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Makkos Daf 2

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### **Mishna**

How do witnesses become *zomemin*? [*Eidim zomemin are witnesses who offer testimony which is refuted by other witnesses who claim that the first set of witnesses could not possibly testify regarding the alleged crime since they were together with them at a different location at the precise time that they claimed to witness the crime somewhere else. The Torah teaches us that we believe the second pair in this instance; the first witnesses are called “eidim zomemim” -- “scheming witnesses,” and they receive the exact punishment that they endeavored to have meted out to the one they accused.*] “We testify that this particular person (a Kohen) is a son of a divorcee” (his mother was divorced in front of us, and therefore he is a *chalal* - a desecrated Kohen; a child born from a union between a Kohen and a woman who is forbidden to Kohanim; the child becomes disqualified from *Kehunah* and is only allowed to marry women who are forbidden to Kohanim), or, they testify that he is the son of a *chalutzah* (when a man dies childless, his brother has a *mitzvah* to perform *yibum*; if he declines, she submits to *chalitzah*, i.e. she removes his shoe, spits before him and declares that he does not want to marry her – in this case, they are testifying that the mother submitted to *chalitzah* before this son was born, and a Kohen is forbidden from marrying her). [They are then found to be *zomemin*.] We do not say that the witnesses (if they are Kohanim) should receive the status of ‘a son of a divorcee,’ or ‘a son of a *chalutzah*’ (i.e., they will become unfit for *Kehunah* – just as they endeavored to do to the person they were testifying about). Rather, they receive forty (thirty-nine) lashes.

The *Mishna* cites another example: “We testify that this particular person is liable to flee to a city of refuge (for he inadvertently killed someone). [They are then found to be *zomemin*.] We do not say that the witnesses should go to the city of refuge (as their punishment); rather, they receive forty lashes. (2a)

### **Not the Usual Case**

The *Gemora* asks: The *Mishna* should have stated: How do witnesses not become *zomemin* (for in the cases mentioned, the witnesses do not incur the exact punishment that they endeavored to have meted out to the one they accused)? And furthermore, it is stated in a *Mishna* later as follows: However, if they said, “How can you possibly testify regarding the alleged crime since you were together with us at a different location at the precise time that you claimed to witness the crime somewhere else,” that is a case of *zomemin* (evidently, the case in our *Mishna* is not)!?

The *Gemora* answers: Our *Tanna* is referring to a *Mishna* which was taught above in the previous tractate. The *Mishna* had stated: *Zomemin* witnesses against a Kohen’s daughter and he who has illicitly cohabited with her (are killed by strangulation), for all the *zomemin* witnesses receive the same death (that they intended to impose upon the defendant), except for *zomemin* witnesses against a Kohen’s daughter (for she would be executed through burning) and he who cohabits with her (for the adulterer is executed through strangulation). [Our *Mishna* continues:]

And there are other types of *zomemin* witnesses where we do not punish them at all with the same type of punishment that they intended to impose upon the defendant, but rather, they receive forty lashes. What is the case? “We testify that this particular person (*a Kohen*) is a son of a divorcee”, or, they testify that he is the son of a *chalutzah*. [They are then found to be *zomemin*.] We do not say that the witnesses (*if they are Kohanim*) should receive the status of ‘a son of a divorcee,’ or ‘a son of a *chalutzah*’ (*i.e., they will become unfit for Kehunah – just as they endeavored to do to the person they were testifying about*). Rather, they receive forty lashes.

The *Gemora* asks: From where is this known (*that the witnesses do not become disqualified from Kehunah*)? Rabbi Yehoshua ben Levi answers: It is written: *And you should do unto him as he planned to do. “Unto him,”* and not to his children. [If the witness would become unfit for *Kehunah*, his children would become disqualified as well; that cannot be included in the punishment.]

The *Gemora* asks: So let us disqualify the witness alone, and not his children!? The *Gemora* answers: That is not an option, for the witness intended that the defendant and his children would become unfit.

Bar Padda answers (*the original question as to why the witnesses do not become disqualified from Kehunah*): It is 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*). If we see by one who disqualifies others (*a Kohen who marries a divorcee disqualifies his children from Kehunah*) does not become disqualified himself, one (*the zomemin witness*) who merely attempts to disqualify another (*the defendant*), should certainly not become disqualified himself!

