People v Ali
2008 NY Slip Op 33704(U)
February 7, 2008
Supreme Court, Queens County
Docket Number: 2400/2006
Judge: William M. Erlbaum
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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-4

THE PEOPLE OF THE STATE OF NEW YORK	BY: WILLIAM M. ERLBAUM, J.
-against-	DATE: February 7, 2008
INTAQUAB ALI, DEFENDANT.	INDICT. NO. 2400/2006

The defendant was indicted in September of 2006 for the crimes of Attempted Murder in the Second Degree [PL 110/125.25(1)], Assault in the First Degree [PL 120.10(1)], Reckless Endangerment in the First Degree [PL 120.25], Aggravated Criminal Contempt [PL 215.52], Criminal Possession of a Weapon in the Fourth Degree [PL 265.01(1)(2)], Endangering the Welfare of a Child [PL 260.10-1], Coercion in the First Degree [PL 135.65(1)] and Menacing in the Second Degree [PL 120.14-1]. It is alleged that the defendant committed these crimes against Nalenie Tilak, with whom the defendant was involved in an intimate relationship, and their infant son, Ethan Ali. The People allege that on June 6, 2006, the defendant threatened the complainant Tilak by placing a machete to her throat and demanding that she relieve him of his obligation to make child support payments. Furthermore, they allege that on July 23, 2006, in violation of a full order of protection that was in place from the June 6, 2006

incident, the defendant repeatedly stabbed the complainant Talik with metal scissors, while she was holding their infant son. Both the complainant and the baby were severely injured. The defendant was arraigned in the Supreme Court, Queens County, on October 5, 2006, and was held without bail.

The People filed a motion dated August 8, 2007, seeking a Sirois hearing (see, People v. Geraci, 85 NY2d 359 [1995]; In the Matter of Holtzman v. Hellenbrand, 92 AD2d 405 [2nd Dept 1983]), claiming that misconduct on the part of the defendant induced complainant Tilak to refuse to testify at the trial of this matter. In a decision dated September 27, 2007, this Court granted the People's motion and ordered a Sirois hearing be conducted.

The hearing was held over a period of two days, specifically October 23, 2007 and January 11, 2008.[1] The People elicited testimony from one witness, Assistant District Attorney Keshia Espinal, of the Queens County District Attorney's Office, whose testimony the Court finds to be credible. The Court will now summarize the relevant testimony of this witness.

ADA Espinal testified that she was assigned the case of

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[1] The minutes reflecting the portion of the hearing conducted on January 11, 2008 are incorrectly dated January 11, 2007.

Intaquab Ali in her responsibilities as an Assistant District Attorney in the Domestic Violence Bureau of the Queens County District Attorney's Office. She explained that she was not the initial assistant assigned to the matter, but received the case post-indictment. One of the first actions she took in this case was to call the complaining witness, Nalenie Tilak, and schedule an interview with her, so that they could meet. On January 25, 2007, the complainant met with ADA Espinal, in her office, and answered questions regarding the crimes the defendant was indicted for. The complainant came to the office with her son.

ADA Espinal continued that she reviewed the files and accusations against the defendant prior to meeting the complainant. She stated that the defendant's indictment reflected two separate dockets, one being a misdemeanor docket, wherein the defendant, who was living with the complainant, threatened her with a machete. ADA Espinal said that the complainant and defendant argued over a child support case that was pending in Family Court. The defendant left after the incident and there were no injuries. The complainant reported the crime, the defendant was arrested, and a full order of protection was issued (see, People's exhibit 1 in evidence, a full stay away order of protection which also prohibits third party contact).

ADA Espinal testified that the felony aspect of the case

began in violation of the full order of protection. She explained that the complainant was home with the defendant and their four month old son, when an argument ensued. The defendant then struck the complainant about the head and then grabbed a pair of metal scissors and stabbed the complainant in the back of the neck, breaking the scissors in her neck. During this altercation, the baby was hit on the top of the head and suffered a depressed skull fracture.

