



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 ADMITTING INTO EVIDENCE TWO STATEMENTS OF
WITNESS PRH056 UNDER RULE 158**

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Hugh
Milne

Counsel for Mr Salim Jamil Ayyash:
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Mr Chad Mair

**Legal Representatives of
Participating Victims:**
Mr Peter Haynes, Mr Mohammad F. Mattar
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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:
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Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Geoffrey Robert
Ms Sarah Bafadhel



INTRODUCTION AND BACKGROUND

1. Part of the Prosecution's case is that the Accused, Mr Hussein Hassan Oneissi, Mr Hassan Habib Merhi and Mr Assad Hassan Sabra, chose Mr Ahmed Abu Adass as a suitable individual to appear in a video-recorded false claim of responsibility for the attack on the former Lebanese Prime Minister, Mr Rafik Hariri, which took place on 14 February 2005 in Beirut.¹ According to the amended consolidated indictment, in early January 2005, Mr Oneissi introduced himself as 'Mohammed' to Mr Abu Adass at the Arab University Mosque of Beirut (known as 'the Al-Houry Mosque'). The Prosecution further alleges that Mr Oneissi asked Mr Abu Adass to teach him how to pray and that, subsequently, the two met on several occasions. The amended consolidated indictment also alleges that, on the morning of 16 January 2005, Mr Abu Adass left his home to meet with 'Mohammed' and has since been missing.²

2. On 13 December 2017, the Trial Chamber determined that Witness PRH056 was unavailable under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence, and thereafter admitted into evidence nine statements—five tendered by the Prosecution and four tendered by the Sabra Defence. The Trial Chamber declined to admit into evidence six other documents tendered by the Sabra Defence. Among these were two statements (referred to as 'the third and fourth documents') and a document, dated 4 March 2005 (referred to as 'the seventh document'). The Trial Chamber declined to admit the seventh document into evidence due to its lack of reliability.³

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential) ('Amended consolidated indictment'), paras 3 (b)-(d), 4; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Prosecution's Updated Pre-Trial Brief dated 23 August 2013, 23 August 2013 (confidential) ('Prosecution's Updated Pre-Trial Brief'), paras 8, 112. The attack killed Mr Hariri and 21 other persons, and injured 226 persons. *See also* STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1492, Second Decision on Agreed Facts under Rule 122, 11 April 2014, disposition, recording these as facts that the Trial Chamber may accept as being proved at trial.

² Amended consolidated indictment, paras 23, 28; Prosecution's Updated Pre-Trial Brief, paras 62, 114, 117, 122, 124, 129, 148.

³ F3480, Decision Admitting into Evidence Statements of Witness PRH056 under Rule 158, 13 December 2017 ('Decision of 13 December 2017'), paras 55, 58, disposition.

Rule 158 provides for the admission of the evidence of unavailable persons, that is, persons who have died, who can no longer with reasonable diligence be traced, or who are for good reason otherwise unavailable to testify orally. Evidence under Rule 158 could be in the form of a written statement, any other reliable record of what the person has said, written or otherwise expressed, or a transcript of a statement, whether or not it is in the form prescribed by the Rules.

3. As regards the third and fourth documents, they appeared to be extracts of a longer undated document in the Lebanese investigation case file. In addition, there was no signature, stamp or other sign of authenticity on either of the two statements. Therefore, the Trial Chamber found them to be unreliable, but stated that it could reconsider its findings if the Sabra Defence could establish their provenance.⁴

4. Subsequently, the Sabra Defence filed an application seeking reconsideration of the Trial Chamber's findings, under Rule 140,⁵ concerning the third, fourth and seventh documents. It tenders for admission into evidence, under Rule 158, two statements of Witness 056, which it submits are dated 15 February 2005 and are duplicates of the third and fourth documents. Counsel for Mr Sabra provide an exchange of correspondence with the Prosecution and a report from the Lebanese Internal Security Forces (ISF), which they submit contains duplicates of these documents.⁶ They also tender material in support of the reliability of the seventh document.⁷

5. The Prosecution responded, opposing the application.⁸

SUBMISSIONS

Sabra Defence motion

6. Counsel for Mr Sabra now provide to the Trial Chamber the relevant information regarding the provenance of Witness 056's two statements of 15 February 2005. They also provide indicia of reliability for the 4 March 2005 document. The statements identify various inconsistencies in Witness 056's evidence, and differences with other evidence in the case,

⁴ Decision of 13 December 2017, para. 55 (examining the admissibility of ERN 50012160-50012163_D_EN—the third document, and ERN 50012169-50012170_D_EN—the fourth document), para. 58 (analysing the admissibility of ERN 50011295-50011301—the seventh document), disposition.

