherwise directed in the interests of justice by the Trial Chamber, evidence at trial shall first be presented by the Prosecution, second by the victims participating in the proceedings and third the Defence. The Prosecution and the victims participating in the proceedings may then present rebuttal evidence. The Defence may then present rejoinder evidence.

³ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass, 25 September 2017.

⁴ F2720, Amended Consolidated Indictment, 12 July 2016, paras 3 (b)-(d), 23, 44, 48 (c), 64 (f), 66 (f), 68 (h), 70 (h).

⁵ F3353, Sabra Request for Certification to Appeal “Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass”; F3360, Prosecution Response to Sabra Request for Certification to Appeal “Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass”.

basis; and certification is concerned not with whether a decision was correctly reasoned but solely on whether the rule is satisfied. Once both requirements of Rule 126 (C) have been met, the Trial Chamber has no discretion to refuse certification.⁶

SUBMISSIONS, DISCUSSION AND DECISION

5. The four issues for certification for interlocutory appeal are:

- a. Whether statements given by individuals to non-parties fall within Rules 155 and 156 [‘First Issue’];
- b. Whether individuals who provide statements to the STL Prosecution can be considered as ‘Defence witnesses’ pursuant to Rule 128(a)⁷ before the completion of the Prosecution case [‘Second Issue’];
- c. Whether Rule 146(B) requires proof of ‘compelling reasons’ or exceptional circumstances to depart from the usual order of presentation of evidence, in circumstances where no live evidence will be presented [‘Third Issue’]; and
- d. Whether the Trial Chamber procedurally erred in dismissing the Sabra Reply dated 27 January 2017 [‘Fourth Issue’].⁸

6. According to the Sabra Defence, these issues affect the fairness and the expeditiousness of the proceedings or the outcome of the trial. They relate directly to evidence concerning the Prosecution’s allegations against Mr Sabra, his involvement with Mr Abu Adass and the false claim of responsibility. This creates an overwhelming burden for the

⁶ STL-11-01/PT/AC/AR126.1, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, 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, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, 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. 8; 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; F1798, Decision on Application for Certification of Decision Regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, para. 13; 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, para. 6; F2069, Decision Denying Certification to Appeal the Trial Chamber’s Decision on Issuing a Summons to Witness 012, 10 July 2015, para. 5.

⁷ This appears to be a typographical error. The correct provision is Rule 128 (i).

⁸ Sabra motion, para. 2 (i)-(iv).

Defence and deprives it of evidence it could use in seeking a judgement of acquittal under Rule 167 at the close of the Prosecution's case.⁹

7. The Prosecution responded generally that the Trial Chamber did not find the statements inadmissible, but merely held that the Sabra Defence's preferred method for seeking their admission was wrong in law. The Defence had made no application under Rule 155,¹⁰ which is the correct procedural mechanism for tendering witness statements. The Defence motion also did not directly address the decision in respect of Rules 154 and 155.¹¹

First issue: Whether statements given by individuals to non-parties fall within Rules 155 and 156

8. Rules 155 and 156 govern the admission of witness statements into evidence; Rule 155 without cross-examination, and Rule 156 with the witness attending court to adopt the statement and to answer questions in cross-examination.

Submissions

9. The Sabra Defence submits that, in finding the 67 statements inadmissible under Rules 155 and 156,¹² the Trial Chamber failed to consider whether these Rules were applicable, since the statements were given 'to third party agencies, outside of proceedings before the Tribunal'. Rules 155 and 156 only concern the admission of evidence 'given by a witness in proceedings before the Tribunal' and thus the decision broadened their scope to a 'distinct category falling outside of Rules 155 and 156.' Had the Trial Chamber correctly identified the statements as mere documents, then they would have been assessed in accordance with Rule 154 without requiring a variation of the presentation of evidence sequence.¹³

10. This issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial because it concerns statements that are, in its view, highly relevant to

⁹ Sabra motion, paras 3-4. Rule 167 provides that the Trial Chambers shall, at the end of the Prosecution case and after hearing from the Parties, 'enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count.'

¹⁰ Rule 155 allows written statements and transcripts to be admitted in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused.

¹¹ Prosecution response, paras 4-5.

¹² Rule 156 allows written statements and transcripts to be admitted in lieu of oral testimony which goes to proof of the acts and conduct of the accused where the witness is present in court, is available for cross-examination and the witness attests to the written statement of transcript. Where a witness is called for cross-examination under Rule 155 (C), the conditions set out in Rule 156 apply.