The Assistant continued that before she was assigned to this case, the complainant testified before the Grand Jury, against the defendant. The Assistant testified that she reviewed the Grand Jury minutes reflecting the complainant's testimony, reviewed photographs depicting the injuries sustained in this case (see, minutes dated October 23, 2007, page 18, People's exhibits 2 and 3 in evidence) and at their meeting, showed the complainant those photos. The complainant informed the Assistant that the photos were taken after the incident, after the complainant and her son were operated on. Furthermore, the details set forth by the complainant to the Assistant in their meeting were consistent with the complainant's Grand Jury testimony.

ADA Espinal testified that at this meeting she and the complainant discussed the complainant's financial situation. ADA

Espinal stated that the complainant informed her that she was going through a difficult time financially. The complainant was not working, and was no longer living in the home where she had lived with the defendant. She was staying at a shelter, was having problems with public assistance, and housing. The complainant was no longer working, as she had always done in the past, because she had to take care of her son who had been hurt during the incident with the defendant. The Assistant further testified that she had arranged for a car service to bring the complainant and her son to the District Attorney's Office for the meeting, and back to the shelter thereafter. The Assistant stated that she contacted the complainant via her cell phone in order to arrange the meeting, and that the complainant answered the phone immediately. The Assistant was able to contact the complainant by cell phone, using the same number, a few times after the meeting.

ADA Espinal testified that this case was eventually scheduled for trial. The Assistant indicated that on January 25, 2007, and shortly thereafter, she would classify the complainant as being ready, willing, and able to testify in connection with the trial of this matter. However, ADA Espinal stated during her testimony that a point came when that changed. She explained that the complainant stopped answering her phone when the

Assistant called, and that sometimes the complainant would answer the phone, tell the Assistant she would call her right back, and then would not. When the Assistant would call back, the complainant would not answer. At one point, though she did not remember the date, the Assistant did manage to get the complainant to come back to her office. On this instance, the Assistant stated that the complainant was complaining about her financial situation and housing problems. ADA Espinal continued that the complainant at this meeting had a different attitude than she had at their first meeting, that she was angry at the Assistant for bringing her back to the office. Additionally, the Assistant said that the complainant asked her a very odd question, namely what would happen if she did not come to court to testify. That was the first time the complainant brought this issue up to the Assistant. The Assistant informed the complainant that she would be under subpoena, and would have to come to court. When asked by the complainant what would happen if she came to court but did not say anything, the Assistant informed her she would have to appear before a judge and discuss the matter.

ADA Espinal continued her testimony by stating there came a time when she conducted an investigation to ascertain whether or not the complainant had any contact with the defendant since his

arrest on August 1, 2006. She stated that the defendant had been in custody since his arrest, and that a full stay away order of protection had been issued in favor of the complainant, said order barring face to face contact, phone calls, e-mails between the parties, and third party contact. In response to a question from the Assistant District Attorney conducting this hearing and presenting this case to the Court, asking ADA Espinal if she recalled the statement allegedly made by the defendant when he was threatening the complainant by holding a machete to her neck, the Court read into the record the statement from the Criminal Court complaint, docket number 2006QN037014, namely, "if you know what is good for you, you will drop the child support, I will kill you".

In conducting her investigation to determine if there was any contact between the defendant and the complaint, the Assistant subpoenaed the Department of Corrections for the defendant's visitor and phone logs (see, minutes dated October 23, 2007, pages 38-39, People's exhibit 4 in evidence; subpoena dated October 12, 2007). ADA Espinal testified that upon her review of the Department of Corrections log regarding visitors, she noticed that there were two visits to the defendant by the complainant, Nalenie Tilak. One visit occurred on March 25, 2007 and one on May 10, 2007. Both visits were made despite the full

order of protection being in place in favor of the complainant. The Assistant explained that on one occasion the complainant used the name Nalenie Ali, and on the other occasion used the name Nalenie Tilak. The Assistant stated that based upon name, birth date, and address information given on the log, she knew the individual who visited the defendant on those two occasions was the same individual as the woman who met her in her office.

