



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: 7 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 MOTIONS FOR RECONSIDERATION
AND ADMISSION OF A WITNESS STATEMENT INTO EVIDENCE
UNDER RULE 154, AND FOR ADMISSION OF A WITNESS STATEMENT
INTO EVIDENCE THROUGH MR QUENTIN MUGG (WITNESS PRH555)**

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Ms Sarah Bafadhel



INTRODUCTION AND BACKGROUND

The amended consolidated indictment and Mr Ahmed Abu Adass's pleaded role

1. The amended consolidated indictment pleads that on 14 February 2005 in Beirut a suicide bomber detonated a large quantity of high explosives concealed in a Mitsubishi Canter, killing the former Lebanese Prime Minister, Mr Rafik Hariri, and 21 others, and injuring 226 people. Shortly after the attack news outlets broadcast a video-tape in which Mr Ahmed Abu Adass falsely claimed responsibility for the attack.

2. It is also alleged that the Accused, Mr Hussein Hassan Oneissi and Mr Assad Hassan Sabra—under Mr Hassan Habib Merhi's supervision—participated in identifying and finding Mr Abu Adass for this purpose. Mr Abu Adass was last seen by his family on 16 January 2005. Additionally, it is alleged that Mr Oneissi, calling himself 'Mohammed' and acting under Mr Merhi's coordination, participated in Mr Abu Adass's disappearance.¹

Mr Quentin Mugg

3. Mr Quentin Mugg (Witness PRH555) is a former Prosecution investigator. Before the trial commenced, the Trial Chamber decided to admit into evidence, under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence,² a statement he had made,³ without cross-examination.⁴ On the Sabra Defence's application, the Trial Chamber reconsidered this decision, allowing Mr Mugg to appear for cross-examination.⁵

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 3 (b)-(d), 4, 13, 23, 41-42.

² Rule 155 states: '(A) Subject to Rule 158, the Trial Chamber may admit in lieu of oral testimony the 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, which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. [...] (C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination. It may decide, providing reasons, that the interests of justice and the demands of a fair and expeditious trial exceptionally warrant the admission of the statement or transcript, in whole or in part, without cross-examination. If the Chamber decides to require the witness to appear for cross-examination, Rule 156 applies.'

³ The statement concerned the creation of still images from CCTV footage of the St Georges Tunnel in Beirut, showing the Mitsubishi; this is not relevant to this decision.

⁴ STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1280, First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013; exhibit P81, Witness Statement of Mr Quentin Mugg (Witness PRH555), 2 July 2013. As explained in Mr Mugg's statement, 'CCTV' stands for 'closed circuit television'. The statement was formally admitted into evidence in court on 29 January 2014; see transcript of 29 January 2014, p. 16.

⁵ Transcript of 20 January 2014, pp 2-4.

4. In August 2010, Mr Mugg and a Prosecution analyst, Mr Christian Carnus (Witness PRH377), took a statement from a witness who will be described as ‘Witness 056’s relative’, on matters related to Mr Abu Adass.⁶

5. On 11 January 2018, Mr Mugg was cross-examined by counsel for Mr Sabra in relation to the process of taking that statement and the investigative steps that followed. The cross-examination was relevant to an apparent contradiction between the evidence of Witness PRH056 and the statement of the relative and how the Prosecution dealt with it.

Witness 056’s evidence

6. The Trial Chamber has admitted into evidence eleven statements made by Witness PRH056, relevant to Mr Abu Adass’s disappearance.⁷ The witness was unavailable to testify and the statements were therefore admissible under Rule 158.⁸ The relevant portion of Witness 056’s evidence is that on the day Mr Abu Adass disappeared, 16 January 2005, he left with someone believed to be ‘Mohammed’.

Witness 056’s relative – 2010 witness statement

7. In the 2010 witness statement, however, Witness 056’s relative states at paragraph 19 that, on the day he disappeared, Mr Abu Adass told Witness 056 that he was with someone called ‘Taha’, and that later that day Taha called from Tripoli saying that Mr Abu Adass would be late because their car broken down but that he would come back.

8. On its face, this statement appears to contradict portions of Witness 056’s evidence. However, the statement does not describe how the witness became aware of this information; namely, when, how, from whom or in what circumstances they obtained this information. It is thus hearsay of unknown provenance.

⁶ ERN 60181033-60181047.

⁷ The Trial Chamber formally admitted exhibits P2128, P2129, P2130, P2131, P2132, 5D474, 5D475, 5D476, 5D477, 5D510 and 5D511 into evidence in court; see transcript of 13 December 2017, pp 73-74; transcript of 14 December 2017, pp 4-5; real-time transcript of 7 February 2018, p. 5.