¹³ Sabra motion, paras 8-10.

the charges against Mr Sabra and their non-admission impairs the Trial Chamber's ability to arrive at the truth and its determination under Rule 167. The decision cannot be remedied during a Defence case. Submitting the statements then would require 'extensive, burdensome, and time-consuming efforts' to call the individuals as *viva voce* (live) witnesses or attempt to have the statements satisfy the requirements of Rules 155 and 156. This would risk their non-admission if the Defence efforts fail in this respect. But even if successful, these efforts would present a significant delay in the proceedings.¹⁴

11. The Prosecution responded that this issue was not addressed in the Trial Chamber's decision as the Sabra Defence had not argued the point. Accordingly, it did not arise from the decision. In any event, the issue is a 'red-herring' which is unsupported by any legal authority.¹⁵

12. The submissions also misrepresent Rules 155 and 156 as these Rules concern the admission in lieu of oral testimony of 'evidence of a witness in the form of a written statement' or a 'transcript of evidence which was given by a witness in proceedings before the Tribunal'. In this context, a statement is merely advance notice of what a witness would say if were to testify, but in circumstances in which the statement is then accepted as the witnesses' evidence in chief. Who created the statement has no relation to the quality and nature of the evidence.¹⁶

13. The Sabra Defence also failed to demonstrate why the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; a speculative assertion that the statements are highly relevant to the charges is insufficient. The Sabra Defence also cannot rely on its own obligations when calling witnesses or its compliance with Rules 155 and 156 and then complain that these would cause significant delay to the proceedings. The Sabra Defence presents the risk of its efforts failing but without actually seeking the admission of the statements in compliance with the Rules.¹⁷

Decision

14. This issue does not arise from the decision and therefore would not significantly affect the fair and the expeditious conduct of the proceedings. The application for certification does

¹⁴ Sabra motion, paras 11-12.

¹⁵ Prosecution response, paras 6-7.

¹⁶ Prosecution response, paras 7-8.

¹⁷ Prosecution response, para. 9.

not cite any paragraph in the decision from which this issue could arise because it was never argued. Further, the Trial Chamber decision did not distinguish statements made to the Prosecution (or the United Nations International Independent Investigation Commission) or to any other authority. For this reason alone it cannot be certified for interlocutory appeal.

Second issue: Whether individuals who provide statements to the STL Prosecution can be considered as ‘Defence witnesses’ pursuant to Rule 128 (i) before the completion of the Prosecution case

Submissions

15. Two potential witnesses gave two statements—among the 67 statements tendered—to the Prosecution. The decision, at paragraphs 90 and 92, considered them to be ‘Defence witnesses’, particularly when it considered the prospect of the Prosecution cross-examining them.

16. The Sabra Defence submits that the Trial Chamber incorrectly designated these witnesses as ‘Defence witnesses’, since the Defence is only obliged to file its witness list under Rule 128 (i) after the Prosecution closes its case and upon its election to present a Defence case. The rejection of the statements prejudiced the Defence and denied it the ability to rely on relevant and probative material during any Rule 167 litigation. This significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial as it goes to the evidence available to the Trial Chamber for the purposes of a Rule 167 determination.¹⁸

17. The Prosecution responds that, viewed contextually, the Trial Chamber’s comments concerning the Prosecution cross-examining witnesses and the matter of witness lists was merely *obiter dicta*. The Trial Chamber did not formally designate the witnesses as ‘Defence witnesses’ but merely used the expression as shorthand to describe witnesses in respect of whom the Defence applied to have evidence admitted. Rather, the Defence designated them as Defence witnesses when it sought to admit their evidence. The decision rejected the admission of the statements on the basis that the Sabra Defence had wrongly sought their admission under Rule 154. Since no other method of admission was sought, this issue would

¹⁸ Sabra motion, paras 13-15.

not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It follows that the issue does not arise from the Trial Chamber's decision.¹⁹

Decision

18. The witness statements, according to the Sabra Defence, merely address Mr Abu Adass' character, religious beliefs and his associates rather than Mr Sabra's responsibility for the attack of 14 February 2005 as pleaded by the Prosecution.

19. This issue affects only two of the 67 statements tendered by the Sabra Defence under Rule 154 from the 'bar table' that the Trial Chamber decided not to admit into evidence during the Prosecution's case. The non-admission of these two statements into evidence during the Prosecution's case would not *significantly* affect the fair and expeditious conduct of the trial. And there is no suggestion that the rejection of these two statements alone—at this stage of the proceedings—would not affect the outcome of the trial concerning Mr Sabra. It therefore cannot satisfy the test in the first part of Rule 126 (C).