ADA Espinal continued her testimony by explaining that Detective Perez from the Queens D.A.'s squad was assigned to the task of attempting to locate, and have contact with, the complainant. Detective Perez was able to contact the complainant by phone, by using a private number, and arranged for her to come into the District Attorney's Office, via car service. However, the complainant never arrived at the location to meet the car service and did not answer her phone when she was called. ADA Espinal testified that she is still attempting to try and locate the complainant, but has had no phone contact with her and has not spoken to her in person. The Assistant continued that she had detectives from her office attempt to serve the complainant with a subpoena to come to court, however, they were unable to do so.

The Assistant informed the Court that at some time toward the end of July, beginning of August of 2007 she was contacted

via beeper by a witness [2] whom she had given her number to while trying to locate the complainant. ADA Espinal called this witness back. The witness was someone the ADA had met before, and whose voice she recognized. The witness indicated to the Assistant that the defendant's mother was going around the neighborhood asking questions about who was cooperating with the District Attorney's Office, and who was giving the Office information about the complainant. The witness told the ADA that it alarmed and scared him that the defendant's mother was asking questions to find out if detectives were asking people in the neighborhood about the complainant. The witness also stated to ADA Espinal that the defendant's mother said to the witness that she did not understand why the case was still going forward because the complainant was fine and that the baby was fine. The defendant's mother was trying to give the witness information that everyone was well and the case should be over soon.

ADA Espinal testified that at the time when she was using detectives to locate the complainant, the investigation revealed that the complainant had left the state. The complainant was not returning phone calls from the District Attorney's Office and was

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[2] The Court has signed a protective order in regards to the name of this witness. The name has been placed on the record, under seal. See, hearing minutes dated October 23, 2007, pages 103- 111.

not responding to subpoenas left for her. One of the detectives spoke to the complainant's landlord from her most recent address who informed him that the complainant went to Florida for the summer and would not be back until September. The Assistant continued that the complainant had once stated to her that she was tired of the case and that it was possible that she would go to Florida to visit her family. The Assistant knew that the complainant was not speaking to her family, because at one point, she contacted the complainant's family in an attempt to locate her. The complainant got upset about that and asked the Assistant not to do that again because she indicated that they were not on speaking terms. When the complainant made this statement about Florida to ADA Espinal, the Assistant asked her how she would go to them when she was not speaking to them. The complainant did not respond.

ADA Espinal testified that the witness who beeped her also informed her that there was an occasion wherein she[3] saw the complainant driving the defendant's father's car. ADA Espinal

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[3] The Court notes that during this part of her testimony, ADA Espinal referred to this witness as a "she" but in another part of her testimony referred to the witness as a "he" (see, hearing minutes, dated October 23, 2007, compare page 49 to page 46). The Court does not find this distinction to be significant, as it is consistent with an effort to conceal the identity of the witness.

indicated to the Court, in response to the Court's inquiry, that the witness who beeped her would not be happy about having to appear in court and testify, and that the witness was scared since the defendant's mother was asking questions throughout the neighborhood about who might be furnishing information to the authorities.

ADA Espinal continued that she had informed the complainant, when they had a discussion in person, that the defendant had a previous record, that he had previously pled guilty to reckless endangerment for shooting at a car where there was another female inside, possibly the defendant's girlfriend at the time.

In concluding her direct testimony, ADA Espinal testified that she filed for a material witness order from the court in regards to the complainant.

Upon cross-examination, ADA Espinal testified that the Assistant who handled the case before it was assigned to her never indicated a reluctance on the part of the complainant to participate in this proceeding. The initial Assistant also never indicated that the complainant was threatened by ACS [The Administration for Children's Services] with the removal of her child if she did not testify in the Grand Jury or cooperate fully with the District Attorney's Office. ADA Espinal stated that she knows that ACS is involved with this case, and gets involved in

all domestic violence cases.