⁸ F3480, Decision Admitting into Evidence Statements of Witness PRH056 under Rule 158, 13 December 2017. Rule 158 enables the Trial Chamber to admit ‘[e]vidence in the form of a written statement, any other reliable record of what a person has said, written or otherwise expressed, or transcript of a statement by a person who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally’.

9. On 25 September 2017, the Trial Chamber denied a Sabra Defence application to admit this witness statement into evidence, under Rule 154.⁹ This Rule allows the Trial Chamber to receive documents into evidence ‘from the bar table’. The Trial Chamber later declined to revisit this decision, after the Sabra Defence retendered the same statement under the same rule.¹⁰

10. On 8 December 2017, the Sabra Defence sought reconsideration, under Rule 140, of the decision of 25 September 2017, and again sought the admission into evidence of the 2010 witness statement under Rule 154. It also sought the admission into evidence, under Rule 155, of a Defence witness statement from Mr Mugg on the taking of the 2010 statement.¹¹ The Prosecution opposed the motion, and the Trial Chamber denied the Defence statement’s admission into evidence under Rule 155, but reiterated that Mr Mugg should be cross-examined.¹²

Mr Mugg’s evidence and cross-examination

11. Mr Mugg was cross-examined on 11 January 2018. He could not recall much about taking the 2010 witness statement with Mr Carnus (it was almost seven and a half years earlier). He could really only comment on the steps he usually took in taking witness statements. The Defence also read onto the record some paragraphs of the 2010 statement—not for the truth of what was said, but for the fact that Mr Mugg accurately recorded what the witness had told him.¹³

⁹ 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 (‘25 September 2017 decision’), paras 83-93. Rule 154 states that, ‘[s]ubject to Rules 155, 156 and 158, the Trial Chamber may admit evidence in the form of a document or other record, consistently with Rule 149 (C) and (D).’

¹⁰ 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 (‘30 November 2017 decision’), para. 15.

¹¹ Taken on 13 and 24 November 2017, *see* F3468, Sabra Motion for Reconsideration and for Admission of Evidence Pursuant to Rules 154 and 155, 8 December 2017 (confidential) (‘Sabra Defence reconsideration motion’), paras 1-2; Witness Statement of Mr Quentin Mugg (Witness PRH555), 13 and 24 November 2017, ERN 1DT5-11143-1DT5-11147. Rule 140 states that ‘[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.’

¹² F3508, Prosecution Response to “Sabra Motion for Reconsideration and for Admission of Evidence Pursuant to Rules 154 and 155”, 8 January 2018 (confidential) (‘Prosecution response to reconsideration motion’). *See* transcript of 13 December 2017, pp 79-92. The Trial Chamber also clarified that the Prosecution should respond to the remaining application for reconsideration and admission into evidence of the 2010 witness statement under Rule 154, and declined to shorten the deadline for the response.

¹³ Transcript of 11 January 2018, pp 11-62. The Prosecution also re-examined Mr Mugg; *see* pp 63-64.

12. The Sabra Defence then sought, again, to tender the 2010 statement through Mr Mugg, not for the truth of its content, but to prove that what was in it was said. The Sabra Defence submitted that it is relevant to whether the Prosecution properly investigated the case by exploring the contradiction between the 2010 statement and Witness 056's statements. The Trial Chamber ordered written submissions on this issue,¹⁴ which were duly filed, joined by the Oneissi Defence.¹⁵ The Prosecution responded, continuing to oppose the motion.¹⁶

13. This decision therefore deals with the Sabra Defence application to reconsider the decision of 25 September 2017 not to admit the 2010 witness statement into evidence under Rule 154, and its subsequent (alternative) application to receive it through Mr Mugg.

SUBMISSIONS

Sabra Defence

14. The Sabra Defence seeks reconsideration under Rule 140 of the 25 September 2017 decision or, alternatively, the admission into evidence of the 2010 statement under Rule 149 (C) through its cross-examination of Mr Mugg. The Prosecution case regarding the 'Mohammed' story is based almost entirely on Witness 056's evidence, which is flatly contradicted by the 2010 statement.

15. The 2010 statement provided a reasonable alternative to the 'Mohammed' story, but the Prosecution improperly failed to investigate it. The Defence seeks the admission of the 2010 statement not for the truth of its content but rather to demonstrate this investigative shortcoming, which casts doubt on this part of the circumstantial Prosecution case. With respect to the reconsideration application, injustice would result should the Defence be prevented from demonstrating that the Prosecution has not excluded an alternative reasonable inference to the 'Mohammed' story.