Third issue: Whether Rule 146 (B) requires proof of 'compelling reasons' or exceptional circumstances to depart from the usual order of presentation of evidence, in circumstances where no live evidence will be presented

Submissions

20. The Sabra Defence submits that the Trial Chamber, when considering whether to depart from the usual order of presentation of evidence under Rule 146 (B), required proof of compelling reasons or exceptional circumstances.²⁰

21. This was an additional requirement that had no basis in Rule 146 (B) and had not been previously relied upon by the Trial Chamber. This higher standard resulted in the decision failing to take into account considerations which were directly relevant to whether the interests of justice required a departure from the usual presentation of evidence. Had the requisite standard been correctly identified, the Sabra Defence would have provided the Trial Chamber with relevant and probative material without calling live witnesses in relation to the

¹⁹ Prosecution response, paras 10-15.

²⁰ Sabra motion, paras 16-17.

Prosecution's case concerning the false claim of responsibility for the purposes of a Rule 167 determination.²¹

22. The Prosecution responds that the decision did not use the expression 'exceptional circumstances' and that the terms 'compelling reasons' had only been used in the context of Defence witnesses being called to testify during the Prosecution's case, a matter which had not been argued by the Sabra Defence. Therefore, this issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.²²

Decision

23. The Sabra Defence made no application for the Trial Chamber to vary the sequence for presenting evidence. The Trial Chamber, however, made a reasoned discretionary decision *not* to depart from the mandated statutory sequence for the presentation of evidence, namely, that of Prosecution evidence followed by evidence from the Trial Chamber at the request of the participating victims, then followed by evidence from the Defence. Rule 146 (B) provides this default procedure unless 'otherwise directed and in the interests of justice'. The decision, at paragraph 93, held *proprio motu* that there was no 'compelling reason to vary the usual sequence of presentation of evidence under Rule 146 (B)' in circumstances in which the Defence was seeking to introduce 67 statements from 45 witnesses that the Prosecution wished to cross-examine, and during the Prosecution's case.

24. The Trial Chamber has a wide discretion 'in the interests of justice' to vary the sequence of the presentation of evidence, or alternatively, not to do so. The decision recognized that it could depart from the usual sequence for presenting evidence.²³ The terminology employed in making a discretionary decision either to vary or not vary the sequence for presenting evidence cannot of itself *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial. This issue cannot be certified for interlocutory appeal, especially in circumstances where the Sabra Defence did not ask the Trial Chamber to vary the sequence for presenting evidence and has not challenged the Trial Chamber's decision not to do so.

²¹ Sabra motion, paras 18-19.

²² Prosecution response, paras 17-18.

²³ See Decision, paras 24, 81, 92, 109.

25. Moreover, the decision did not use the term ‘exceptional circumstances’ and the issue posed for certification confuses two concepts, namely, the correct legal basis for submitting witness testimony—namely Rules 155, 156 or 158—with whether no ‘live evidence will be presented’. The latter is the Trial Chamber’s, not the Parties’ decision. It does not arise from the decision.

Fourth issue: Whether the Trial Chamber procedurally erred in disregarding the Sabra Reply dated 27 January 2017

26. The brief procedural background is that the Sabra Defence filed a motion on 16 December 2016, to which the Prosecution responded, and then the Sabra Defence filed a reply on 27 January 2017.²⁴ On the Trial Chamber’s order, the Sabra Defence filed, on 8 February 2017, an addendum to the motion, to which the Prosecution responded.²⁵ However, because of continued deficiencies in the original motion of 16 December 2016, the Trial Chamber ordered the Sabra Defence to refile it in its entirety, which it did on 27 February 2017.²⁶ The Prosecution then filed a new response,²⁷ to which the Sabra Defence did not file a reply. The decision did not consider the reply of 27 January 2017 to the Prosecution’s response to the 16 December 2016 Sabra Defence motion.²⁸

²⁴ F2914, Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass, 16 December 2016 (confidential, with confidential annexes A-C); F2943, Prosecution Response to Sabra “Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass”, 18 January 2017 (confidential, with confidential annexes A-C); F2957, Reply to “Prosecution Response to Sabra ‘Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass’”, 27 January 2017 (confidential).

²⁵ F2914, Addendum to “Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass”, 8 February 2017 (confidential, with confidential annexes A-C); F3011, Prosecution Response to Sabra Addendum to “Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass”, 23 February 2017 (confidential).