⁵ Under Rule 140, entitled 'Power to Reconsider Decisions', a Chamber may, *proprio motu* or at the request of a Party, reconsider a decision, other than a judgement or sentence, if necessary to avoid injustice.

⁶ F3515, Sabra Motion for Reconsideration and for Admission of Evidence Pursuant to Rules 140 and 158, 12 January 2018 (public, with confidential annexes A-E) ('Sabra Defence motion'), annex A (confidential). The report is at ERN 50008351-50008452_D_EN (English version) and at ERN 50008351-50008452 (Arabic version).

⁷ Sabra Defence motion, paras 1-2, 9; Decision of 13 December 2017, para. 58; Sabra Defence motion, annex B (confidential), p. 4, according to which the statement at ERN 50012160-50012163 is identical to the statement at ERN 50008354-50008357, and the statement at ERN 50012169-50012170 is identical to the statement at ERN 50008363-50008364.

⁸ F3542, Prosecution Response to "Sabra Motion for Reconsideration and for Admission of Evidence Pursuant to Rules 140 and 158", 29 January 2018 (public, with confidential annex A) ('Prosecution response').

which is relevant to the collusion involved in the development of the ‘Mohammed’ story. If they were not admitted into evidence, the Defence would be prejudiced by not being able to fully demonstrate these aspects. Hence, the Sabra Defence requests the Trial Chamber, pursuant to Rules 140 and 158, to reconsider its decision of 13 December 2017 and to admit the three documents into evidence.⁹

Witness 056’s two statements in the ISF report of 15 February 2005

7. Although the Sabra Defence identified the report, from which the statements were extracted, it does not seem to contain the relevant stamps of the ISF, which would confirm its reliability. The Defence thus relies on another version of the same report, which the Prosecution confirmed is the same document. This version has an ISF stamp, which authenticates its reliability under Rule 158 (A) (ii). Hence, the Sabra Defence requests the Trial Chamber to reconsider its decision by admitting into evidence the newly proposed Witness 056’s statements of 15 February 2005.¹⁰

Document of 4 March 2005

8. As regards the document of 4 March 2005, which the Trial Chamber found to be unreliable and thus inadmissible, in a letter, dated 21 December 2012, the Prosecution confirmed that it formed part of the material gathered by the Fact-Finding Mission dispatched by the United Nations Secretary-General in Beirut following Mr Hariri’s assassination. The Prosecution attached to its letter two indexes, entitled Index A and Index B, which list all of the Mission’s material in the Prosecution’s possession.¹¹

9. The 4 March 2005 document is listed in Index A, which means that it was obtained in the Mission’s context. The Trial Chamber took judicial notice of some parts of the report, issued after the Mission’s completion, including the facts that following its arrival in Beirut on 25 February 2005, it performed a thorough review of the Lebanese investigation and legal proceedings, examined the crime scene and the evidence collected by the local police, and interviewed some witnesses in relation to the crime.¹²

⁹ Sabra Defence motion, paras 4-6, 16.

¹⁰ Sabra Defence motion, paras 8-10.

¹¹ Sabra Defence motion, paras 12-13.

¹² Sabra Defence motion, paras 13-15.

10. The same findings regarding the careful and thorough examination of the evidence collected by the Mission equally apply to the document of 4 March 2005. The Mission thus carefully analysed it and considered it to be fully reliable. Moreover, the Trial Chamber already found admissible other documents obtained during the Mission.¹³

Prosecution response

11. The Prosecution submits that the Sabra Defence has failed to demonstrate an injustice warranting reconsideration. Under Rule 140, reconsideration is exceptional and cannot be used to circumvent the unfavourable consequences of the decision of 13 December 2017. The Sabra Defence bears the onus of demonstrating on specific grounds injustice that involves prejudice. It, however, makes only generic, speculative and unsubstantiated arguments.¹⁴

12. The Sabra Defence had the opportunity to raise the submissions about the provenance of the three documents in its original application for their admission into evidence. At a minimum, it did not explain why it did not previously include these submissions, as obliged.¹⁵

13. The Sabra Defence failed to demonstrate the reliability of the three statements. If the statements are admitted based upon provenance alone, this would unduly prejudice the Prosecution. The Prosecution would be put at an unfair disadvantage when presenting its case because a higher admissibility standard would be applied to its tendered statements.¹⁶

14. The three statements lack the requisite indicia of reliability under Rules 149 (C) and 158 (A) (ii), in particular, a warning of the consequences of providing a false statement, or the witness's solemn declaration to speak the truth and or a witness acknowledgement of the truthfulness of their contents. They are also missing the signatures of the witness and the interviewers, and a witness acknowledgement.¹⁷

15. Two of the three statements, which the Trial Chamber assumed to be part of a longer document, are undated. It is only the first page of the report, which is dated 15 February 2005 and bears a stamp. At best, the two statements were possibly taken between 15 and 17

¹³ Sabra Defence motion, para. 15.