¹⁴ See transcript of 11 January 2018, pp 64-91. At the beginning of the hearing, the Trial Chamber denied a Prosecution application for the protective measure of distorting the witness's publicly broadcast image; the Trial Chamber also admitted into evidence, as exhibit 5D509, the list of pseudonyms used during Mr Mugg's cross-examination. See transcript of 11 January 2018, pp 2-5, 9, 16-17.

¹⁵ F3517, Submissions on the Admission into Evidence of the Statement of the Relative of PRH056, 16 January 2018 ('Sabra Defence alternative application'); F3518, Defence for Hussein Hassan Oneissi Joinder to Sabra Submissions on the Admission into Evidence of the Statement of the Relative of PRH056, 16 January 2018.

¹⁶ F3523, Prosecution Response to Sabra Defence "Submissions on the Admission into Evidence of the Statement of the Relative of PRH056", 18 January 2018 (confidential) ('Prosecution response to alternative application').

16. Reconsideration is proper given the new fact of Mr Mugg's confirmation that the Prosecution was made aware of the content of the witness's statement in August 2010. With respect to Rule 149 (C), Mr Mugg is an appropriate witness to use to tender the 2010 statement, as he took it. The 2010 statement is probative of what the witness said to Mr Mugg in the interview, which is relevant to establishing that the Prosecution was aware of and failed to investigate a reasonable alternative to the 'Mohammed' story. International criminal law case law establishes that a statement may be tendered through a witness where the tendering party does not rely on the truth of the statement's content.¹⁷

Prosecution

17. The Prosecution opposes both applications. There is no injustice or prejudice warranting reconsideration. The Sabra Defence tendered the 2010 witness statement under the wrong rule and can tender it under Rule 155 during its own case.

18. The witness statement *is* being tendered for the truth of its content because the Sabra Defence relies on it to challenge Witness 056's evidence and credibility and to show an alternative reasonable inference to Mr Sabra's guilt. The Prosecution had no obligation to investigate and eliminate purported inferences or contradictions. The Sabra Defence failed to establish the relevance and probative value of the 2010 witness statement. The statement cannot be tendered through Mr Mugg as he is not its author and cannot adopt or confirm its contents.

19. There is no need to admit the statement into evidence in order to prove that the Prosecution had the information at the relevant time, as Mr Mugg testified that he took the statement and disclosure records show that it was disclosed to the Defence under Rule 113.¹⁸

APPLICABLE LAW

Reconsidering a decision

20. Under Rule 140, '[a] Chamber may, *proprio motu* or at a Party's request, reconsider a decision, other than a judgement or sentence, if necessary to avoid injustice.' Reconsideration

¹⁷ Sabra Defence reconsideration motion, paras 1-24, 34; Sabra Defence alternative application, paras 5-26.

¹⁸ Prosecution response to alternative application, paras 1-28, 30; Prosecution response to reconsideration motion, paras 1-20, 22. Under Rule 113, the Prosecution must disclose exculpatory information in its possession including that which affects the credibility of its evidence.

of a decision is an exceptional remedy, and must not be used to redress ‘imperfections in a decision or to circumvent the unfavourable consequences of a ruling’. The Party requesting reconsideration of a decision must demonstrate, on specific grounds, an injustice involving prejudice. If such an injustice is demonstrated, the Trial Chamber may reconsider a decision on grounds including an error of law, an abuse of discretion, or the existence of new facts of a material change in the circumstances.¹⁹

Tendering evidence through a witness

21. Under international criminal procedural law, a Party may tender a piece of evidence through a witness who is not its author but can speak to its origins and or content or make some other positive comments about. It may also be tendered to challenge the witness’s credibility, even if witness has no knowledge of the document and has rejected its contents. When a witness cannot comment on a document or say anything meaningful about it, a Chamber may assess that the witness therefore cannot lay the necessary foundation for its admission.²⁰ The Trial Chamber agrees with and adopts these general principles.

DISCUSSION AND DECISION

22. The issue for determination is whether the 2010 witness statement can be tendered either under Rule 154—‘from the bar table’—or through a witness, namely Mr Mugg.

