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Sanhedrin Daf 41

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The Source for Warning

Ulla said: The Scriptural source proving that a warning is required (*Tosfos – either that a Torah scholar needs to be warned, or that in order to be punished, the offender must commit the action immediately after the warning*) can be derived from the following verse: *And if a man shall take his sister, his father’s daughter, or his mother’s daughter, and sees her nakedness. The Gemora asks: Does guilt then depend upon the mere seeing of his sister? It must therefore mean that he is liable to punishment only if they show him the reason for his liability (he is warned that the action he is about to perform carries a death sentence with it). And since this is inapplicable to kares (which is a punishment administered by Hashem, and Hashem does not need to warn him to know if he performed the act unintentionally or deliberately), we apply it to lashes.*

The Academy of Chizkiyah taught: *And when a man will plan regarding his fellow to cunningly kill him.* This implies he was warned, and he killed him willingly anyway.

The Academy of Rabbi Yishmael taught: *The ones who found him gathering wood.* This implies that they warned him, and he continued gathering the wood.

The Academy of Rebbe taught: *Al dvar – for the reason that he afflicted.* This (*using the word dvar that implies speech*) implies that there was a verbal warning.

The Gemora notes: All of the above teachings are necessary. If the Torah would have just said, *“His sister,”* I would think that it only applies to punishments where one is liable to receive lashes, not death. This is why the Torah says, *And when a man will plan* etc. If it would only say, *And when a man*

will plan etc., I would think that this only applies regarding death by the sword that is a lenient type of execution; however, a warning would not be required when the punishment is death through stoning. Therefore, the other verses are necessary.

The Gemora asks: Why do we require (*the last*) two teachings regarding cases of stoning?

The Gemora answers: According to Rabbi Shimon, it is in order to include those who are burned (*Rabbi Shimon holds burning is more severe than stoning*). According to the Rabbis, the Torah will write something extra despite the fact that it could be derived using a *kal vachomer*.

The Gemora asks: Why doesn’t the Torah merely write this teaching once regarding those who receive stoning, and we can derive all other punishments from there?

The Gemora answers: It must be that the Torah will write something extra despite the fact that it could be derived using a *kal vachomer*. (40b – 41a)

Releasing Himself to be Executed

The braisa says that he must have allowed himself to be killed (*by saying after hearing the warning that he is doing so anyway*).

The Gemora asks: How do we know that this is necessary?

Rava says, and some say Chizkiyah says: The verse says: *shall the one who deserves to die be put to death.* This implies that he must have allowed himself to be killed.



Rav Chanan says: Witnesses who say they saw a betrothed *na'arah* committing adultery, and they were then made into *zomemim*, are not killed. This is because they can say that they did not have intention to kill her, but rather, they merely intended to forbid her to her husband (*as a betrothed or married woman who willingly has an affair is forbidden from then on to have relations with her husband*).

The *Gemora* asks: Didn't they warn her that she would be killed?! (*How can they say they merely wanted to forbid her to her husband?*)

The *Gemora* answers: The case is where they did not warn her.

The *Gemora* asks: If so, why would she have been killed?

The *Gemora* answers: The case is where the woman was scholarly, and is according to the opinion of Rabbi Yosi the son of Rabbi Yehudah. The *braisa* states: Rabbi Yosi the son of Rabbi Yehudah says: A scholar does not need warning, as warning is only given to differentiate between someone who sins inadvertently and one who does so deliberately.

The *Gemora* asks: If they cannot be killed, how can she be killed? This is testimony that cannot be refuted through *hazamah*, and the rule is that such testimony is invalid!?

The *Gemora* answers: Rav Chanan indeed means that being that they cannot be killed, she also cannot be killed.

The *Gemora* asks: If so, how can a scholarly betrothed *na'arah* who commits adultery be killed according to Rabbi Yosi the son of Rabbi Yehudah?

The *Gemora* answers: The case would be if she committed adultery and then had relations again (*for the witnesses cannot claim that they intended to forbid her to her husband, for she is forbidden from the first time*).

