



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: 20 December 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING SABRA DEFENCE MOTION TO ADMIT INTO EVIDENCE
TWENTY WITNESS STATEMENTS**

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



BACKGROUND

1. In the amended consolidated indictment, the Prosecution alleges that five interconnected mobile telephone groups—colour-coded as ‘red’, ‘green’, ‘blue’ and ‘yellow’, operating in four closed networks, and, additionally one group of ‘purple’ mobiles—were involved in planning, preparing and executing the attack that resulted in Mr Rafik Hariri’s death in Beirut on 14 February 2005. The ‘purple’ phones, a group of three mobiles, were used to coordinate a false claim of responsibility for the attack. The Prosecution alleges that the Accused, Mr Assad Hassan Sabra, was involved in the preparatory acts, the dissemination of the statements falsely ascribing responsibility for the attack, and was the user of one of the three ‘purple’ mobile phones, including the number 3419018 (‘Purple 018’).¹

2. The Trial Chamber—in six decisions issued in September and November 2017—has extensively discussed the procedural limitations in relation to receiving into evidence witness statements during the Prosecution’s case under Rules 154 or 155 of the Special Tribunal’s Rules of Procedure and Evidence.²

3. The Sabra Defence tenders under Rule 155 or, alternatively, under Rule 154, the relevant paragraphs of 20 witness statements that relate to the attribution of Purple 018 and the methodology used by Prosecution analyst Mr Andrew Donaldson (Witness PRH230) when he prepared his report attributing this mobile number to Mr Sabra.³

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 3 (c), 14-15, 18, 19 (d); F1077, Prosecution’s Submission of Updated Pre-Trial Brief Pursuant to Rule 91 (G) (i) and the Pre-Trial Judge’s Order of 7 August 2013 and Decision of 16 August 2013, 23 August 2013 (public with confidential annexes A-B), annex A, para. 55; F2125, Public Redacted Version of Prosecution Motion for the Admission of CSTs and SMS CSTs Related to the Accused Assad Hassan Sabra, 7 October 2016, paras 2-3.

² F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 (‘Decision of 25 September 2017’); F3439, Decision Partly Granting Third Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – the Selection of Ahmed Abu Adass, 30 November 2017; F3442, Decision Partly Granting Third Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass - The Failed Recruitment of Mr Ahmed Abu Adass, 30 November 2017; F3443, Decision Partly Granting Fourth Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass - The Successful Recruitment of Mr Ahmed Abu Adass, 30 November 2017; F3444, Decision Partly Granting Fifth Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass - The False Claim of Responsibility, 30 November 2017; F3445, Decision Partly Granting Sixth Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Fax, 30 November 2017. *See also* F2909, Decision on Salim Jamil Ayyash’s BMW and Mobile Numbers and Ayyash Request Regarding Witnesses PRH331 and PRH682, 16 December 2016 (‘Decision of 16 December 2016’).

³ F3409, Sabra Motion to Admit Twenty Statements Pursuant to Rule 155, 13 November 2017 (‘Defence motion’), para. 1. Although only the relevant portions of the statements are tendered, the Sabra Defence is open to the admission of the statements in their entirety to provide context of the interview and allow the Trial Chamber to assess the credibility of the witnesses. *See* Defence motion, paras 30-31.

4. Mr Donaldson provided analytical opinion evidence attributing usage of mobile numbers to Mr Sabra. During his cross-examination on 28 September 2017, the Trial Chamber received into evidence, as an *aide-memoire*, a list prepared by the Sabra Defence of 24 Prosecution witnesses in relation to the usage of Purple 018.⁴ Four witness statements from this list have already been admitted into evidence, while for the remaining 20 statements a discrete column in a table annexed to the motion lists the required indicia of reliability for each statement.⁵ According to the Sabra Defence, counsel explained their relevance and probative value throughout Mr Donaldson's cross-examination.⁶