¹⁴ Prosecution response, paras 5-7, 9.

¹⁵ Prosecution response, para. 8.

¹⁶ Prosecution response, paras 2, 11-12, 14.

¹⁷ Prosecution response, para. 13.

February 2005. The names of the witness and the interviewers are typewritten and none of the pages bears any signatures.¹⁸

16. As regards the document of 4 March 2005, it is only the first two pages which are dated. However, it is unknown whether this is the date of the purported interview or the date when the document was drafted. The context in which the purported interview was taken, how it was taken, who took it or where it was taken, remain unknown. The Sabra Defence's submissions that the statement was carefully analysed by the Fact-Finding Mission and considered to be fully reliable is not supported. The Mission's index listing the statement describes its origin as unknown. Although the Trial Chamber already found admissible other documents obtained during the Mission, they were tendered through witnesses who testified before the Trial Chamber or they were subject to different reliability analysis.¹⁹

DISCUSSION AND DECISION

17. The Trial Chamber has already found the third, fourth and seventh documents to be relevant.²⁰ Consequently, the issue for determination here is whether the Trial Chamber can now be satisfied that they are reliable pursuant to Rule 158 (A) (ii) and have probative value which is not substantially outweighed by the need to ensure a fair trial, as required by Rule 149 (C) and (D).

18. In its decision of 13 December 2017, the Trial Chamber noted that it will assess the admissibility of the material tendered by the Sabra Defence with the same scrutiny that it applied to the five statements tendered by the Prosecution.²¹ The Trial Chamber applies a consistent and uniform standard in determining the admissibility of evidence, irrespective of the tendering Party, guided by Rules 149 (C) and (D), and 158 and in line with the principle of equality of arms. The Defence and the Prosecution bear the same evidentiary onus of establishing the relevance, reliability and probative value of any material they seek to tender

¹⁸ Prosecution response, para. 15.

¹⁹ Prosecution response, paras 16-18.

²⁰ Decision of 13 December 2017, paras 55 and 58.

²¹ Decision of 13 December 2017, para. 53.

into evidence. Consequently, contrary to the Prosecution's submissions,²² neither Party is put at a disadvantage.²³

Witness 056's two statements in the ISF report of 15 February 2005

19. The Trial Chamber has considered the exchange of correspondence of 20 December 2012 between the Sabra Defence and the Prosecution. It is satisfied that the two newly submitted statements, contained in the ISF report of 15 February 2005, are identical to the third and fourth documents, considered in the decision of 13 December 2017.

20. In determining whether the two statements meet the requirements under Rule 158 (A) (ii) read together with Rule 149 (C) and (D), the Trial Chamber does not need to reconsider, under Rule 140, its previous findings. Rather, the Trial Chamber will assess anew the reliability of the two statements which are tendered now in a different version than before.

21. The previous versions of the two statements were extracts of a longer document—undated, unsigned and unstamped—in the Lebanese investigation case file.²⁴ The re-tendered versions of these statements,²⁵ however, reveal that they are parts of an ISF report.

22. As the Trial Chamber has held in earlier decisions, statements and documents tendered under Rule 158 need not be in the form prescribed by Rules 155 and 156, which govern the admission into evidence of written statements and transcripts *in lieu* of oral testimony or examination in chief. Consequently, with respect to material tendered under Rule 158 the Trial Chamber applies the Practice Direction relating to Rules 123, 155 and 157²⁶ to the extent to which it provides useful guidance in assessing reliability.²⁷

²² See Prosecution response, para. 14.

²³ See *similarly*, F3537, Decision Denying Admission into Evidence of Two Call Sequence Tables Tendered by the Oneissi Defence, 26 January 2018, paras 22, 26, 40.

²⁴ Decision of 13 December 2017, para. 55.

²⁵ ERN 50008354-50008357 (duplicate of ERN 50012160-50012163—the third statement) and ERN 50008363-50008364 (duplicate of ERN 50012169-50012170—the fourth statement).

²⁶ 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.

²⁷ F3371, Decision Admitting into Evidence the Audio Recordings and Transcripts of the Prosecution Interview of Mr Wissam Al-Hassan (Witness PRH680) under Rule 158 and Three Related Documents under Rule 154, 20 October 2017 ('Decision of 20 October 2017'), para. 58; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2100, Decision on Prosecution Motion to Admit the Statements of Deceased Witness PRH045, 24 July 2015, para. 3.

