



Produced by Rabbi Avrohom Adler, Kollel Boker Beachwood

Daf Notes is currently being dedicated to the neshamot of

Moshe Raphael ben Yehoshua (Morris Stadtmauer) o”h

Tzvi Gershon ben Yoel (Harvey Felsen) o”h

May the studying of the Daf Notes be a zechus for their neshamot and may their souls find peace in Gan Eden and be bound up in the Bond of life

Mishna

Money is divided among them (*the zomemin witnesses*), but not the lashes. What is the case? If they testified that a particular person owed his fellow two hundred zuz, and they were found to be *zomemin*, the penalty is divided among them, but if they testified that a person is liable to receive forty lashes, and they were found to be *zomemin*, each of them receives forty lashes. (5a)

Combining the Two

The *Gemora* asks: What is the source for this *halachah*?

Abaye answers: We derive “*rasha-rasha*” from sins punished with death. The verse says here (*regarding lashes*), “*And it will be that the “rasha” -- “evildoer” will receive lashes.*” It says elsewhere, “*That he is an evildoer to die.*” Just as the capital case cannot be divided in half, so too regarding a case of lashes, it cannot be divided in half.

Rava answered: It is written: *Like he intended to do to his brother.* If we would give each of them only half of the lashes, we would not be giving them what they intended to do to him.

The *Gemora* asks: If so, the money should not be divided either?

The *Gemora* answers: The money paid by both of them can combine; the lashes from each of them cannot combine (*for the defendant receives what he would have lost*). (5a)

Mishna

Witnesses are not condemned as *zomemin* until they personally are discredited. What is the case? If they said: “We testify that So-and-so killed a person,” and the other witnesses said to them, “How can you testify to that since the murdered person, or the murderer was with us on that day in a particular place?!” these are not *zomemin*. But if they said to them, “How can you testify to that, since you were with us on that day in a particular place?!” these are *zomemin* and they are executed on their word.

If other witnesses came (*and testified to the same crime as the first set*) and they were proven to be *zomemin* and yet others came (*and testified to the same crime as the first set*) and were proven to be *zomemin*, even up to a hundred, they are all executed. Rabbi Yehudah says: This is a conspiracy (*for one set plotted to discredit any set of witnesses who testify against the defendant*), and only the first set is executed. (5a)

Zomemin



The *Gemora* cites several Scriptural sources as to how it is known that witnesses are not condemned as *zomemin* until they personally are discredited.

Rava said: If two witnesses come and say, "In the eastern part of the palace, So-and-so killed another person," and two other witnesses come and say, "How can you say that? Behold, you were with us on the western side of the palace"; we determine if they could possibly see what happened on the eastern part from the western part; if they could see from there, they are not *zomemin*; otherwise, they are *zomemin*.

The *Gemora* notes that we do not consider that the witnesses had unusually strong eyesight (*and were able to see from one end to the other – even though nobody else can*).

And Rava said: If two witnesses come and say, "In Sura on Sunday morning, So-and-so killed another person," and two other witnesses come and say, "How can you say that? Behold, on Sunday evening, you were with us in Nehardea"; we determine if they could possibly go from Sura to Nehardea between morning and evening, they are not *zomemin*; otherwise, they are *zomemin*.

The *Gemora* notes that we do not consider that the witnesses had a "flying camel" (*and were able to go from one city to the other – even though nobody else can*).

And Rava said: If two witnesses come and say, "On Sunday, So-and-so killed another person," and two other witnesses come and say, "How can you say that? Behold, on Sunday, you were with us; however, So-and-so killed a person on Monday"; and furthermore, even if the second set of witnesses come and say, "On Friday, So-and-so killed another person," they (*the first set of witnesses*) are executed, for at the time of their

testimony, the defendant was not yet subject to execution (*and they attempted to have an "innocent" person executed*).

The *Gemora* notes that there is not much novelty in that *halachah*, for it is taught in a *Mishna* below; rather, Rava wanted to teach the novelty of his second ruling: If two witnesses come and say, "On Sunday, a death sentence was handed down against So-and-so," and two other witnesses come and say, "How can you say that? Behold, on Sunday, you were with us; however, a death sentence was handed down against So-and-so on Friday"; and furthermore, even if the second set of witnesses come and say, "On Monday, a death sentence was handed down against So-and-so," they (*the first set of witnesses*) are not executed, for at the time of their testimony, the defendant was already subject to execution (*and they attempted to have a "dead" person executed*).