ADA Espinal continued her testimony under cross-examination by explaining that she met the complainant for the first time on January 25, 2007, and prior to that spoke to her on the phone a few times, perhaps two or three times. The Assistant did not make contemporaneous notes of their telephone conversations. ADA Espinal testified that she told the complainant that the defendant was going to be prosecuted but did not discuss with the complainant numbers regarding sentencing. When the Assistant was pressed if she had a discussion with the complainant about what the state was seeking against the defendant in terms of punishment, she testified that she told the complainant that her objective was to have a jury convict him of attempted murder, and that his sentence would be up to the judge. She further testified that she was not sure if she told the complainant a specific number as to what the defendant's sentence could be after conviction and that she tries to not talk to complainants about sentencing numbers.

ADA Espinal stated that she met with the complaint again in person sometime after the January 25, 2007 meeting, and before April 16, 2007. She testified that she did not remember what the exact date was, as it was not marked in her calendar. Defense counsel indicated that he was trying to ascertain a sense of

timing between when the Assistant met with the complainant for the second time and when the complainant went to see the defendant while he was incarcerated. Defense counsel asked the Assistant if the complainant had already seen the defendant in jail before their second meeting. ADA Espinal testified that she did not know. She testified that she did not know whether or not her second meeting with the complainant, subsequent to January 25, 2007, was before or after the complainant visited the defendant in jail on March 25, 2007.

ADA Espinal indicated that she had spoken to ACS in this case, in an attempt to locate the complainant. The Assistant further indicated that the second meeting she had with the complainant, wherein the complainant had a different attitude, occurred sometime after January 25, 2007 and before April 16, 2007. The Assistant continued that she could not recall the last contact she had with the complainant, but that the complainant stopped calling her right before the first court appearance for trial, which was April 16, 2007. ADA Espinal said that though she made voice contact with the complainant after April 16, 2007, she never actually spoke to her, that the complainant would answer the phone and then say she would call the Assistant back, but never would. The Assistant testified she had no substantive contact with the complainant thereafter, and it became clear to

her that the complainant did not want to cooperate with the People. ADA Espinal stated that the complainant did not indicate to her that she was threatened or coerced in any way. The Assistant testified that the complainant never told her her reasons for pulling away from her role as a cooperative witness. The Assistant further testified that she asked the complainant if she had any contact with the defendant or his family, and the complainant stated no. This conversation took place over the phone.

ADA Espinal testified that she did not know whether or not the complainant ever brought her and the defendant's child to see the defendant's parents for a visit. She testified that the defendant and the complainant had lived together during the time of the two incidents encompassed in the indictment. She also testified that the complainant was seen by the witness many months later, after the incidents, coming out of the house she had shared with the defendant, with the defendant's family, taking things out of the apartment. The complainant was also seen in the home a few other times, but the witness did not know any specific dates. However, ADA Espinal did state that the time period was after May of 2007, as that was when she had met the witness. The conversation with the witness was not recorded in any way, and the Assistant stated that she did not know if the

witness had any ill will towards the Ali family, and she did not inquire about that topic. ADA Espinal explained that the witness simply did not want to get involved because the witness was afraid something could happen, though the Assistant did not ask what it was that the witness was afraid of. Though the Assistant attempted to make contact with the complainant after hearing that the complainant was seen with the defendant's family, she never had any substantive conversation with her. ADA Espinal continued her testimony by stating that it became clear to her around April of 2007 that the complainant was not returning her phone calls, and though the complainant knew the Assistant wanted to talk to her, and wanted to prepare her for trial, the Assistant had the sense that the complainant was hiding from her, and trying to avoid being a witness.

Upon further cross-examination, ADA Espinal testified that the defendant received jail house visits[4], on March 25, 2007 and May 10, 2007, by the complainant. The Assistant did not know the duration of these visits and did not know anything about the substance of any conversation that may have taken place. She also indicated that the timing of these visits is very

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[4] The defense, at this point in the hearing testimony, did not concede that these visits were made by the complainant, as alleged by the People. But see footnote 5 and accompanying text, infra, for that concession later.

suspicious. ADA Espinal continued that she was given information that the complainant was in Florida over the summer of 2007, but she did not reach out to the complainant's Floridian relatives at that time. She did reach out to them at a subsequent point and asked them to let the complainant know that the Assistant was trying to find her, that she should call the Assistant. The family stated they had not spoken to her for some time.