The *Gemora* asks: Can't the witnesses say that they wanted her to be forbidden to the second man with whom she committed adultery (*as she is forbidden to the men she has an affair with, just as she is forbidden to her husband*)?

The *Gemora* answers: The case is where she committed adultery again with the same person. Alternatively, she committed adultery with a relative who she is forbidden to have relations with anyway (*they therefore cannot claim they wanted to forbid her from this second man*).

The *Gemora* asks: Why did Rav Chanan specifically say a betrothed *na'arah*? The law would be the same regarding a married woman!?

The *Gemora* answers: The law indeed would be the same. Rav Chanan merely wanted to say that the witnesses can claim they wanted to forbid her from her husband even if they were only betrothed, and not yet married. (41a)

Contradicting Witnesses

Rav Chisda says: If one witness testified that he killed him with a sword, and one says that he killed him with a battle-ax, this is not a correct testimony (*and is disqualified*). If one testified that he was wearing black clothes and the other said that he was wearing white clothes, this can still be deemed correct.

The *Gemora* asks a question on this from a *braisa*. The *braisa* states: "Correct" means they both have to be correct. If one witness testified that he killed him with a sword, and one says that he killed him with a battle-ax, or, if one testified that he was wearing black clothes and the other said that he was wearing white clothes, this is not a correct testimony (*and is disqualified*).

Rav Chisda explains: This *braisa* is referring to choking someone with a handkerchief. The contradiction among the witnesses is regarding the color of this handkerchief (*this is regarded as an essential part of their testimony - as opposed to his statement that was regarding his clothes in general*).

This is akin to the contradiction of whether it was a sword or battle-ax.

The *Gemora* asks a question from another *braisa*. The *braisa* states: If one testified that he was wearing black sandals and the other said that he was wearing white sandals, this is not deemed correct.

The *Gemora* answers: Here, too, Rav Chisda will say the case is where he killed him by kicking him.

The *Gemora* asks a question from our *Mishna*. The *Mishna* had stated: There was an incident that Ben Zakkai checked the witnesses by asking about the stems of the figs. (*What does this have to do with the murder weapon?*)

Rami bar Chama answers: The case is where a person desecrated *Shabbos* by harvesting a fig, and he would be killed because of this fig.

The *Gemora* asks: Doesn't the *Mishna* say that they testified that he killed under the fig tree? (*This is clearly not a case of Shabbos desecration!*)

Rather, Rami bar Chama says: He killed him with a fig branch.

The *Gemora* asks a question from a *braisa*. The *braisa* states: They asked the witnesses whether the fig tree had thin or thick stems, and whether it had black or white figs. (*Why was this relative if he did not kill him with the fig itself?*)

Rather, Rav Yosef answers: Are you asking a question from Ben Zakkai? Ben Zakkai held that background questions are like the essential questions.

The *Gemora* asks: Which "Ben Zakkai" are we talking about? If this refers to Rabbi Yochanan ben Zakkai, was he on the *Sanhedrin* (*that he ever tried a capital case*)? It was taught in a *braisa*: Rabbi Yochanan ben Zakkai lived for one hundred and twenty years. The first forty he was involved in business, the second forty he learned, and the third forty he taught

others. The *braisa* also states: Forty years before the destruction of the Temple, the *Sanhedrin* went into exile and sat in a storefront. Rabbi Yitzchak bar Avdimi said: This meant that they did not judge laws of fines anymore.

The *Gemora* asks: This cannot mean laws of fines, as what do fines have to do with the Great *Sanhedrin*?

The *Gemora* answers: Rather, it means they did not judge capital cases.

Additionally, the *Mishna* states: After the Temple was destroyed, Rabbi Yochanan ben Zakkai instituted etc. [*This clearly shows that Rabbi Yochanan ben Zakkai would not have judged a capital case, as he was only teaching others (and presumably judging) when the Sanhedrin was no longer judging capital cases.*]

Rather, the *Gemora* answers: It must have been a judge who lived earlier named Ben Zakkai. This is logical (*for another reason as well*), as if it would have been Rabbi Yochanan ben Zakkai, Rebbe would have called him "Rabbi Yochanan ben Zakkai" not just Ben Zakkai!