23. In determining the reliability of a statement, record or transcript under Rule 158 (A) (ii), the Trial Chamber must consider how it was made and maintained. The document in the Lebanese investigation case file is dated, signed and stamped²⁸ by the investigative authorities who conducted the interviews contained in the report, including those with Witness 056. It also provides information on the context in which the statements were made and how they were made. Further, at the beginning of the first interview the interviewer informed Witness 056 of the rights, to which they were entitled.²⁹

24. As regards the dates of the two interviews, although not every interview contained in the report is dated, they appear in a chronological order. Certain pages note a date and it is evident that the Lebanese investigative authorities conducted interviews with different suspects and witnesses on the same day. The first interview with Witness 056 appears to be the only one conducted on 15 February 2005. Subsequently, on 16 February 2005 the investigators interviewed several people, including Witness 056 for the second time.³⁰ Witness 056's interview on 16 February 2005 was the last on that date.³¹

25. The two statements contain Witness 056's account concerning Mr Abu Adass and, among other things, the circumstances surrounding his meeting and interactions with 'Mohammed' and Mr Abu Adass's subsequent disappearance. Consequently, these statements are probative of these alleged facts. They may also help provide context and contribute to the assessment of the witness's credibility at a later stage of the proceedings.

26. All these factors, taken together, confer on the two statements sufficient indicia of *prima facie* reliability and hence probative value, which is not substantially outweighed by the need to ensure a fair trial. The Trial Chamber has consistently stated that probative value is distinct from the weight that it may ultimately attach to a piece of evidence.³² The two

²⁸ See ERN 50008351.

²⁹ See ERN 50008354.

³⁰ See ERN 50008357, noting the date 16 February 2005, and ERN 50008358- 50008362, containing interviews with other individuals on the same date.

³¹ See ERN 50008364, noting the date 17 February 2005 and the first interview taken on that date.

³² See e.g. Decision of 20 October 2017, paras 57 and 85; F2258, Decision on Prosecution Motion for the Admission of Evidence Related to the Locations of Residences Associated with the Accused, 9 October 2015, para. 10; F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 66; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1308, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, 13 January 2014, para. 8.

statements of Witness 056 satisfy the admissibility criteria under Rule 158 read together with Rule 149 (C) and (D), and therefore the Trial Chamber will admit them into evidence.

Document of 4 March 2005

27. The Trial Chamber found this seventh document unreliable and, therefore inadmissible, because, other than a date, it contains no information which could identify the context in which it was made, how, by whom or where it was made.³³

28. The Trial Chamber does not need to reconsider, under Rule 140, its previous findings concerning the document's admissibility. There is no injustice to be avoided because the document is patently unreliable. Rather, the Trial Chamber will determine anew whether, in light of the material which the Sabra Defence submits in support of its reliability, the document meets the admissibility criteria under Rule 158 (A) (ii) read together with Rule 149 (C) and (D).

29. The material submitted by the Sabra Defence in support of the provenance of this document³⁴ still falls short of providing *prima facie* indicia of reliability for the document, as required by Rule 158 (A) (ii). The fact that this document is among the items, listed as received by the Mission from the Lebanese investigation case file, does not in itself suffice in establishing the context, in which it was made, or by whom. Contrary to the Sabra Defence's submissions, nothing in the material presented in support of the document's provenance suggests that it was carefully analysed by the Mission and considered to be fully reliable.³⁵ To the contrary, the Mission itself noted that the origin of this document is unknown.³⁶

30. Moreover, even if the Mission had considered the document to be fully reliable, a prior assessment of reliability and or admissibility of evidence in general, performed by another body, is neither binding on the Trial Chamber nor affects its authority to determine the admissibility of the evidence sought into admission under Rule 158. The Trial Chamber finds that, despite the newly submitted material in support of its provenance, the document

³³ Decision of 13 December 2017, para. 58.

³⁴ See Sabra Defence motion, annexes C-E (confidential) containing a letter from the Prosecution, dated 21 December 2012, and two indexes (A and B), which list all of the Fact-Finding Mission material in possession of the Prosecution. The 4 March 2005 document is listed as item A0111 on p. 21 of annex D.

³⁵ See Sabra Defence motion, para. 15.

³⁶ Sabra Defence motion, annex D, p. 21, item A0111.

lacks the necessary indicia of *prima facie* reliability under Rule 158 (A) (ii) and is therefore inadmissible. Consequently, the Trial Chamber dismisses the application to admit this document into evidence.

DISPOSITION

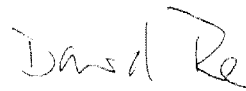
FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 158, Witness 056's two statements of 15 and 16 February 2005 and **DECIDES** that, at a suitable stage of the proceedings, it will formally admit these statements into evidence; and


DECLINES to admit the document, dated 4 March 2005, into evidence.

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

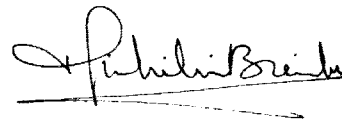
Leidschendam,
The Netherlands
5 February 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