Tendering the 2010 witness statement through Mr Mugg

23. The Sabra Defence tenders the 2010 witness statement to show that, in August 2010, the Prosecution received contradictory information on a material issue in its case—namely who Mr Abu Adass was with when he left his home on 16 January 2005—yet apparently failed to investigate the contradiction. The Prosecution, it is argued, should have promptly

¹⁹ See F3459, Decision Clarifying Decision of 25 September 2017 Admitting Exhibit 5D251 MFI (Relevant to Mr Admed Abu Adass) and Denying Prosecution Application for Reconsideration, 6 December 2017, para. 8; STL-11-01/PT/AC/R176bis, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0327, Decision on Defence Requests for Reconsideration of the Appeals Chamber’s Decision of 16 February 2011, 18 July 2012, paras 22-26; F2719, Decision on Ayyash Defence Motion for ‘Reissuance’ and Oneissi Defence Motion for Reconsideration of the Trial Chamber’s Decision of 29 July 2016, 14 September 2016, para. 10.

²⁰ See, e.g., ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, fn. 49; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Guidelines for the Admission of Evidence Through Witnesses, 19 May 2010, paras 10-11, 14, 25; *Prosecutor v. S. Milošević*, IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Obrad Stevanović, 8 July 2005, p. 2.

investigated any information that contradicted Witness 056's version of who was with Mr Abu Adass.

24. The Sabra Defence has put on the court record transcript, through Mr Mugg, that Witness 056's relative gave him and Mr Carnus information that, on its face at least, seemingly contradicted part of Witness 056's evidence.²¹ Regretfully, this 2010 witness statement is deficient in that it does not explain the provenance of this apparently contradictory information. The interviewers, it appears, neglected to ask the witness about the circumstance of obtaining this hearsay evidence, namely when, how, from whom or in what circumstances the witness obtained this information. Remarkably, they apparently overlooked asking—or, alternatively, including in the statement—whether Witness 056's relative actually obtained this information from Witness 056. Without knowing this, the information relayed by Witness 056's relative is simply an unreliable piece of hearsay.

25. However, the Sabra Defence tenders the information in the statement not for its truth, nor to attack Witness 056's credibility, but only to highlight an alleged deficiency in the Prosecution's investigations, and one that could be used to raise a reasonable doubt about the Prosecution's case against Mr Sabra and Mr Oneissi.

26. As the information is now on the court record and the Sabra Defence may in due course make *appropriate* submissions on this alleged Prosecutorial investigatory omission, there is no need to consider accepting the relevant portions of the statement into evidence. In relation to the non-relevant portions, the Sabra Defence has not properly explained why they should be admitted into evidence, so the Trial Chamber denies their admission.

Reconsideration of the 25 September 2017 decision

27. The Sabra Defence has placed the relevant portions of the 2010 witness statement on the court record to highlight an alleged omission in the Prosecution's investigations. There is thus no injustice to the Sabra and Oneissi Defence requiring reconsideration of the decision under Rule 140.

²¹ Co-counsel for Mr Sabra asked Mr Mugg to comment on paragraphs 14-16, 18-19 and 24-26 of that statement. Co-counsel read paragraphs 14, 18, 19 and 24 onto the record in full, read pertinent sections of paragraphs 15, 25 and 26 onto the record, and phrased a question regarding paragraph 16 in such a way as to put the relevant part of that paragraph on the record.

CONFIDENTIALITY

28. The Sabra Defence filed its reconsideration motion confidentially because it refers to someone who provided a statement to the Prosecution, and a protected witness, but undertook to file a public redacted version.²² The Prosecution filed its response confidentially as it concerns Witness 056 and another witness whose views on protective measures have not been confirmed by the Sabra Defence, and to prevent potential prejudice to the Prosecution's cross-examination of the latter. It undertook to file a public redacted version.²³ The Prosecution also filed its response to the alternative application confidentially due to Witness 056's protective measures, and will file a public version.²⁴

29. The Trial Chamber notes these undertakings and, in light of the public nature of the proceedings, orders the Parties to file public redacted versions of their confidential filings.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Sabra Defence's motion for reconsideration of the 25 September 2017 decision and the admission into evidence, under Rule 154, of the 2010 witness statement;

DISMISSES the Sabra Defence's alternative application, joined by the Oneissi Defence, for the admission into evidence of the 2010 witness statement through Mr Quentin Mugg; and

ORDERS the Parties to file public redacted versions of their confidential filings.

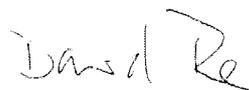
²² Sabra Defence reconsideration motion, para. 33.

²³ Prosecution response to reconsideration motion, para. 29.

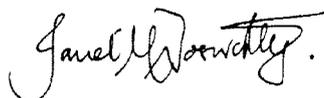
²⁴ Prosecution response to alternative application, para. 21.

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

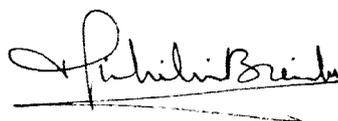
Leidschendam,
The Netherlands
7 February 2018



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

