



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: 5 February 2018

Original language: English

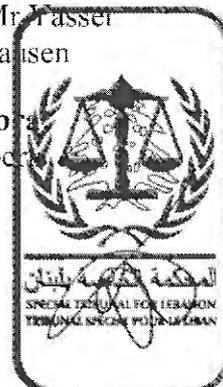
Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING SABRA DEFENCE APPLICATION FOR
CERTIFICATION TO APPEAL DECISION ADMITTING STATEMENTS OF
WITNESS PRH056 UNDER RULE 158**

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 Robert
Ms Sarah Bafadhel

INTRODUCTION AND BACKGROUND

1. In the amended consolidated indictment, the Prosecution pleads that on 14 February 2005, the former Lebanese Prime Minister, Mr Rafik Hariri, was assassinated in an attack in Beirut that killed 21 others and injured 226 people. Shortly after the blast, the Al-Jazeera news network in Beirut received and broadcast a video featuring Mr Ahmed Abu Adass falsely claiming responsibility for the attack.

2. The Accused, Mr Assad Hassan Sabra and Mr Hussein Hassan Oneissi, allegedly participated in identifying and effecting Mr Abu Adass' disappearance in January 2005.¹ Specifically, the Prosecution alleges that Mr Oneissi introduced himself to Mr Abu Adass as 'Mohammed' at the beginning of January 2005 at the Arab University Mosque of Beirut (the Al-Houry Mosque) and asked Mr Abu Adass to teach him how to pray. They met on several subsequent occasions. This was all part of a plan to lure Mr Abu Adass into making the false claim of responsibility. On the morning of 16 January 2005, Mr Abu Adass left his home to meet 'Mohammed' (allegedly Mr Oneissi), and has been missing since.²

3. Witness PRH056 did not testify in court but provided some evidence relevant to Mr Abu Adass, his meetings and interactions with 'Mohammed', the false claim of responsibility and his subsequent disappearance. The Trial Chamber found that the witness was for good reason unavailable to testify, and under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence, has allowed into evidence nine statements—five tendered by the Prosecution and four by the Sabra Defence.³

4. In a further decision on 5 February 2018, the Trial Chamber admitted into evidence two additional statements of Witness 056 retendered by the Sabra Defence. The Trial Chamber declined to admit a third remaining document for lack of *prima facie* reliability.⁴

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Redacted Amended Consolidated Indictment, 12 July 2016 ('amended consolidated indictment'), paras 3-5, 23, 44, 48 (c), 64 (f), 66 (f), 68 (h), 70 (h).

² Amended consolidated indictment, paras 23, 28; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Redacted Version of the Prosecution's Updated Pre-Trial Brief, dated 23 August 2013, 31 October 2013 ('Prosecution pre-trial brief'), paras 8, 62, 112, 114, 117, 122, 130.

³ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3480, Decision Admitting into Evidence Statements of Witness PRH056 under Rule 158, 13 December 2017 ('Decision of 13 December 2017'), paras 2, 54, 56, 60, disposition. The five statements tendered by the Prosecution are: exhibits P2128, P2129, P2130, P2131, P2132. The four statements tendered by the Sabra Defence are exhibits 5D474, 5D475, 5D476, 5D477.

⁴ F3550, Decision Admitting Into Evidence Two Statements of Witness PRH056 Under Rule 158, 5 February 2018 ('Decision of 5 February 2018').

5. The Sabra Defence sought certification to appeal the decision to admit into evidence the five statements tendered by the Prosecution.⁵ The Oneissi Defence also sought certification to appeal the decision⁶ and the Prosecution filed a consolidated response to both applications.⁷ The Trial Chamber denied the Oneissi Defence application in a separate decision.⁸

LEGAL PRINCIPLES

6. Rule 126 (C) provides that a decision may only be subject to interlocutory appeal ‘with certification, 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’. The Trial Chamber has set out the principles governing the certification of decisions for interlocutory appeal,⁹ which are equally applicable here.

7. The Trial Chamber emphasizes that decisions on the admission of evidence are discretionary and highlights its finding that ‘certification to appeal is the absolute exception when deciding on the admissibility of evidence. A question for certification relating to admitting something into evidence will therefore rarely meet the standard in Rule 126 (C).’¹⁰

⁵ F3495, Request for Certification to Appeal “Decision Admitting into Evidence Statements of Witness PRH056 under Rule 158”, 20 December 2017 (‘Sabra Defence application’).

