

**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: 8 June 2017

Original language: English

Classification: Public

DECISION ON JOINT DEFENCE APPLICATION TO ADJOURN THE EVIDENCE OF WITNESS PRH230, MR ANDREW DONALDSON, AND ALLOWING THE PROSECUTION TO CONTACT THE WITNESS

(Extract from Official Public Transcript of Hearing on 8 June 2017, page 23, line 3 to page 26, line 24)

This is a decision on an application by counsel for Salim Jamil Ayyash, supported by counsel for the three other accused, to adjourn the evidence of Mr. Andrew Donaldson, a Prosecution analyst, until the Prosecution has completed disclosure of PowerPoint slides relating to his evidence of the methodology in his five reports and reports he has prepared in relation to each of the four accused and the former accused Mr. Mustafa Amine Badreddine.

Mr. Donaldson was due to commence his evidence today, the 8th of June, and to testify for around 15 days in evidence in-chief for the Prosecution.

[...]

The Prosecution had completed disclosure of Mr. Donaldson's slides in relation to the four accused and Mr. Badreddine sometime before he was due to testify today. However, there was another application made by counsel for Mr. Ayyash and Mr. Hassan Habib Merhi on the 21st of April, 2016, asking the Trial Chamber to exclude any opinion evidence from

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Mr. Donaldson in relation to co-location of mobile phones and hence drawing a conclusion as to whether a single user was using two or more mobile phones at the same time.

The Trial Chamber noted in its decision, delivered on the 2nd of June, decision allowing Prosecution analyst Andrew Donaldson to provide opinion evidence, that's filing F3172, that the filing had been made very late, at most two weeks before Mr. Donaldson was scheduled to begin testifying.

As a result of this and other matters, the Chamber had to adjourn hearing Mr. Donaldson's evidence. One of the other matters was also a very late application by the Defence of Mr. Merhi seeking disclosure of documents in eight categories relating to Mr. Donaldson's evidence, which was filed on the 21st of March, 2017. The Trial Chamber also delivered a decision in relation to that matter on the 2nd of June in filing F3171, "Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230," in which we ordered the Prosecution to immediately disclose to the Defence Mr. Donaldson's draft reports and statements.

The result of [...] this confluence of events - that is, the late filing of these applications for exclusion, disclosure, and the Chamber's having to adjourn to consider these decisions which had to be delivered before Mr. Donaldson could testify - is that, and in particular in relation to the decision on allowing Mr. Donaldson to give some opinion evidence, is that the Prosecution had to restructure the methodology of Mr. Donaldson's evidence.

The result is Mr. Donaldson and the Prosecution counsel and his team have had to prepare additional PowerPoint slides and change the matter in which they were going to testify. This is necessitated by the content of the reports and Chamber's decision on the Defence applications.

In court today, the Prosecution sought the Chamber's permission to commence Mr. Donaldson's evidence today but over the next week when the Chamber is not sitting, and thereafter during his testimony, which is scheduled for the week of the 19th of June, to continue working on the slides with Mr. Donaldson - that is, communicating with Mr. Donaldson who would by then be testifying, and presumably on a daily basis during his testimony about additional matters in his testimony.

The Chamber's guidelines on the Conduct of Proceedings state that a witness may only communicate with counsel after the witness has taken the solemn declaration with the Chamber's permission. The Chamber has granted Prosecution applications in the past and

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would be sympathetic to any Defence or Legal Representative of Victims's applications in similar circumstances, but has noted that the circumstances have to be, well, maybe not exceptional, but there has to be something which justifies a departure from the normal principle in international criminal law, procedural law of witnesses not communicating with counsel during their testimony.

The Prosecution counsel indicated that doing it in that manner, they anticipated completing disclosure of the slides by Tuesday, the 27th of June. Counsel for the Defence opposed the applications, saying that it was [...] preferable to allow Mr. Donaldson to complete the preparation of the slides and then to commence his testimony.

The Prosecution didn't object to that application or submission. And upon reconsideration, and the Chamber heard some brief evidence from Mr. Donaldson on this point, counsel for the Prosecution, Mr. Desalliers, and Mr. Donaldson, agree that they could probably have it done by the 21st of June. That's Wednesday, the 21st of June.

In these circumstances, the Chamber is of the view the preferable course to take in the interests of justice would be to grant the application to adjourn Mr. Donaldson's evidence. We believe it would be more efficient for him to continue working on the slides so that he can complete his evidence without interruption and without any suggestion that his evidence is being influenced by his dealings with Prosecution counsel and his team, and the Chamber, of course, accepts that the witness would be working in good faith not to allow that to happen. But taking this course would prevent any suggestion that that is, in fact, occurring.

So in those circumstances, the Chamber will grant the application. But in doing so, we note that it has been necessitated by the Chamber's decision on the 2nd of June, which was as a result of, as I mentioned earlier, a very late application by Defence counsel [...] to exclude Mr. Donaldson's evidence in significant respects.

So the Chamber will grant the application to adjourn Mr. Donaldson's evidence. However, we note the date of the 21st of June has been mentioned. The Chamber, however, urges Mr. Donaldson and the Prosecution to work to completing the slides by an earlier date, so the Chamber will make the order that we will adjourn the proceedings until at least Tuesday, the 20th of June, and we ask the Prosecution to provide an update to the Chamber by Friday, the 16th of June as to progress and which will allow the Chamber to make any necessary adjustments, either forwards or backwards, to its sitting schedule.

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