ADA Espinal testified that the she did not perceive that the complainant bore any hostility toward her, that she never called the Assistant the "B" word. The Assistant continued that she told the complainant that she would be subpoenaed to come to court, that she would have to come in, and would have to talk to the judge if she did not say anything. ADA Espinal also stated that she did not tell the complainant that she could be sent to jail, or that her child could be taken from her.

The Assistant testified that the complainant did not indicate to her that she wanted the defendant to have a relationship with their son. The Assistant also indicated that she did not believe she discussed with the complainant specifics regarding how much time the defendant would get in this matter, did not remember if the complainant asked what the defendant's sentence would probably be after trial, and was not sure if general numbers came up. She stated specific numbers as to

sentence were not discussed.

ADA Espinal continued that she remembers the complainant telling her something about how she was good friends with the defendant's sister, and that his parents were interested in seeing the child. However, she was unsure of this information. The Assistant stated that the complainant indicated that his family was calling her all the time, and that she changed her cell phone number. This occurred in January, 2007. The Assistant did not discuss with the complainant whether she felt harassed by the defendant's family, and the Assistant did not have this concern in January. ADA Espinal further testified that the complainant did not express concerns to her that the complainant's clothes, her child's clothes, and their possessions were still at the house that she shared with the defendant, or that she wanted to get the things back. The ADA testified that she did not know if the complainant had any belongings at the home, and that the home is owned by the defendant's parents. The Assistant stated that the witness saw the complainant at the home a couple of times, on different dates, but the Assistant never addressed the issue with the complainant. Though the Assistant had information that the complainant is no longer living in the home, the complainant had been seen there. ADA Espinal continued that the last time she spoke to the witness was at the end of

July, beginning of August, 2007, and that the defendant's mother was the one who was asking questions of the neighbors, and told the witness that the complainant and her child were okay, that the case should be over soon, and that the defendant's mother did not threaten anyone. The Assistant testified that the complainant indicated to the Assistant that the complainant was tired of this case. The Assistant elaborated on this last point by explaining that the complainant was going through a rough time with finances and housing, she did not care what happened because she was just too tired, and she was not feeling well due to the injury to her neck, and that her child was a handful.

The Assistant continued her testimony by indicating that she discussed the defendant's criminal record with the complainant. However, she stated she did not do this in an effort to get the complainant to cooperate so the defendant, who had a bad past, could be punished, or because the complainant was expressing reluctance to continue with the case. The Assistant testified that when she has a case with a defendant with a record, she tries to find out if the other cases involve the same complainant, and when the case involves an intimate relationship, she feels that the victim should know what she got herself into with the defendant, especially since many domestic violence cases have issues with reluctant witness. The Assistant continued that

it is not unusual in domestic violence cases, which the instant matter is, for the victims to have close affection for the person that did them wrong, to not want to fully cooperate, or to be leaned on by the wrongdoers.

At the conclusion of the cross-examination of ADA Espinal, the People conducted a re-direct examination. Upon re-direct, the ADA stated that on January 25, 2007, at her initial meeting with the complainant, the complainant was cooperative. The complainant was not cooperative by some time in March, April, or May of 2007. The first time the witness had beeped the Assistant was after the Assistant had filed, and served on defense counsel, a motion requesting a Sirois hearing. The Assistant testified that in her application for the hearing she made reference to the defendant's family, that the complainant was seen coming out of the defendant's home with his family. The Assistant indicated that she was beeped by the witness, who stated that the defendant's mother was questioning people as to who was in contact with the authorities, less than two weeks after she put that information in writing. ADA Espinal also stated that the complainant was seen by the witness driving the defendant's family's vehicle.

Defense counsel did not re-cross ADA Espinal, and the People then rested their case. After much colloquy not relevant to the

summary of testimony at the hearing, the defense rested it's case as well.