⁶ F3499, Request for Certification to Appeal the “Decision Admitting into Evidence Statements of Witness PRH056 under Rule 158”, 20 December 2017 (confidential) (‘Oneissi Defence application’).

⁷ F3521, Prosecution Consolidated Response to Oneissi and Sabra Requests for Certification to Appeal Decision Admitting Statements of PRH056 under Rule 158, 18 January 2018 (confidential) (‘Prosecution consolidated response’). The Trial Chamber granted the Prosecution’s request to file a consolidated response to the Oneissi Defence and Sabra Defence applications in the interests of judicial economy. *See* email from Trial Chamber Senior Legal Officer to Prosecution counsel, 12 January 2018.

⁸ F3547, Decision Denying Oneissi Defence Application for Certification to Appeal Decision Admitting Statements of Witness PRH056 under Rule 158, 1 February 2018 (‘Decision on Oneissi Defence application’).

⁹ *See e.g.* 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, paras 5-6; F2874, Decision Denying Certification to Appeal ‘Decision on the Admission of Call Sequence Tables related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements’, 6 December 2016, paras 5-6; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1798, Decision on Application for Certification of Decision Regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, paras 12-13.

¹⁰ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1841, Decision on ‘The Defence for Hussein Hassan 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. 11. *See also* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3175, Decision Denying Certification to Appeal ‘Decision Admitting 10 Call Sequence Tables Related to Mr Salim Jamil Ayyash and Mr Hassan Habib Merhi under Rule 154 and Two Related Witness Statements under Rule 155’, 8 June 2017, para. 18.

SUBMISSIONS

Defence submissions

8. The Sabra Defence seeks certification for interlocutory appeal under Rule 126 (C) of the following six issues:

- (i) Whether the Trial Chamber erred in ruling that a witness with the ‘medical condition’ at issue is permanently unfit to be questioned and objectively unavailable for the purposes of Rule 158;
- (ii) Whether the Trial Chamber abused its discretion by concluding that a witness suffering from the ‘medical condition’ at issue is unavailable for the purposes of Rule 158 without first considering whether special measures would have facilitated the witness’s attendance;
- (iii) Whether the Trial Chamber erred in its determination that hearsay evidence cannot go to the acts and conduct of an accused;
- (iv) Whether the Trial Chamber abused its discretion in making factual findings on the internal inconsistencies of Witness 056’s statements without considering all prior statements of the witness;
- (v) Whether the Trial Chamber abused its discretion in making factual findings on the internal inconsistencies of Witness 056’s statements in advance of any determination pursuant to Rules 167 or 168; and
- (vi) Whether the Trial Chamber erred in ruling that evidence which does not go to facts in the amended consolidated indictment are irrelevant for the purposes of Rule 158.¹¹

9. The issues significantly affect the fairness and expeditiousness of the proceedings and the outcome of the trial, and the decision’s consequences cannot be remedied with any other witness or during the Defence case.

10. Regarding the first and second issues, the Trial Chamber only explored procedural avenues to secure the witness’s attendance, but not special measures which may have facilitated testimony and prevented the undue prejudice caused by the lack of cross-examination. The Trial Chamber does not explain why the witness is ‘permanently unfit’ to be questioned due to a medical condition, and has repeatedly heard evidence from other witnesses with the same medical condition. The witness cannot thus be permanently or

¹¹ Sabra Defence application, para. 2.

objectively unavailable, and the statements should not have been admitted into evidence under Rule 158. The lack of cross-examination does not merely go to these statements' weight because only Witness 056 testified that Mr Abu Adass left with 'Mohammed'; other witnesses—also not cross-examined—merely restated this based on information received from Witness 056. Other witnesses who testified about Mr Abu Adass meeting an individual at the Arab University Mosque did not testify as to whether this was the same individual as 'Mohammed', or whether Mr Abu Adass left with 'Mohammed'.¹²

11. Regarding the third issue, the Trial Chamber's finding that the statements do not go directly to proof of the Accused's acts or conduct—as the evidence is hearsay and does not identify Mr Oneissi as 'Mohammed'—takes a narrow view and ignores other Prosecution evidence which suggests that Mr Oneissi is 'Mohammed'. The Prosecution's attribution of the acts and conduct contained in Witness 056's statements is dispositive, irrespective of whether the witness specifically identifies the Accused. Had the Trial Chamber assessed this correctly, it would have declined to admit the statements into evidence as their probative value is substantially outweighed by the need to ensure a fair trial.¹³