And similarly, regarding fines: If two witnesses come and say, "On Sunday, So-and-so stole a sheep or an ox, and then slaughtered or sold it," and two other witnesses come and say, "How can you say that? Behold, on Sunday, you were with us; however, So-and-so stole a sheep or an ox, and then slaughtered or sold it on Monday"; and furthermore, even if the second set of witnesses come and say, "On Friday, So-and-so stole a sheep or an ox, and then slaughtered or sold it," they (*the first set of witnesses*) are obligated to pay (*the fourfold or fivefold payment*), for at the time of their testimony, the defendant was not yet subject to paying the fine (*and they attempted to make an "innocent" person liable*).

If two witnesses come and say, "On Sunday, So-and-so stole a sheep or an ox, and then slaughtered or sold it, and he was convicted in *Beis Din*," and two other witnesses come and say, "How can you say that? Behold,



on Sunday, you were with us; however, on Friday, So-and-so stole a sheep or an ox, and then slaughtered or sold it and he was convicted in *Beis Din*"; and furthermore, even if the second set of witnesses come and say, "On Monday, So-and-so stole a sheep or an ox, and then slaughtered or sold it, and he was convicted in *Beis Din*," they (*the first set of witnesses*) are not obligated to pay (*the fourfold or fivefold payment*), for at the time of their testimony, the defendant was subject to paying the fine (*and they attempted to make a "guilty" person liable*). (5a)

Conspiracy

The *Mishna* had stated: Rabbi Yehudah says: This is a conspiracy (*for one set plotted to discredit any set of witnesses who testify against the defendant*), and only the first set is executed.

The *Gemora* asks: If it is a conspiracy, even the first set of witnesses should not be executed!?

Rabbi Avahu answers: The *Mishna* is referring to a case where they were killed already.

The *Gemora* asks: Whatever happened, happened (*what point is there for the Mishna to say that if the halachah is that they should not be executed*)!?

Rather, Rava answers that if there was only one set of witnesses that became *zomemin*, they are executed; however, if there are more, then none of the sets are executed.

The *Gemora* points out that the words of the *Mishna*, "only the first set is executed" is difficult.

The *Gemora* cites the following incident: A certain woman brought witnesses who were found to be liars (*they contradicted each other during the examinations*). She brought another set of witnesses who were also found to be liars. She then brought a third set that did not lie. Rish Lakish said: This woman has established herself to bring false witnesses (*so we cannot accept the third set*). Rabbi Elozar said: Just because she has established herself to bring lying witnesses, does that mean all of Israel are liars (*and we therefore can assume that the third set is valid*).

A different time, Rish Lakish and Rabbi Elozar were sitting before Rabbi Yochanan. A similar case (*as above*) was presented to Rabbi Yochanan. Rish Lakish said: This woman has established herself to bring false witnesses (*so we cannot accept the third set*). Rabbi Yochanan asked Rish Lakish: Just because she has established herself to bring lying witnesses, does that mean all of Israel are liars (*and we therefore can assume that the third set is valid*). Rish Lakish turned and looked at Rabbi Elozar with displeasure and said, "You have heard something from the blacksmith's son (*Rabbi Yochanan*) and you did not say it to us in his name?"

The *Gemora* suggests: Perhaps Rish Lakish follows Rabbi Yehudah's opinion (*in the Mishna that a suspicious pattern can be ruled as a conspiracy*), and Rabbi Yochanan holds like the *Chachamim*.