Ravina challenges this *kal vachomer*: If that would be correct, it would completely negate the punishment (*in all cases*) for *zomemin* witnesses, for we can say as follows: If we see by one who causes another to be stoned (*a witness testified that someone is liable to death, and Beis Din executes him*) does not get stoned himself (*if he is found to be a zomeim witness, he is not executed, for we learn from a verse that zomemin receive the punishment that they intended to impose upon the defendant only if the punishment was not actually carried out*), one (*the zomemin witness*) who merely attempts to cause another to be stoned (*the defendant*), should certainly not be stoned himself! Rather, it is clear that we have to revert to the first answer (*they do not become disqualified from Kehunah because of the verse: “unto him,” and not to his children*).

The *Mishna* had stated: We testify that this particular person is liable to flee to a city of refuge (*for he inadvertently killed someone*). [They are then found to be *zomemin*.] We do not say that the witnesses should go to the city of refuge (*as their punishment*); rather, they receive forty lashes.

The *Gemora* asks: From where is this known? Rish Lakish answers: It is written: *He (the murderer) should flee to one of these cities. “He,”* and not the *zomemin* witnesses.

Rabbi Yochanan answers: It is derived through a *kal vachomer*. If he (*the murderer*) who performed an action (*of killing*), yet, if he committed this act deliberately, he is not exiled (*to a city of refuge*); so they (*the zomemin witnesses*), who did not commit a deliberate action (*it was mere words*), should certainly not be required to flee to a city of refuge.

The *Gemora* challenges this logic: This precisely should be the reason (*that the zomemin witness should be exiled*)!? He (*the murderer*) who performed an action (*of killing*) deliberately, does not flee to a city of refuge, for we do not

want him to receive atonement (*in this manner*); but they, who did not commit a deliberate action (*it was mere words*), should be exiled in order for them to receive atonement (*for their sin is less severe than a murderer, and therefore, they are worthy of atonement in such a manner*)! Rather, it is clear that we have to revert to Rish Lakish's1 answer. (2a – 2b)

### Source for Zomemin

Ulla says: Where is there a hint for *zomemim* in the Torah?4.

The *Gemora* interrupts: How can Ulla ask this? Doesn't the Torah explicitly say, "*Like they planned to do*"? [*The Torah explicitly discusses the laws of zomemim!*]

Rather, Ulla is asking for a hint that *zomemim* receive lashes (*when they cannot be given what the accused was supposed to receive, as in the cases discussed above*). 1.

He answers: The verse states: *And they will proclaim the righteous as a righteous person, and they will proclaim the evildoer as an evil person (and they will then give lashes to the evildoer)*. Is it because they will proclaim the righteous as a righteous person, and proclaim the evildoer as an evil person that they will then gives lashes to the evildoer? [*What does proclaiming the righteous person into a righteous person have to do with the evil person receiving lashes?*] Rather, this refers to witnesses who testified falsely against a righteous person, and then other witnesses came and made the victim into a righteous person (*by turning these witnesses into zomemim*). This leads to the witnesses receiving lashes.

The *Gemora* asks: Why can't this be derived from the prohibition against testifying falsely, "*Lo sa'aneh*"?

The *Gemora* answers: This is because it is a negative prohibition that does not entail an action, and one does not receive lashes for transgressing such prohibitions. (2b)

### Zomemin Witnesses

The *Gemora* cites a *braisa*: There are four things said with respect of *zomemin* witnesses:

1. They do not become 'the son of a divorcee,' or 'the son of a *chalutzah*.'
2. They are not exiled to a city of refuge.
3. They are not required to pay *kofer* ("*redemption money*"-*money paid when a mu'ad ox kills a person*).
4. They are not sold as a Jewish servant.

It was said in the name of Rabbi Akiva: They do not pay by their own admission (*if they went to a different Beis din before the defendant sued them for their attempted scheme, and they admitted that they testified falsely, they will not be liable to pay*).

The *Gemora* explains the *halachos*:

1. They do not become 'the son of a divorcee,' or 'the son of a *chalutzah*,' like we explained above.
2. They are not exiled to a city of refuge, like we explained above.
3. They are not required to pay *kofer*, for the Rabbis maintain that the payment of *kofer* is in actuality an atonement (*for the owner is liable to death by the Hands of Heaven for the fact that his mu'ad ox killed a person*), and these witnesses are deserving of this atonement (*for their ox did not kill anyone*).