12. Regarding the fourth, fifth and sixth issues, the Trial Chamber erred in finding that the statements were *prima facie* reliable and with no manifest inconsistencies within or between them. The Trial Chamber failed to consider all of the witness's prior statements and had not heard submissions or made a decision under Rules 167 or 168. The Trial Chamber also declined to admit into evidence three of the statements tendered by the Sabra Defence, which suggest that the witness withheld information from the Lebanese authorities, may have had reason to withhold information, or provided information which is inconsistent with other witnesses' evidence. The Trial Chamber considered that these statements were of limited relevance as they do not go to facts alleged in the amended consolidated indictment. This ignores the importance of prior statements for assessing inconsistencies between the witness's statements and their potential relevance under Rule 150 (J).¹⁴

13. An immediate resolution by the Appeals Chamber may advance the proceedings by determining whether the Defence needs to present a case. Witness 056's evidence is central to the Prosecution's case against Mr Oneissi and Mr Sabra, such that without its admission there would be no case to answer. Moreover, it is necessary for the Appeals Chamber to clarify, in

¹² Sabra Defence application, paras 3, 7-10, 16-17.

¹³ Sabra Defence application, paras 11-12.

¹⁴ Sabra Defence application, paras 13-15.

advance of any Defence case, the relevance of material tendered by the Defence which on its face does not go to a fact alleged in the amended consolidated indictment.¹⁵

Prosecution response

14. The Prosecution argues that the application should be dismissed as it does not meet Rule 126 (C)'s stringent requirements and focuses instead on the underlying merits of the Trial Chamber's decision.¹⁶

15. Regarding the first and second issues identified by the Sabra Defence, the Trial Chamber did not find that Witness 056 was 'permanently unfit'—rather the Defence misread the decision which cannot be grounds to certify these issues for appeal. In addition, the Sabra Defence did not substantiate its claims that the Trial Chamber erroneously concluded that Witness 056 is objectively unavailable to testify or that the Trial Chamber abused its discretion by failing to consider any special measures to facilitate the witness's oral testimony.¹⁷

16. In relation to the third issue, the Trial Chamber appropriately supported its conclusion that Witness 056's statements do not directly go to proof of acts and conduct of the Accused. Further, even if the statements did go to acts and conduct, the Trial Chamber correctly reasoned that this would not preclude their admission into evidence at this stage as their weight will be assessed later in the proceedings. The Sabra Defence does not refer to the Trial Chamber's reasoning on this point but speculates that the Trial Chamber 'would have declined' to admit the evidence had it not erred on the law. As a result, the Sabra Defence fails to demonstrate that the third issue meets either part of the Rule 126 (C) test.¹⁸

17. Regarding the fourth and fifth issues, the Trial Chamber's *prima facie* assessment of the reliability of Witness 056's statements was an essential part of its determination as to whether to admit them into evidence and did not amount to a finding of fact. In fact, the Trial Chamber indicated that it was not assessing the weight to be accorded to the statements and would do so later only in view of the totality of the evidence in the case. The Sabra Defence has not identified why this presents an exceptional issue that would significantly affect the

¹⁵ Sabra Defence application, paras 3, 18-19.

¹⁶ Prosecution consolidated response, paras 1-2, 6.

¹⁷ Prosecution consolidated response, paras 7-9.

¹⁸ Prosecution consolidated response, paras 11-13.

proceedings or the outcome of the trial, or how the immediate intervention of the Appeals Chamber is justified.¹⁹

18. With respect to the sixth issue—in which the Sabra Defence challenges the Trial Chamber’s decision not to admit three of Witness 056’s statements based on relevance—it fails to demonstrate the necessity of certification to appeal the Trial Chamber’s discretionary decision on the admission of evidence and makes no reference to the fact that the Trial Chamber admitted four statements tendered by the Sabra Defence.²⁰

DISCUSSION AND DECISION

19. With respect to the first and second issues, contrary to the Sabra Defence’s submission, the Trial Chamber made no finding that Witness 056 was ‘permanently unfit’. As to the Trial Chamber incorrectly concluding that the witness is objectively unavailable to testify and that it abused its discretion by failing to consider any special measures to facilitate the witness’s oral testimony, the Trial Chamber, on the contrary, held that it had carefully examined the witness’s personal medical documentation and that it had unsuccessfully exhausted and explored all existing possibilities to secure the witness’s testimony.²¹ The Trial Chamber cannot certify for interlocutory appeal an issue that does not accurately reflect a decision or arise from one. Nor can it certify an issue that represents a mere disagreement with the decision.