The sole issue before the Court is whether the People presented sufficient evidence to establish that the defendant's misconduct caused the complainant, Nalenie Tilak, to be unavailable to testify at the trial of this matter. The People submit that it did, and that they should therefore be permitted to introduce into evidence on their direct case, during trial, the complainant's out of court statements. The People are seeking to use statements made by the complainant to police officers and Assistant District Attorneys, as well as her Grand Jury testimony.

Generally, out of court statements of unavailable witnesses are not admissible as evidence in chief in a criminal prosecution. However, if the People prove at a Sirois hearing, by clear and convincing evidence, that the defendant caused the witness's unavailability through violence, threats, or chicanery, the out of court statements may be admissible into evidence due to the defendant's waiver of his constitutional Right of Confrontation (see, People v. Santiago, 2003 N.Y. Slip Op. 51034(U)) and of the rules against admitting hearsay into evidence (see, People v. Geraci, 85 NY2d 359, 366 [1995]). "Because of the inherently surreptitious nature of witness

tampering circumstantial evidence may be used to establish in whole or in part, that a witness's unavailability was procured by the defendant" (see, People v. Cotto, 92 NY2d 68, 76 [1998]; see also, People v. Geraci, 85 NY2d 359 [1995]). Furthermore, at a Sirois hearing, when evaluating evidence, the Court may consider hearsay testimony (see, People v. Geraci, 85 NY2d 359 [1995]).

Initially, the Court finds that the complainant in this case is clearly unavailable. She has avoided the People's phone calls, missed a scheduled appointment, avoided subpoenas that the People attempted to serve her with, has basically had no contact with the District Attorney's Office, and has essentially vanished. Therefore, the question at hand is whether the People have met their burden, by clear and convincing evidence, that the defendant caused the witness's unavailability. The Court holds that they have.

When ADA Espinal first met the complainant on January 25, 2007 she was a cooperative witness. She voluntarily went to the Assistant's Office, she answered all questions put to her, and she answered them consistent with the statements she had made to the authorities and to the Grand Jury, when she testified against the defendant as a People's witness. Furthermore, after this initial meeting, the Assistant had contact with the complainant over the phone. The complainant always answered the phone when

the Assistant called her, and gave the People no reason to suspect that she was not an invested and participating witness.

However, at some point, things began to change. The complainant stopped taking the Assistant's phone calls, if she did answer, she would tell the Assistant she would call back, but never did. Clearly, she was avoiding the People. ADA Espinal did manage to get the complainant into her office for one more meeting. The Assistant was unable to recall that date, but it was some time after January 25, 2007 and before April 16, 2007. At this meeting, the complainant was different. She had a different attitude than when the Assistant and witness initially met. She was complaining about her personal situation, she was annoyed at having to be in the Assistant's office, and started asking questions of the Assistant, such as what would happen if she did not come to court, and did not testify against the defendant. The complainant indicated she was tired of this case already, that she did not care how it ended. After this final meeting, the complainant never permitted any substantive phone contact again between herself and the Assistant, never made herself available for conversation, interviews, or trial preparation, missed an appointment scheduled through a detective, and ignored subpoenas left for her. It became clear to the People, and it is quite obvious to the Court, that the

complainant was no longer a cooperating, available witness in this matter.

In People v. Geraci, 85 NY2d 359, 370 [1995], the New York State Court of Appeals stated that "the cumulative evidence and the inferences that logically flow therefrom [are] sufficient to support a determination by a rational fact finder, under the clear and convincing evidence standard, that defendant either was responsible for or had acquiesced in the conduct that rendered [the complainant] unavailable for trial". Likewise, in the case at bar, the cumulative evidence and the inferences that follow, establish that the defendant, with the aid of his family, rendered Ms. Talik unavailable for trial.