Who is the *Tanna* that holds that the payment of *kofer* is an atonement? Rav Chisda says that it is Rabbi Yishmael the son of Rabbi Yochanan ben Berokah, for it was taught in a *braisa*: *Then he shall give a ransom for his life*. This indicates that he pays the value of the life of the person killed. But Rabbi Yishmael the son of Rabbi Yochanan ben Berokah interprets it to refer to the value of the life of the damager (*the owner of the ox*). Now, is this not the point at issue between them, that the Rabbis consider *kofer* to be a compensatory payment (*and therefore, he pays the value of the victim*), whereas Rabbi Yishmael the son of Rabbi



Yochanan ben Berokah holds that *kofer* serves as an atonement (*and that is why it is based upon the value of the damager*).

Rav Pappa said that this is not necessarily the case. For we may suppose all to agree that *kofer* serves as an atonement, and the point at issue between them here is merely that the Rabbis hold that this atonement payment should be fixed according to the value of the life of the victim, whereas Rabbi Yishmael the son of Rabbi Yochanan ben Berokah maintains that it should be fixed according to the value of the damager.

The *Gemora* cites the Scriptural sources for their respective opinions.

They are not sold as a Jewish servant. Rav Hamnuna thought to say that they are not sold as Jewish servants in a case where the defendant has money, for since he would not have been sold (*for he could have redeemed himself with his money*), they also cannot be sold (*even if they do not have money*); but in a case where the defendant does not have money, even though they do have money, they are sold (*for he would have been sold if their testimony would have been accepted*). The *Gemora* asks on this: Let the witnesses say, "If you would have had money, would you have been sold (*and the answer is no*), so we also should not be sold?" Rather, Rav Hamnuna said: They are not sold as Jewish servants in a case where either the defendant has money, or they have money; but in a case where neither of them have money, they are sold. Rava disagrees, and based on the verse holds that only one who stole can be sold as a Jewish servant, but *zomemim* witnesses are never sold. (2b)

## INSIGHTS TO THE DAF

### **Warning not Necessary**

We are now learning the *sugya* of *eidim zomemim*, false witnesses who testify that they saw an act performed by a certain person and are later contradicted by others who assert that the witnesses were with them elsewhere at the time of the supposed act and could not have seen it. The false witnesses are punished with the punishment they intended to mete out to the person about whom they testified. At the beginning of *Makkos* we should cite the explanation of HaGaon Rav Shimon Shkop zt"l about this *halachah*.

False witnesses are punished without being warned: A *Beis Din* does not punish a person unless he was warned before his act that he is about to transgress a prohibition of the Torah and will be punished accordingly. Still, false witnesses are punished without such warning (*Kesuvos* 33a), as the *Gemora* (*ibid*) explains, since they wanted to punish someone whom they never warned. Rambam (*Hilchos 'Edus*, 20:4) adds that even unwitting false witnesses (*shogegim*), who did not know about the prohibition of false testimony, are punished.

Two reasons for warning: There are two reasons why we can't punish someone without warning him: (a) He should not be considered *shogeg* (*Makkos*, 6b), unaware that he is transgressing a Torah prohibition, and (b) He should know that by his act he decrees a punishment on himself (*Sanhedrin* 41a and Rambam, *Hilchos Sanhedrin*, 12:2; see *ibid*, that the transgressor must explicitly acknowledge his penalty). Apparently, the *Gemora's* explanation, that we don't have to warn false witnesses because they wanted to punish an unwarned person, means that we can punish the witnesses even though they didn't know that they could be punished with death. Still, what is Rambam's basis for saying that we don't have to verify that the witnesses acted willfully (see Raavad, *ibid*)?



False witnesses are punished for their cruelty: Rav Shkop explains that Rambam assumes that false witnesses are not punished for transgressing but “because of their wickedness, acting against characteristic human decency. Even though they didn’t know of the prohibition by the Torah, since they knew that they were falsely incriminating a person...that is the main point of their evil...” (*Chiddushei Rabbi Shim’on Yehudah HaKohen*, Kesuvos, #39, and see *Ketsos HaChoshen*, 25, S.K. 8, and *Sefer HaMaftaiach* as for other explanations for Rambam’s ruling).

### **Zomemin**

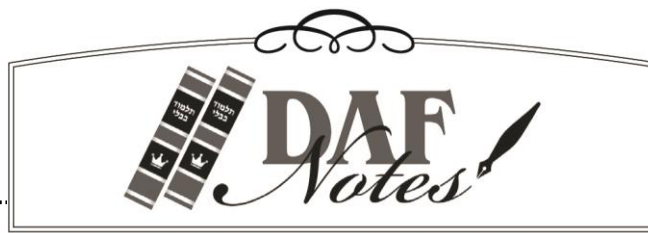
In a situation where two groups of witnesses contradict one another about an event; it is classified as contradictory witnesses, where we have no reason to believe one any more than the other. Under these circumstances the *Gemora* in Bava Basra has a discussion about what to do - it is an uncertainty, so follow the *chazakah*. One thing, however, is clear, that we do not believe the latter group any more than the first. However, where the second group doesn't testify about the event, rather about the validity of the first two as being valid witnesses, such as testifying that they are thieves, the second group is completely believed to overthrow the testimony of the first group. This is not considered a novelty, since everything that the first group is saying is true, just that by believing the second group that the first are thieves, we automatically do not accept their testimony.