The *Gemora* shows how the two cases are different. Rish Lakish can say: I can be in accordance with the *Chachamim*, for they rule that the witnesses are all *zomemin* because there is nobody seeking out these witnesses convincing them to testify (*they are coming on their own accord*); however, here, this woman is seeking them out to testify for her benefit. Rabbi Yochanan can say: I can be in accordance with Rabbi Yehudah, for he



rules that the witnesses are not all *zomemin* because it is not logical that the entire world was together with these two witnesses (*who were being "mazim" all the other witnesses*); however, here, it is quite possible that the first sets of witnesses did not know the testimony, but the third set did. (5a – 5b)

Mishna

Zomemin witnesses are not executed unless the judgment (*against the defendant*) has already been pronounced (*before they became zomemin*). For the Sadducees say that the *zomemin* witnesses are not executed only after the accused had been put to death, for it is written: *A life for a life*. The Sages said to them: But is it not written: *And you shall do to him as he intended to do to his brother*, thus his brother must still be alive? Why then does the Torah write: *A life for a life*? For one might have thought that they are liable to be executed from the time their evidence was received; therefore the verse states: *A life for a life*. This teaches us that they are executed only if the verdict has already been pronounced. (5b)

Executing the Zomemin

It was taught in a *braisa*: Beribi said: If the defendant was not executed, the *zomemin* witnesses are executed; if, however, the defendant was executed, they are not executed. His father said to him: My son, is it not a *kal vachomer* (*that if the Torah punishes the witnesses for merely intending to have someone executed, should there not certainly be a punishment if they actually have him executed*)? Beribi answered him: Our teacher taught us that we do not establish a punishment based upon the logic of a *kal vachomer*. This principle was taught in a *braisa*.

The *Mishna* had stated that *zomemin* witnesses are not executed unless the judgment (*against the defendant*) has already been pronounced (*before they became zomemin*). This rule applies by capital cases. The *Gemora* proves from Scriptural sources that it applies by those that are liable to lashes and those that are liable to exile as well.

The *Gemora* cites a *braisa*: Yehudah ben Tabbai said: I shall see consolation if I did not execute a single *eid zomeim* in order to disprove the viewpoint maintained by the Sadducees who held that *eidim zomemin* are not executed unless the defendant was executed because of them (*according to the Chachamim, this law only applies as long as the accused was not punished already*).

Shimon ben Shetach heard of this and told him: I shall see consolation if you did not execute an innocent person since we have learned that *eidim zomemim* can only be punished if both of the witnesses are found to be lying and not only one.

Yehudah ben Tabbai immediately accepted upon himself never to issue a ruling unless he was in the presence of Shimon ben Shetach (*in order to be corrected by him*). For all the remaining days of Yehudah ben Tabbai's life, he would prostrate himself on the grave of the person that he had mistakenly killed (*begging for forgiveness*). His voice could be heard but the people thought that it was the cry of the man whose blood he had innocently shed. Yehudah ben Tabbai said: I will prove it to you that it is my voice, for after I die, you will not hear the crying any longer.

Rav Acha the son of Rava said to Rav Ashi: Perhaps the crying was from the one who was executed, but after Yehudah ben Tabbai died, he stopped crying because he



was appeased or because the Heavenly Court administered justice against him. (5b)

Mishna

It is written: *By the word of two witnesses or three witnesses shall the one who is to die be put to death.* If testimony is valid with two witnesses, why mention three? It teaches us the following analogy: Just as three witnesses can be “*mazim*” two witnesses, so too, two witnesses can be “*mazim*” three witnesses. And from the extra word “witnesses,” we derive that even one hundred witnesses can be discredited through the *hazamah* of two witnesses.

Rabbi Shimon says: Just as two witnesses will not get executed unless they both become *zomemin*, so too three witnesses will not get executed unless all three become *zomemin*. And from the extra word “witnesses,” we derive that even one hundred witnesses cannot get executed unless they all become *zomemin*.

Rabbi Akiva says that the third witness is mentioned in the Torah to deal strictly with him by making his status equal to that of the other two (*even though the testimony would have been effective without him; nevertheless, by joining them, he is equally responsible, and therefore, if the first set of witnesses were found to be zomemim, the “third” witness will get killed as well*), indicating, incidentally, that if the Torah punishes an accomplice to a sinner just as it would a sinner, how much more so will it reward accomplices to people performing *mitzvos*, as though they themselves had actually fulfilled them. And (*another comparison*), just as in the case of two witnesses, if one is found to be a relative or otherwise disqualified, the entire testimony is rendered void, so too in the case of three witnesses, the disqualification of one invalidates the entire testimony.