Defence's submissions

5. The Sabra Defence submits that the 20 witnesses whose statements are tendered are third party contacts of Purple 018 from whom Mr Donaldson had assessed that the Prosecution should take witness statements. The statements are relevant to the methodology employed by Mr Donaldson in compiling his report. Mr Donaldson omitted to include in his final attribution report that some of these witnesses were unable to identify the user of Purple 018 or identify Mr Sabra from a photograph shown to them. This demonstrates the Prosecution's incomplete and selective presentation of evidence, and shows Mr Donaldson's lack of independence and impartiality. The 20 statements are tendered to undermine the attribution of Purple 018 to Mr Sabra.⁷

6. The 20 statements are directly relevant to the Prosecution's case and do not form part of the Defence's case.⁸ In the absence of any positive attribution of Purple 018 to Mr Sabra, these statements are material to assessing the weight to be afforded to Mr Donaldson's evidence and to assessing the credibility of the Prosecution's attribution theory, namely that Mr Sabra was the only user of Purple 018.⁹

7. A number of the statements do not comply with the relevant Practice Direction; for example, they do not include an interviewer's certificate confirming the identity of the interviewed person.¹⁰ These defects are however overcome by the other indicia of reliability

⁴ Defence motion, para. 2. Exhibit 5D412.

⁵ Exhibits P1151, P2103, P1156, and P1822. Defence motion, para. 4.

⁶ Defence motion, para. 3. *See* transcript of 28 September 2017, pp 30-35.

⁷ Defence motion, paras 6-9, 18, 25-26.

⁸ Defence motion, paras 11, 23.

⁹ Defence motion, paras 9-11, 23.

¹⁰ Defence motion, paras 14-15, annex A. *See* STL-PD-2010-02, 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.

contained in the statements and furthermore, the Trial Chamber has previously not considered such defects to be a bar to the admission of witness statements into evidence.¹¹ If necessary, the Sabra Defence could recall the Prosecution's investigators to give evidence on how the identity of each witness has been verified or such evidence could be provided in a written statement.¹²

8. Finally, it is in the interests of justice to admit into evidence the 20 statements at this stage of the proceedings. Any decision of the Trial Chamber under Rule 167¹³ would depend on its assessment of Mr Donaldson's evidence. To avoid any unfair extension of the trial and any undue prejudice to the Defence—either with or without varying the sequence of the presentation of evidence under Rule 146 (B)¹⁴—the admission of the statements now is therefore in the interests of justice.¹⁵

Prosecution's submissions

9. The Prosecution responds that although Rule 146 (B) provides for the interests of justice as an exception for varying the sequence of the presentation of evidence, the Sabra Defence did not establish or substantiate that it is in the interests of justice to depart from the existing sequence to admit the 20 statements into evidence. The Sabra Defence failed to explain or substantiate why the list of statements used as an *aide-memoire*, or the fact that the statements were tendered to undermine Mr Donaldson's credibility during cross-examination, precludes the application of Rule 146 (B) to the tendered statements. The Sabra Defence's argument that the 20 statements do not form part of the Defence case is based on too narrow of a definition.¹⁶

10. The Sabra Defence's argument that it should be able to rely upon the 20 statements to challenge the credibility and reliability of the Prosecution's evidence in any Rule 167 application is unsupported and inconsistent with the case-law of other international criminal

¹¹ Defence motion, paras 14-15.

¹² Defence motion, para. 16.

¹³ Rule 167 provides that, at the close of the Prosecutor's case, the Trial Chamber shall, by oral or written decision and after hearing submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count.

¹⁴ Rule 146 (B) provides that, unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the Prosecutor; (ii) evidence called by the Trial Chamber at the request of victims participating in the proceedings; (iii) evidence for the defence; (iv) Prosecutor's evidence in rebuttal; (v) rebuttal evidence called at the request of victims participating in the proceedings; (vi) defence evidence in rejoinder.

¹⁵ Defence motion, paras 20, 27-28.