²⁶ F3015, Order on Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass, 27 February 2017; F3024, Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass with updated annexes, 7 March 2017 (confidential, with confidential annexes A-D). Deficiencies in Sabra Defence filings have persisted. Recently, the Trial Chamber was forced to summarily dismiss 224 documents tendered by the Sabra Defence on account of their having already been admitted into evidence, already considered and rejected in a prior decision, already tendered in other motions that are awaiting a decision from the Trial Chamber and without the Sabra Defence providing sufficient information on their relevance and *prima facie* reliability and hence their probative value: F3418, Summary Dismissal of Sabra Defence Application for the Admission of 224 Documents, 21 November 2017.

²⁷ F3047, Prosecution Response to Sabra “Motion for the Admission of Documents Relating to the Claim of Responsibility – Character, religious beliefs and associates of Ahmed Abu Adass”, 22 March 2017 (confidential, with confidential annexes A-D).

²⁸ Decision, fn. 3.

Submissions

27. The Sabra Defence argues that the Trial Chamber procedurally erred by failing to consider its reply. While the decision noted the existence of the reply and that the Trial Chamber had ordered the original motion to be refiled, the Trial Chamber gave no indication that it was also required to refile its reply.²⁹

28. The Prosecution's response to its refiled motion was substantively the same as the one which had been addressed in its reply and thus did not require additional submissions in a new reply. Had this error not occurred, the Trial Chamber could have addressed whether the considerations under Rule 150 (G)³⁰ meant that the interests of justice required a departure from the presentation sequence under Rule 146 (B). It would have had evidence available for consideration in any Rule 167 determination. This issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial as it concerns submissions relating to departures from the presentation sequence in Rule 146 (B) and could have significant consequences on the need for a Defence case at all.³¹

29. The Prosecution responds that the filing process was restarted from the beginning. Thus, it should have been obvious to the Sabra Defence that if its original motion needed to be refiled, then what flowed from it also required refiling. If the arguments contained in the reply were crucial to the Defence, they could have been incorporated into an addendum or the refiled motion; the refiled motion did not seek to adopt or preserve the arguments in the reply. The strong similarities in the Prosecution's responses should have triggered the refiling of the Sabra Defence's reply. In any event, the reply only concerned the interaction of Rule 154 and Rule 146 (B), and given the Trial Chamber's rejection of Rule 154 as a means to admit witness statements, the reply's contents became moot. Further, the failure of a Party to advance a submission cannot give rise to an appeal based on the Trial Chamber's failure to consider it, and therefore the ground advanced does not arise from the decision. The Sabra Defence's claim that this issue significantly affects the fair and expeditious conduct of the

²⁹ Sabra motion, para. 21.

³⁰ Rule 150 (G) provides that, upon an objection by a Party, the Trial Chamber may exercise control over the mode and order of questioning of witnesses and presentation of evidence so as to make questioning effective for the ascertainment of the truth and to avoid needless consumption of time and resources.

³¹ Sabra motion, paras 20-23.

proceedings or the outcome of the trial because it could have significant consequences on the need for it to call a case at all is speculative.³²

Decision

30. This issue too cannot meet the test in the first part of Rule 126 (C). The Trial Chamber not considering a reply to a response to a motion—which had been refiled in its entirety—goes nowhere near meeting the test of an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

31. The Sabra Defence also made submissions, to which the Prosecution responded—in respect of all four issues—concerning the second part of Rule 126 (C), namely, whether immediate resolution by the Appeals Chamber may materially advance the proceedings. However, having decided that none of the four issues meet the first part of the cumulative test in Rule 126 (C), the Trial Chamber need not consider the second part.

CONFIDENTIALITY

32. While the Sabra Defence has filed its motion publicly, the Prosecution has filed its response as confidential on the basis that ‘the Decision is currently Confidential’.³³ However, the decision is not classified as confidential. Nonetheless, the Prosecution does not object to its response being reclassified. The Trial Chamber therefore orders the Prosecution’s response to be reclassified from confidential to public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Sabra Defence motion; and

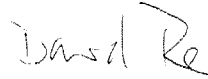
ORDERS the Prosecution’s response to be reclassified as public.

³² Prosecution response, paras 20-24.

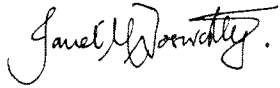
³³ Prosecution response, para. 27.

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

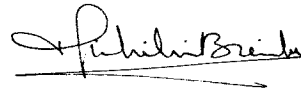
Leidschendam,
The Netherlands
23 November 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

