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Sanhedrin Daf 40

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Daf Notes is currently being dedicated to the neshamot of

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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

When examining the witnesses regarding their testimony in a capital case, they would ask the following seven questions: In which seven year *Shemittah* cycle did you witness the offense? The second question was in which year of the *Shemittah* cycle did the offense occur. The third question was on which date of the month did the offense occur. The fourth question was on which date of the month did the offense occur. The fifth question was on which day of the week did the offense occur. The sixth question was in which hour did the offense occur. The seventh question was in which place did the offense occur.

Rabbi Yosi said: They asked three questions: On which day? In which hour? In which place?

[If they were testifying regarding a murder, they are asked:] Did you know the victim (*perhaps he was an idolater*)? Did you warn him? If they were testifying regarding one who worshipped idols, they are asked: What idol did he worship, and how did he worship it?

The *Mishna* notes: If they add more supplementary questions, they are praiseworthy. There was an incident and Ben Zkai asked them regarding the stems of the figs.

What is the difference between the standard questions and the supplementary ones? [*Chakiros are the seven standard questions that were posed to the witnesses, and bedikos were the supplementary questions that were posed to the witnesses.*] Regarding the *chakiros*, if one of the

witnesses did not know the answer to one of the seven questions, the testimony would be invalid. Regarding the *bedikos*, however, if one witness would say that he does not know, or even if both witnesses say that they do not know the answer to the question, the testimony is still valid. Regarding *chakiros* or *bedikos*, if they contradict each other, the testimony is disqualified.

If one witness testified that the incident occurred on the second day of the month and the other witness says that the incident occurred on the third day of the month, their testimony is valid, because we can assume that the witness who said that the incident occurred on the second of the month was aware that the previous month was thirty days, and the other witness did not know that the previous month was thirty days. [*Rosh Chodesh was established on the day after the thirtieth day of the previous month. The day that the witness assumed was the first of the month was really the thirtieth of the month. Subsequently, the witness assumed to be the third of the new month was really only the second day. As this is a common mistake, we accept their testimony.*] If one witness testified that the incident occurred on the third of the month and the second witness said that the incident occurred on the fifth of the month, their testimony is invalidated (*because people are never two days off in their calculation of dates*). If one witness said that the offense occurred in the second hour of the day and one says that it occurred in the third hour of the day, their testimony is valid. If one witness said that the incident occurred in the third hour and one witness said that the incident occurred in the fifth hour, their testimony is invalid. Rabbi Yehudah maintains that their testimony is



valid. Nonetheless, even Rabbi Yehudah agrees that if one witness said that the incident occurred in the fifth hour and the second witness said that the incident occurred in the seventh hour, the testimony is invalid, because in the fifth hour the sun is in the east, whereas in the seventh hour, the sun is in the west.

Afterwards they bring in the second witness and examine him. If their words were found to correspond, they open with acquittal. If one of the witnesses says, "I can argue for his acquittal," or one of the students say, "I can argue for his conviction," they silence him. If one of the students said, "I can argue for his acquittal," they elevate him and seat him among them, and he would not descend from there the entire day. If there is substance to his words, they listen to him. And even if the accused himself says, "I can argue for my acquittal," they listen to him, provided that there is substance to his words.

If they found a reason for his acquittal, they set him free; and if not, they postpone his verdict to the next day. They would form themselves into pairs (*to discuss the case at home or in the marketplace*), and would eat less, and not drink wine the entire day, and would deliberate the entire night. The next day, they would rise early and come to the Court. The one who stated he was innocent says, "I state he is innocent, and vote this way." The one who stated he was guilty states, "I state he is guilty, and vote that he is guilty." If someone said he is guilty he can retract and state he is innocent, but if he said he is innocent he cannot retract and state that he is guilty. If they erred in the matter, the two scribes of the judges remind them.

If they found that he is not guilty, they freed him; and if not, they vote on it. If twelve vote that he is not guilty and eleven find him guilty, he is acquitted. If twelve vote that he is guilty and eleven find not guilty; and even if eleven favor acquittal and eleven favor conviction, and one says, "I do not know," and even if twenty-two favor acquittal or favor conviction, and one says, "I do not know," they add

judges. How many do they add? They add two at a time - until seventy-one. If thirty-six vote for acquittal and thirty-five favor conviction, he is acquitted. If thirty-six vote for conviction and thirty-five favor acquittal, they debate each other, until one of those favoring conviction sees the words of those favoring acquittal. (40a)

Seven Questions

The *Gemora* cites the Scriptural source which proves that we examine the witnesses with seven questions.

The *Gemora* cites verses dealing with an *ir hanidachas* (a *subverted town*), idolatry, and *zomemim* witnesses.

The *Gemora* explains that although they are different from each other (*regarding their money (if it must be destroyed or not), their punishment (stoning or beheading by sword), and if a warning is necessary*), they still can be used to instruct about each other. This is because there is a *gezeirah shavah* (*one of the thirteen principles of Biblical hermeneutics; it links two similar words from dissimilar verses in the Torah*) from one passage to another. The *Gemora* proceeds to explain that the words used in this exposition are superfluous, for otherwise, it would be possible to refute it by showing the differences between them.

The *Gemora* notes: Now that we know that there is a requirement to ask the witnesses seven questions (*by cases dealing with stoning or beheading by sword*), how do we know that this applies by cases punishable by strangulation as well?