¹⁶ F3430, Prosecution Response to "Sabra Motion to Admit Twenty Statements Pursuant to Rule 155", 27 November 2017 ('Prosecution response'), paras 5-13.

tribunals in relation to judgments of acquittal.¹⁷ The Sabra Defence has also not shown that presenting its evidence in the order required by Rule 146 (B) would cause undue prejudice or unfairly extend the proceedings.¹⁸

11. Further, the Prosecution's preliminary view is that it would need to cross-examine the 20 witnesses and that it would therefore be unfair to force it to make this determination before the Sabra Defence has fully explained its case and complied with its disclosure obligations.¹⁹ Finally, the reliability deficiencies in a number of the statements resulting from their non-compliance with the Practice Direction can be remedied when the witnesses attend for cross-examination.²⁰

DISCUSSION AND DECISION

12. Despite clear similarities between the Sabra Defence's motion and Trial Chamber's decisions of 16 December 2016 and 25 September 2017—in which it analysed the requirements and impediments to varying the sequence of receiving evidence under Rule 146 (B) and receiving the Defence's evidence during the Prosecution's case²¹—the Defence motion makes no reference to those decisions. The principles established in these decisions though clearly apply here.

13. Mr Donaldson's updated 'Evidence of Telephone Attribution – Assad Hassan Sabra, Version 4' of 18 August 2017—from which references to the 20 statements have been excluded—was disclosed to the Sabra Defence on 31 October 2017.²² This is sufficient notice from the Prosecution to the Defence that these witnesses were no longer part of its case.

14. Further, the Sabra Defence is tendering the statements under Rule 155 during the Prosecution's case, in circumstances in which the Prosecution may want to cross-examine the witnesses. The Trial Chamber has consistently held that a procedural unfairness may result from the Trial Chamber forcing the Prosecution to decide whether or not to seek to cross-examine a witness without appropriate disclosure orders of the Defence case to the Prosecution. The Trial Chamber concluded that, where the Prosecution is resisting the

¹⁷ Prosecution response, paras 14-15.

¹⁸ Prosecution response, para. 18.

¹⁹ Prosecution response, paras 20-21, 23.

²⁰ Prosecution response, para. 25, annex A. The Prosecution agrees with the Sabra Defence that admitting the statements in their entirety will assist the Trial Chamber in properly considering the surrounding context of each interview and the credibility of the witnesses. *See* Prosecution response, paras 26-27.

²¹ Decision of 16 December 2016; Decision of 25 September 2017.

²² Exhibit P1953. *See also* F3408, Decision on Three Defence Applications for Disclosure of Andrew Donaldson's Final Reports, 10 November 2017, para. 3 and fn. 8.

submission of statements under Rule 155 by the Defence during the Prosecution's case, the witness statements most properly belong in the Defence's case.²³

15. As to the Sabra Defence's request to admit the statements into evidence under Rule 154, the Trial Chamber already found, in its decision of 25 September 2017, that the Rules do not provide for the Sabra Defence to seek to admit witness statements under Rule 154 (if they are objected to).²⁴ For the same reasons, the Trial Chamber, consistent with its decision of 16 December 2016,²⁵ rejects the admission of the 20 statements under Rule 154.

16. The unfairness resulting from forcing the Prosecution to now decide whether it will cross-examine the 20 witnesses before the disclosure of the Sabra Defence's case may be avoided if the Trial Chamber decides to vary the order of receiving evidence under Rule 146 (B). According to the Sabra Defence, it is in the interests of justice to admit into evidence the 20 statements at this stage of the proceedings because any decision of the Trial Chamber under Rule 167 would depend on its assessment of Mr Donaldson's evidence.

17. The Trial Chamber is not persuaded that the Sabra Defence will be unduly prejudiced in relation to any Rule 167 application if the Trial Chamber does not vary the sequence of receiving evidence. The Trial Chamber agrees with the Prosecution that it is an established practice in the international criminal tribunals, regarding judgments of acquittal,²⁶ that a Trial Chamber, at the mid-trial phase of a case, neither evaluates the weight of the evidence, nor assesses its credibility and reliability.²⁷ Nor is of any significance the Sabra Defence's claim that the statements are underlying documents supporting the admitted *aide-memoire*—exhibit 5D412—that, according to Sabra Defence, constitutes demonstrative evidence.²⁸ Moreover, Mr Donaldson was not questioned as to the contents of the 20 statements, and counsel for Mr Sabra did not explain in court the relevance and probative value of exhibit 5D412 during Mr Donaldson's cross-examination.