The *Gemora* asks: Isn't there another *braisa* that indeed says that there was an incident that Rabbi Yochanan ben Zakkai checked by asking about the stems of the figs?

The *Gemora* answers: Indeed, it must be that this was Rabbi Yochanan ben Zakkai. However, at the time he was a student (*as proven above that he could not have been a judge*) who was sitting before his teacher who was judging. He asked a good question that his teacher thought was appropriate, and they therefore said this law in his name. When he was a student, they called him Ben Zakkai. When he was a teacher, they started to call him Rabbi Yochanan ben Zakkai. In one *Mishna* he was described as Ben Zakkai because that was what he was originally called, as opposed to the later source which was based on what he was presently called. (41a – 41b)



The *Mishna* had stated: There was an incident and he checked ... the difference between essential questions etc. (*and even if they both cannot answer the question, their testimony is nevertheless valid*).

The *Gemora* asks: Why does the *Mishna* bother to say that even if both witnesses do not know the answer to a background question that it does not invalidate their testimony? If one does not have to know, obviously they both do not have to know!

Rav Sheishes answers: This is referring back to the beginning of the *Mishna*. It means that if when asked an essential question, two witnesses know the answer and one does not, their entire testimony is invalid. Whose opinion is this? This is the opinion of Rabbi Akiva, who compares three witnesses (*who testify as a group*) to two witnesses.

Rava asks: Doesn't the *Mishna* say that their testimony is valid in such a case?

Rather, Rava says: Rav Sheishes means that the *Mishna* means that if when asked an essential question, two witnesses know the answer and one does not, their testimony is valid. Whose opinion is this? This is unlike the opinion of Rabbi Akiva, who compares three witnesses (*who testify as a group*) to two witnesses.

Rav Kahana and Rav Safra were learning Tractate Sanhedrin by Rabbah's Yeshivah. Rami bar Chama met them, and asked them what they are learning in Rabbah's Yeshivah regarding Sanhedrin. They asked: Even if we were not learning Sanhedrin with Rabbah, what question do you have on Sanhedrin? Rami bar Chama answered: I have a question regarding the *Mishna's* question of what is the difference between essential questions and background questions. The *Mishna* says that if one witness says he does not know the answer to an essential question, their testimony is invalid. If one witness says he does not know the answer to a background question, even if both witnesses do not know the answer to a background question, it does not invalidate their

testimony. Why should there be a difference between the two categories of questions? Both have their source in the Torah!

They answered: If a witness says he does not know regarding essential questions, his testimony is clearly invalid, as he cannot be refuted through *hazamah* regarding this testimony. If he cannot be refuted through *hazamah*, his testimony is invalid. However, if a witness says he does not know regarding background questions, his testimony is clearly valid, as being made a *zomeim* is not relevant to background questions. [*Being made a zomeim is based on time, date, and place which are essential questions.*]

Rami bar Chama replied: If you can give such a good answer, you obviously have a lot more good things to say about Sanhedrin!

They replied: Being that you are a good person (*and sincerely wanted to know the answer*), we were able to say good things. If you would have just wanted to put us down, we would have not been able to say good answers.

The *Mishna* had stated: If one testified etc. (*that it occurred on the second of the month and the other testified that it happened on the third, it is valid, for one knew that the previous month was extended and the other did not*).

The *Gemora* asks: How far into the month do we say that they are one day apart because of not knowing that the previous month was extended?

Rabbi Acha bar Chanina says in the name of Rabbi Assi in the name of Rabbi Yochanan: This is until most of the month has passed.