The Court finds that what occurred between January 25, 2007, when the complainant was involved in the prosecution of this matter and after April 2007, when she was not, was unlawful behavior on the part of the defendant. Specifically, in violation of an order of protection, the defendant had personal contact with the complainant which caused her unwillingness to testify against him in this matter. The Court finds as the People contend, that the complainant was the individual who visited the defendant in jail on two occasions,[5] after the complainant was

[5] Defense counsel states during oral argument that, regarding the visits to the jail and who made them ". . . and I will even concede they may have been her. They may have been

initially cooperative with the People, and in or about the same time period when she became uncooperative. Furthermore, extensive contact between the complainant and the defendant's family contributed to her unavailability as a People's witness at trial. After she became unavailable to the People, and began visiting the defendant in jail, the complainant was seen many times with the defendant's family, in the house they shared together, and driving his father's car. Also, the defendant's mother was informing the neighbors that this prosecution was going to go away. The Court finds that these circumstances suggest that the defendant's mother was confident that this case would end, that the complainant would never testify against her son, since they were all in such close contact again.[6]

It is apparent from the evidence adduced at the hearing that the complainant is choosing not to testify against the defendant because of the defendant's violations, with the complicity of his

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her. Probably her" (see, minutes of January 11, 2008, page 162, lines 14-16).

[6] The Court notes that though there was no direct evidence presented that the defendant's family threatened the complainant to not testify against their son, case law has held that specific threats are not a necessary tool to improperly influence a witness. Evidence that a defendant simply used his relationship with a witness to pressure her to refrain from testifying provides enough of a basis to conclude that the defendant caused a witness's unavailability (see, People v. Jernigan, 2007 NY Slip Op. 5629 [1st Dept 2007], leave denied, 9 NY3d 923 [2007]).

family, of an order of protection issued in favor of the complainant, and in virtue of the defendant's history of violent behavior towards her (see, People v. Santiago, 2003 N.Y. Slip Op. 51034U [2003]; see also, People v. Jernigan, 2007 NY Slip Op. 5629 [1st Dept 2007], leave denied, 9 NY3d 923 [2007]). As the Court notes above, the complainant had informed the authorities and had testified before the Grand Jury that the defendant threatened her in the past, by holding a machete to her throat, to not be a witness against him in Family Court, and then violently attacked, and injured, her and her child with scissors (see, People's exhibits 2 and 3 in evidence). The Court finds by clear and convincing evidence that the complainant has chosen not to testify against the defendant out of fear of additional acts of violence by the defendant (see, People v. Santiago, 2003 N.Y. Slip Op. 51034U [2003]). As the Court noted during the hearing of this matter, "a person will often, in ordinary human experience, treat verbal or other actions meant to be intimidating in a more or less serious light depending on their past experience, with the person who allegedly performed these acts" (see, hearing minutes, dated October 23, 2007, page 20, lines 1- 5).

In People v. Cotto, 92 NY2d 68 [1998], the Court of Appeals found that based upon the past actions of a defendant as well as

the accumulation of all the facts that were developed at a Sirois hearing, a court could properly link a defendant to the unavailability of a complainant. The only logical inference that follows from all of the "concrete facts from which . . . conclusions naturally and reasonably could be drawn" (see, People v. Geraci, 85 NY2d 359, 371 [1995]), that were elicited during the hearing in the case at bar, is that the defendant's illegal involvement in the complainant's life caused the complainant to be unavailable as a witness in his prosecution. This conclusion is inevitable, especially when drawn in light of the behavior of the defendant in the past when the complainant was proceeding against him in Family Court, and he put a machete to her throat.

In this case, the Court finds that the continued illegal contact between the complainant and the defendant and his family caused the complainant to absent herself from these proceedings. Accordingly, the Court finds that the People have met their burden at the Sirois hearing and grants their application to introduce into evidence on their direct case during the trial of this matter the out- of- court statements of the complainant Nalenie Tilak, specifically her statements to the police, the assistant district attorneys, and the Grand Jury (see, People v. Cotto, 92 NY2d 68 [1998]).

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to provide copies of this decision and order to the attorney for the defendant and to the District Attorney.

WILLIAM M. ERLBAUM, J.S.C.