The *Gemora* answers: it may be derived through a *kal vachomer* from cases punishable by stoning (*idolatry*) and cases punishable by beheading with a sword (*eidim zomemim and ir hanidachas*), and then we can derive cases which are punishable by burning with a *kal vachomer* from cases punishable by stoning. [*If cases, where the*

punishment is severe, the seven questions are required, then in cases where the punishment is relatively mild, the seven questions should certainly be required!]

The *Gemora* asks: this is very well according to the Rabbis who maintain that stoning is more severe of a punishment than burning; however, according to Rabbi Shimon, who holds that burning is more severe, what is there to say (*perhaps the seven-question requirement does not apply*)?

Rather, Rav Yehudah answers that there are other extra verses which teach us that the *halachah* applies by all cases. And although they are not necessary according to the Rabbis, the Torah sometimes writes something that could have been derived otherwise through a *kal vachomer*.

Rabbi Avahu voiced a strong objection to this: Perhaps the extra words are coming to teach us that there should be eight questions asked of the witnesses!?

The *Gemora* asks: Is there indeed an eighth question to be asked?

The *Gemora* answers: Yes, there is! We can ask them as to what part of the hour the incident occurred. And as a matter of fact, there is a *braisa* which states that we ask the witnesses eight questions.

The *Gemora* asks on Rabbi Avahu's question: It is well according to Abaye's understanding of Rabbi Meir's opinion that one does not err at all (*for then it is possible to refute the witnesses through hazamah – by saying that they were with us someplace else at that precise time*). And even if you maintain that one errs slightly, it is also well (*for the witnesses can be refuted*). But according to Abaye's explanation of Rabbi Yehudah's opinion that a person errs by a half an hour, or according to Rava who holds that a person may err even by more than that, what is there to say? [*This question cannot lead to hazamah, for even if they*

will answer that the incident occurred at a certain part of the hour, and then witnesses will come to contradict them, the first pair can respond by saying that people err by more than half an hour; so what is Rabbi Avahu's objection?]

The *Gemora* answers: Rabbi Avahu's question was that we should ask them in which *Yovel* cycle did this occur.

Rav Yehudah would hold that once they are asked regarding in which of the seven-year *Shemittah* cycle it occurred, there is no need to ask about which *Yovel* cycle (*for generally, people do not postpone their testimony for over fifty years*).

Rabbi Yosi had stated (*in the Mishna*): They asked three questions: On which day? In which hour? In which place?

The *Gemora* cites a *braisa*: Rabbi Yosi said to the *Chachamim*: According to your view (*that we ask him regarding the year of Shemittah and Yovel*), what would be the *halachah* if one would come and testify that So-and-so killed So-and-so last night, must be asked: In which *Shemittah*? In what year? In what month? On what day of the month?

They retorted: And according to your view, one who comes and testifies that So-and-so killed So-and-so just now, is he to be asked: On what day? At what hour? And where? Rather, you too must answer that even though the questions may be unnecessary, they are asked of the witnesses, in accordance with the view of Rabbi Shimon ben Elozar (*who said that we move the witnesses from place to place in order to induce them to retract their testimony*), so here too, even if they are unnecessary, they are asked of them in accordance with Rabbi Shimon ben Elozar.

Rabbi Yosi would distinguish between a case where they said "last night," which is a frequent testimony; whereas,



“just now” is not so common (*and therefore all the questions would be required*). (40a – 40b)

INSIGHTS TO THE DAF

Kal Vachomer

The *Gemora* states that something which may be derived through a *kal vachomer* (*literally translated as light and heavy, or lenient and stringent; an a fortiori argument; it is one of the thirteen principles of biblical hermeneutics; it employs the following reasoning: if a specific stringency applies in a usually lenient case, it must certainly apply in a more serious case*), the Torah may anyway take the trouble to write it explicitly.

The *Bnei Yissoschar* explains the reasoning for this: A *kal vachomer* is based upon logic. One might say that the reason this *halachah* (*derived through a kal vachomer*) is correct is because it is understandable to me; it makes sense. The Torah therefore goes out of its way to write it explicitly in order to teach us that the *halachah* is correct because the Torah said so; regardless of whether it is understood or not.

The *Ra"n* in *Nedarim* (3a) notes that this concept is applicable by a *hekesh* (*when the halachos from one topic are derived from another one*) as well. The *Gemora* in *Bava Metzia* (61a) states that it also applies to a *gezeirah shavah* (*one of the thirteen principles of Biblical hermeneutics; it links two similar words from dissimilar verses in the Torah*).

According to the explanation of the *Bnei Yissoschar*, we could say that the concept should only apply to a *kal vachomer*, for that is based upon logic. The Torah would not find it necessary to state explicitly a *halachah* which is derived through a *hekesh* or *gezeirah shavah*, for they are not based upon logic at all, and it would be superfluous to write it.

The *Yad Malachei* writes that if the Torah does explicitly write a *halachah* which was derived through one of the thirteen principles of Biblical hermeneutics, we must treat it more stringently than an ordinary *halachah*. This is comparable to a Rabbinical prohibition, which has a slight support from something written in the Torah. *Tosfos* in *Eruvin* (31b) rules that such a prohibition is stricter than an ordinary one, which does not have any Scriptural support.