²³ Decision of 16 December 2016, para. 20; *see also* F3441, Decision Denying Ayyash Defence Application to Admit into Evidence Witness Statements Tendered During the Cross-Examination of Prosecution Analyst Andrew Donaldson, 30 November 2017, para. 24.

²⁴ Decision of 25 September 2017, para. 103.

²⁵ Decision of 16 December 2016, paras 19-20.

²⁶ Rule 167 (A) is the equivalent of the ICTY Rule 98 *bis*, which provides that, at the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

²⁷ Prosecution response, para. 15, citing, *e.g.*, ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*, 5 April 2004, para. 15; *Prosecutor v. Strugar*, IT-01-42-T, Decision On Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*, 21 June 2004, para. 10.

²⁸ Defence motion, paras 23-24.

18. In these circumstances, the Trial Chamber is of the view that the 20 statements most properly belong in the Sabra Defence's case. The Defence has not made an application to vary the sequence of receiving evidence under Rule 146 (B) and the Trial Chamber considers meritless counsel's argument that Rule 146 (B) does not apply to the statements because they are merely underlying documents supporting the admitted *aide-memoire*. The Trial Chamber also declines to vary *proprio motu* the sequence for the presentation of evidence. Nor has the Defence requested the Trial Chamber to order the production of additional evidence under Rule 165²⁹ and the Trial Chamber is not persuaded that it should exercise its powers under this Rule at this point in time in the proceedings.

19. Having examined the 20 statements, the Trial Chamber, however, finds that they may contain material that could assist it in assessing the Prosecution's case. Therefore, at an appropriate time during the proceedings, such as the closure of the Prosecution's case, and after receiving further submissions, the Trial Chamber may exercise its discretion under Rule 165 in relation to these statements.

20. If the Trial Chamber decides to admit the statements into evidence at a future stage, it will address issues such as their relevance, probative value, the compliance of the 20 statements with the Practice Direction and whether to admit the statements in their entirety.

CONFIDENTIALITY

21. The Sabra Defence filed annex A to its motion confidentially as it identifies witnesses who provided statements to the Prosecution. Annex B was also filed confidentially as it contains communications between the Parties.³⁰ The Prosecution's response is filed publicly, while the annex was filed confidentially. The confidential annexes to the Sabra Defence's motion as well as the annex to the Prosecution's response contains information revealing the identity of the witnesses³¹ and information about whether the witnesses had requested protective measures or would likely do so. In these circumstances, the Trial Chamber is satisfied that the present classification of the annexes to both filings is justified and maintains their confidentiality.

²⁹ Rule 165 provides that, after hearing the Parties, the Trial Chamber may, *proprio motu* or at the request of a Party, order either Party or a victim participating in the proceedings to produce additional evidence. It may, after hearing the Parties, *proprio motu* summon witnesses and order their attendance.

³⁰ Defence motion, para. 32.

³¹ Prosecution response, paras 28-29.

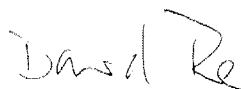
DISPOSITION

FOR THESE REASONS, the Trial Chamber:

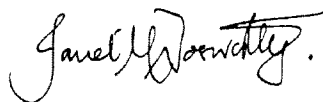
DISMISSES the Sabra Defence motion to tender 20 statements into evidence under Rule 154 or 155.

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

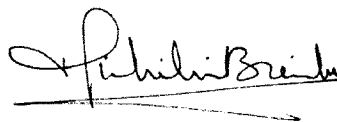
Leidschendam,
The Netherlands
20 December 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

