

BEFORE 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: 21 July 2017

Filing Party: Defence Counsel - Oneissi

Original language: English

Classification: Public

PROSECUTOR
v.
SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

Defence for Hussein Hassan Oneissi Request for Certification of the Trial Chamber
Order dated 18 July 2017

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

Defence Office:

Mr François Roux

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothée Le Fraper du Hellen & Mr Khalil Jad

Legal Representatives of Participating Victims:

Mr Peter Haynes, Mr Mohammad F. Mattar & Ms Nada Abdelsater-Abusamra

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



I. INTRODUCTION

1. On 18 July 2017, the Trial Chamber ordered the Defence to provide submissions in relation to the questioning of a witness under Rule 125(B).¹

2. Pursuant to Rule 126(C) of the Special Tribunal for Lebanon Rules of Procedure and Evidence ('STL' and 'Rules'), the Defence for Mr. Oneissi ("Defence") hereby seeks certification to appeal the following issue raised by this Order:

Did the Trial Chamber err in delivering an order asking the Defence to provide submissions on the questioning of a witness conducted under Rule 125(B), without providing any supporting legal basis and in contradiction with the interpretation it provided of this Rule in a previous Order dated 14 June 2017?

II. SUBMISSIONS

3. In a Decision dated 14 June 2017, the Trial Chamber clarified the interpretation of Rule 125(B).²

4. First, regarding the *collection* of the evidence, the Trial Chamber noted that Rule 125(B) did not regulate in any detail the manner of questioning of witnesses.³ It further noted that even though "[n]ormally a Party may object to a question before it is answered",⁴ when the witness is being questioned pursuant to Rule 125, "[n]either the Trial Chamber, the Third State nor anyone else can direct the Third State judge in this regard."⁵ And finally, "Defence Counsel may submit any material they wish to be used in questioning the witness. How it is used is a matter for the Third State Judge."⁶

5. Second, regarding the *admissibility* of the evidence collected pursuant to Rule 125, the Trial Chamber noted that the Rule did not regulate the matter either. The Trial Chamber clarified that it would "receive submissions as to the weight of the evidence based on the

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash et al.* F3231, Order to provide submissions on the relevance of proposed questions to a witness testifying under Rule 125(B) as Submitted by the Oneissi and Sabra Defence, 18 July 2017 ("Order of 18 July").

² STL-11-01/T/TC, *Prosecutor v. Ayyash et al.*, F3180, Order and Decision in Relation to a Witness testifying under Rule 125, 14 June 2017 ("Order of 14 June").

³ Order of 14 June, para. 14.

⁴ Order of 14 June, para. 14.

⁵ Order of 14 June, para. 20.

⁶ Order of 14 June, para. 21.

manner of its collection under Rule 125 at the appropriate time in the proceedings”⁷ and that “[a]s with any admitted evidence, the Trial Chamber will evaluate its weight after hearing submissions from the Parties.”⁸

6. In a subsequent Order dated 18 July 2017, the Trial Chamber considered it had the right to review the questions submitted by Counsel for the cross examination of a witness to be conducted under Rule 125(B).⁹ As a result, it requested submissions in relation to the relevance and probative value of some of the questions as well as an explanation as to the reason for the repetition of questioning relating to evidence contained in the witness statements.¹⁰

7. The Order of the Trial Chamber dated 18 July 2017 does not refer to any clear and appropriate legal basis and contradicts the interpretation of Rule 125 previously provided by the Trial Chamber in its Order dated 14 June 2017. The Defence submits that such a practice and the lack of legal certainty and unpredictability it allows should be subject to the control of the Appeals Chamber.

8. Rule 126(C) provides that “Decisions on all motions under this rule are without interlocutory appeal save 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

9. The Appeals Chamber has held that there are two cumulative requirements to Rule 126 (C), namely: (i) the existence of a precise issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial; and (ii) the urgency requirement.¹¹

10. The legal unpredictability resulting from the lack of reference to a clear legal basis and from the contradicting orders of the Trial Chamber is an issue which impacts significantly affect the fair and expeditious conduct of the proceedings. Without legal

⁷ Order of 14 June, para. 21.

⁸ Order of 14 June, para. 14.

⁹ Order of 18 July.

¹⁰ Order of 18 July, para 2 in fine and para. 4.

¹¹ F0008-AR126.2, Decision on Appeal against Pre-Trial Judge’s Decision on Motion by Counsel for Mr. Badreddine alleging the Absence of authority of the Prosecutor, 13 November 2012, paras. 13 and 14.

certainty, those subject to the law can no longer regulate their conduct and are no longer protected from the arbitrary use of judicial power.

11. In light of these contradictory orders, the Defence would have been wrong either way. Indeed, this legal uncertainty appears to have resulted in the Defence implementing a Trial Chamber's Decision whilst breaching another one. The Defence followed the interpretation of Rule 125 provided for in the Order of 14 June 2017 and was found in breach of the Order of 18 July 2017. Had it complied with the Order of 18 July 2017, it would have been in breach of Rule 125 as interpreted by the Order of 14 June 2017.

12. Should the interpretation of Rule 125 dated 18 July 2017 be the one finally retained as applicable, this could obviously lead to a subsequent order of the Trial Chamber directing the Defence to withdraw some of the questions it intends to submit to the witness. Notwithstanding the contradiction, this would amount to an interference of the Trial Chamber with the Defence strategy, infringe on its right to an adequate and proper opportunity to challenge and question a witness against him. Further, the Defence would also have legitimate reasons to question the respect of the full equality principle since it has at this stage no possibility to check whether the Prosecution's questions were reviewed according to the same standards.

13. Contradiction of grounds is equivalent to their absence.¹² Pursuant to article 306 of the Lebanese Code of Criminal Procedure, referred to under Article 3(A) of the Rules as a source for their interpretation, lack of legal basis or defective reasoning are amongst the grounds for interlocutory appeal. Further, the European Court of Human Rights has consistently held that article 6 of its Convention requires the courts to provide reasons for their decisions.¹³ The obligation to provide reasons also derives from the right to an impartial tribunal. The impartiality of the tribunal is not limited to the control of its composition, but must also appear from its reasoning. When reading a decision, the parties must be able to establish that the court relied on a consistent legal reasoning.¹⁴

14. The Defence submits that the resolution of this issue should be immediate and would materially advance the proceedings as it is necessary to pre-empt the repercussions of

¹² Cass. crim., 25 avr. 1974, Bull. crim, n° 154.

¹³ See for example CEDH, 19 avril 1994, Van de Hurk, Rec. CEDH, série A, n° 288, para. 61.

¹⁴ Jacques et Louis Boré, La cassation en matière pénale, n° 80.06, p. 201, Dalloz, 2005.

erroneous, contradictory or illegal interpretations on the fairness of the proceedings in the future.

III. RELIEF SOUGHT

15. For the above reasons, the Oneissi Defence respectfully requests that the Trial Chamber to certify the following issue for appeal:

Did the Trial Chamber err in delivering an order asking the Defence to provide submissions on the questioning of a witness conducted under Rule 125(B), without providing any supporting legal basis and in contradiction with the interpretation it provided of this Rule in a previous Order dated 14 June 2017?

Submitted on the 21st of July 2017,

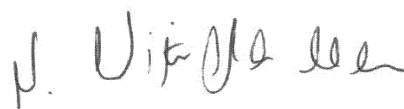
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