Rava says: We also learned that if one says it was on the third of the month and one says it was on the fifth of the month, their testimony is invalid. Why don't we say that one witness knew about two leap months, and the other did not know about the past two leap months? It must be that we assume

that since most of the first of these months had passed, he already knew that it was extended.

The *Gemora* rejects Rava's proof. It could be that he did not know when most of the first month passed, but he found out at the sounding of the second *shofar* (to indicate the start of the month). We say that while he might have missed one *shofar* blast, he did not miss the second one (of the second month). (41b)

INSIGHTS TO THE DAF

The Purpose of Hasra'ah

The *Gemora* cites various verses as the source for the requirement of *hasra'ah* (warning).

The Maharatz Chayus points out that there are two sources for *hasra'ah*. The first is a *sevara*, - this serves to make sure that the person is aware of the severity and consequences of his actions. Included in the *hasra'ah* is both the education of the *halachah*, and the awareness of the action that he is about to do. The second source is the verses that the *Gemora* quotes which serve as a *gezeiras hakasuv*, whether they apply or not, that no punishment can be carried out unless there is a warning.

The Maharatz Chayus deduces this from Tosfos who is bothered why the *Gemora* has to find a source for *hasra'ah*, to which they answer that it is needed for a non-*chaver* (someone who isn't educated in the laws). It is obvious from logic that he requires *hasra'ah*, because otherwise, he would have no idea whether the action that he is doing is prohibited by the Torah, but, a *chaver*, who is well educated, knows very well what he is doing and understands the consequences. He shouldn't require *hasra'ah* if not for the fact that the Torah would demand it as a *gezeiras hakasuv*. The verses are the rationale for requiring the details of *hasra'ah*, such as killing him within the time of an utterance (and perhaps having to accept the *hasra'ah*).

Based on this, he points out that Tosfos, who asks regarding the source for *hasra'ah* by an *ir hanidachas* (subverted town), is difficult. Who says that *ir hanidachas* has the *gezeiras*

hakasuv requirement of *hasra'ah* that would involve the details? Perhaps it would only have the *sevara* aspect of *hasra'ah* to differentiate between unintentional and deliberate, so that no source is necessary. Clearly, Tosfos assumes that the type of *hasra'ah* necessary by *ir hanidachas* is the *gezeiras hakasuv* type - with all the details, and not just the determination that he was aware of the consequences of his actions.

The Rambam, however, doesn't seem to follow this same approach. The *Gemora* 8b and 41a quote Rabbi Yosi bar Yehudah, who says that a Torah scholar doesn't require *hasra'ah*, since the sole purpose of *hasra'ah* is to differentiate between unintentional and deliberate. This would imply that the Rabbis, who hold that even a Torah scholar requires *hasra'ah*, would hold that *hasra'ah* is a *gezeiras hakasuv*, and NOT just to distinguish between unintentional and deliberate. However, the Rambam (Sanhederin 12:2) writes: A Torah scholar and an unlearned man require *hasra'ah*, for the sole purpose of *hasra'ah* is to differentiate between unintentional and deliberate. This seems to be very strange. The Rambam cites the rationale of Rabbi Yosi bar Yehudah, yet requires *hasra'ah* even for a *chaver*! Why?

The Kesef Mishneh and Lechem Mishneh explain that according to the Rambam, the Rabbis don't disagree with Rabbi Yosi bar Yehudah in principal; rather, they hold that because of his concern, we require *hasra'ah* even by a *chaver* who knows the law, since he may not be aware of the action he is about to do. The Rambam clearly learns that the concept of *hasra'ah* is only meant to make him aware of his actions, and educate him about the *halachah*, not just a *gezeiras hakasuv*. Nevertheless, the Rambam requires *hasra'ah* within the time of an utterance of the action, implying that this concept isn't merely a *gezeiras hakasuv*, but an actual concern that he may have a very short term memory. It seems that the Rambam doesn't buy into the two sources for *hasra'ah* approach; rather, he understands that the rationale for the sources of *hasra'ah* cited in the *Gemora* is to differentiate between unintentional and deliberate - to educate and inform.