And how do we know that this *halachah* would apply even if there are a hundred witnesses? We learn this from the repetition of the word “witnesses.”

Rabbi Yosi says: These *halachos* (*that a third witness is like the other two*) apply only to witnesses in capital cases (*where the Torah looks for ways to exonerate the defendant and therefore the testimony can be voided*), whereas, in monetary cases, the testimony offered can be established by those remaining (*the other two witnesses*).

Rebbe says that the rule (*if one is found to be a relative or otherwise disqualified, the entire testimony is rendered void*) applies by monetary cases and capital cases. However, this is only if the disqualified witnesses warned the defendant (*that he was about to commit a crime; only then is he regarded as a witness and not merely a spectator*). But, if they were not among those who gave the warning (*it was only the qualified witnesses who warned the perpetrator; the testimony will not be voided*), what should two brothers and another witness do if they saw someone kill another (*will the murderer be exonerated automatically for two relatives witnesses the event*)? [*They maintain that people combine for a testimony only if they warned him. Rabbi Yosi holds that they can combine even if they did not warn him; therefore, if one of them is disqualified, the entire testimony is void.*] (5b – 6a)

INSIGHTS TO THE DAF

As they Intended

The *Mishna* teaches us that the *zomemin* witnesses are only punished if they attempted to have someone executed, but they were found to be *zomemin* before the defendant was executed (*as long as it was after the*



verdict was handed down). However, if they were discredited through *hazamah* only after the defendant had been executed, they will not be punished. This is derived from the Scriptural verse: as they intended to do; but not as they actually accomplished.

The Kesef Mishnah explains this seemingly perplexing *halachah* in two manners:

1. When the *zomemin* witnesses actually carry out their plan and the accused is executed - such a sin is of such a magnitude that they cannot get punished in this world. The punishment for such a hideous sin can only take place in the next world - in Gehinnom.
2. Alternatively, he explains, if the accused was actually executed, we assume that he was indeed guilty and deserved to die. Hashem is present by every court case and it must be attributed to Divine Providence that the second set of witnesses did not arrive until after the defendant was executed.

DAILY MASHAL

Your Brother

In the event that a set of witnesses is found to be false and conspiring through the testimony of a 2nd set of witnesses who claim that the 1st set were in a different location at the time of the alleged incident, the beis din punishes the 1st set by inflicting upon them whatever punishment they would have brought on the defendant through their testimony. Rashi (Devarim 19;19), quotes our Gemora that this is only in the event that their conspiracy is discovered before the defendant is punished. If, however, he has already been killed as a result of their testimony, then they are no longer to be put to death.

In his commentary on Makkos, Rashi explains that this law is derived from the Torah's wording *ka'asher zamam la'asos l'achiv* – as he conspired to do to his fellow – and a person is only considered one's fellow as long as he is alive. Once he has been put to death, he is no longer called one's fellow, and this law is no longer applicable. The Ritva there questions Rashi's derivation by noting that the Torah uses the word *achiv* in reference to the dead both when discussing the mitzvah of *yibum* (25:6-7) and in reference to Nadav and Avihu after their deaths (Vayikra 10:4).

Rav Ezriel Hildesheimer answers by suggesting that the word *achiv* has two different connotations: a familial relative, or a "brother" with whom one is united through their common obligation in mitzvos. The difference is that while the former is still appropriate after death, which doesn't negate one's familial connection, the latter is only applicable as long as both parties are still alive, as the Gemora in Shabbos (30a) explains that a person becomes exempt from all mitzvos after he dies.

Therefore, it is perfectly appropriate for the Torah to use the expression *achiv* in conjunction with the mitzvah of *yibum*, which applies only to one's brother, or in association with deceased Nadav and Avihu when discussing them with their cousins Mishael and Eltzaphan, as this bond isn't broken through death. Our verse, however, is discussing the laws of conspiring witnesses and their scheme to false punish "their brother," the defendant. As there is no familial relationship between the parties, it can only be referring to their common obligation in mitzvos. If the verse refers to the defendant as their brother, it can only be applicable when he is still alive and has yet to be punished, thus providing a clear source for the ruling of the Gemora in Makkos, exactly as Rashi explained!