Rava (*in the first version*) holds that a *zomeim* is a novelty and therefore only becomes disqualified from the time of the *hazamah*, and not retroactively from the time of the testimony. Abaye would presumably agree with Rava that *zomemin* is a novelty, just that it is not logical for them to be disqualified from the time of the *hazamah*; therefore we disqualify them retroactively from the time of their testimony.

It seems that the concept of “novelty” by *zomemin* is that rather than considering it to be a case of contradictory witnesses, where the second group are merely disagreeing about the event, we consider it as if the second group are actually testifying about the character of the first group, invalidating them as witnesses. (See Tosfos who explains that the novelty of *zomemin* more than contradictory testimony is either that the second group is entirely believed, or that the first group is definitely disqualified, not just out of uncertainty. Assuming like Tosfos’ second approach that the novelty of *zomemin* is to view the testimony to be on the character of the witnesses, not on the event, in which case it is not a novelty to directly disqualify the first or to validate the second, rather it is a novelty in classification).

Why are *zomemin* somewhere in between? In essence, the second group is not making a character judgment; they are only contradicting the facts – “these two witnesses could not have possibly witnessed what they claim to have witnessed since they were with us elsewhere.” Had it not been for the novelty of the Torah that we believe the second group, we would view it as if they just contradicting the first group about the events, where we would have a legitimate doubt as to who to believe. We would interpret their intent as simply being that the event was not witnessed by these two witnesses because they were with us elsewhere. But the Torah teaches us that we are not to regard the *hazamah* as just undermining the plausibility of the event, rather they are giving a character testimony similar to claiming that the first group were thieves. Why?

It would seem that the reason is because when testifying about an event, it is sometimes possible to misinterpret the event, or not have a clear picture as to what actually happened, so we give each group the benefit of the doubt. But, by *zomemin*, the second group is claiming that it was clearly premeditated lying that is taking place, not an innocent mistake. People who would fabricate a story when they were in an entirely different location have a



fatal character flaw just as thieves do, and therefore they are not admissible as witnesses in any court.

The Mishna states that where two witnesses testify that a man killed unintentionally and should be sentenced to Galus, if the witnesses are found to be lying (zomemim) they are not sent into Galus themselves, but instead, they receive lashes.

Tosafos asks how the witnesses could have brought about Galus – what if he claimed that he killed on purpose? A similar situation arises in the Gemara (Bava Metzia 3b) where two witnesses accuse someone of having eaten Chailev (forbidden fat) unintentionally, for which he must offer a Korban. The Gemara asks: what if he argues that he ate it on purpose? Since we derive from a verse that his sin must become known to him – not through others that witnesses cannot obligate him in a Korban if he rebuts them, so too, if he denies their accusation that he killed unintentionally, claiming to have done so on purpose, their testimony should be powerless to place him in Galus.

The MaHarSha questions this comparison, pointing out that normally we would not believe someone who claims he sinned on purpose, because of the rule: a person cannot make himself into a Rasha. It is only because a Korban is so improper where the Chailev was not eaten B'Shogeg (unintentionally), that he is believed, in order to prevent the possibility of an invalid Korban. However, there is no such "excuse" available with regard to killing someone.

The Kinyan Torah suggests that a killer would also have a reason to claim "Maizid" – "deliberately" - since the Gemara (Makos 10a) states that if the one who goes to Galus is a teacher, all his students should join him there. As such, a killer who does not want to be responsible for the Galus of all those students might therefore assert that he killed deliberately.

## DAILY MASHAL

### *Makkos and Forty*

The Chidah writes that he heard from an elderly *mekubal* that it is advantageous to study Tractate Makkos, for it is the same numerical value as "*hirhurim*" – "thoughts," and it will be an assistance to those who wish to rid themselves from any impure thoughts.

It is stated in the Medrash Tanchuma that one who transgresses a negative prohibition incurs forty lashes because a person is created in forty days, and he violated the Torah which was given to Moshe in forty days.