20. The third issue also does not meet the Rule 126 (C) test. The Trial Chamber found that, on balance, Witness 056’s evidence does not go directly to proof of acts or conduct of the Accused as charged in the amended consolidated indictment. The witness does not identify Mr Oneissi as ‘Mohammed’. Moreover, Rule 158 (B), subject to the application of Rule 149 (D), allows the admission into evidence of statements which go to proof of acts and conduct of the Accused. The Trial Chamber has the discretion to admit evidence that goes to proof of acts and conduct of the Accused if it is satisfied that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial.²²

21. The Trial Chamber will assess the weight of Witness 056’s evidence at a later point in the proceedings, in light of other supporting evidence and the Defence’s inability to cross-

¹⁹ Prosecution consolidated response, paras 14-15, 19.

²⁰ Prosecution consolidated response, paras 17-19.

²¹ Decision of 13 December 2017, paras 36, 38-39.

²² See Decision of 13 December 2017, paras 50-51.

examine the witness. This issue therefore would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and therefore does not meet the requirements of the first part of Rule 126 (C).

22. In relation to the fourth and fifth issues—namely that the Trial Chamber erred in law and fact in finding Witness 056’s statements to be *prima facie* reliable—the Sabra Defence failed to show that the issue *significantly* affects the fair and expeditious conduct of the proceedings.

23. The Sabra Defence incorrectly argues that the Trial Chamber’s assessment of *prima facie* reliability in admitting the statements amounts to a final factual finding against Mr Sabra; the Trial Chamber only found that the evidence was not *manifestly* unreliable. The Trial Chamber will assess the weight to be given to the evidence and will consider the lack of cross-examination and that a conviction cannot be based solely or decisively on insufficiently corroborated untested evidence.²³ In addition, Witness 056’s statements comprise only one piece of evidence which corroborates other evidence relevant to this area of the Prosecution’s case against Mr Sabra. This issue alone cannot significantly affect the outcome of the trial.

24. To the extent the fourth and fifth issues relate to the remaining evidence for Witness 056 tendered by the Sabra Defence, the Trial Chamber has decided to admit two additional statements into evidence.²⁴ This aspect of the fourth and fifth issues raised by the Sabra Defence is therefore moot.

25. Similarly, with respect to the sixth issue, the Trial Chamber has re-assessed the additional evidence tendered by the Defence and admitted two of the three statements into evidence.²⁵ This aspect of the sixth issue is therefore also moot. The Trial Chamber has admitted or will receive into evidence eleven of the twelve tendered statements related to Witness 056. The sole remaining non-admitted document—if sufficiently reliable for admission into evidence—would have merely added a further piece of evidence relating to

²³ See STL-14-05/A/AP, *In the Case Against Al Jadeed [Co.] S.A.L. / New T.V. S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat*, F0028, Public Redacted Version of Judgment on Appeal, 8 March 2016, fn. 378, citing ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 53; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Request for Admission of the Statement of Jadranko Prlić, 22 August 2007, para. 33. See also Decision on Oneissi Defence application, para. 20.

²⁴ Decision of 5 February 2018.

²⁵ Decision of 5 February 2018.

this part of the Prosecution's case against Mr Sabra. Its non-admission into evidence cannot meet the test for certification in Rule 126 (C).

26. None of the issues satisfy the first part of the certification test under Rule 126 (C). However, even if they did, none could meet the second part in requiring an immediate resolution by the Appeals Chamber in materially advancing the proceedings. As deciding the admissibility of evidence is first and foremost the responsibility of the Trial Chamber, as the trier of fact, it is not for the Appeals Chamber to assume this responsibility.

CONFIDENTIALITY

27. The Sabra Defence filed its application publicly, but the Prosecution filed its submission confidentially because it responded to the confidential Oneissi Defence application. The Trial Chamber has already ordered that the Prosecution's consolidated response be reclassified as public²⁶ and therefore all relevant filings are now public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Sabra Defence application for certification for interlocutory appeal.

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

Leidschendam,
The Netherlands
5 February 2018

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



²⁶ Decision on Oneissi Defence application, para. 29, disposition.