

וקתני¹ ישיאו את אשתו – And it states they may marry off his wife

OVERVIEW

רב יוסף ruled that a יוצא ליהרג is considered לחומרא as if they are still alive. רב יוסף explained that this is only בבי"ד של ישראל however by a בי"ד of עכו"ם, who will certainly kill the accused, we can assume that a יוצא ליהרג is dead. The גמרא cited a ברייתא which (was interpreted as) stating that by היוצא ליהרג we marry off the wife for we assume that he is dead; in contradiction to the view of רב יוסף. Our תוספות explains why the גמרא could not have asked an additional question on רב יוסף.

מהא דקתני קומנטריסין של עובדי כוכבים אל ישיאו את אשתו -

From this which the ברייתא stated that if we heard from the gentile executors that this person is יוצא ליהרג, that will not allow his wife to remarry (for we are not certain that her husband was executed) -

ורב יוסף קאמר דמיקטל קטלי ליה לא מצי לאקשווי -

And רב יוסף ruled that a בי"ד של עכו"ם will certainly kill the convicted, which seemingly contradicts the ברייתא, nevertheless the גמרא could not have challenged (מיקטל קטלי) in this case, from the ברייתא (which maintains that he may still be alive); the reason there is no contradiction is -

דאיכא לאוקמי לברייתא מיקמי דליחתם פורסי שנמג² -

Because we can establish the ברייתא in case where the פורסי שנמג did not sign yet –

תוספות offers another solution:

ועוד אומר רבינו יצחק³ דדלמא הא דעובד כוכבים מסיח לפי תומו כשר לעדות אשה -

And additionally, says the ר"י, that perhaps this which we say that a gentile who speaks casually is fit to testify regarding a woman that her husband died -

היינו כשמעיד שכבר מת דלא טעי בין מת ללא מת אבל יוצא למות או ליהרג לא מהימן:

¹ In our text the text reads, וקתני ישיאו, של ישראל (not וקתני ישיאו). See marginal note.

² In this case רב יוסף clearly stated that they can be bribed to set aside the execution. See 'Thinking it over'.

³ The case of רב יוסף is when we know that the accused is יוצא ליהרג (and by a בי"ד של עכו"ם he is presumed dead). The case of the ברייתא is when we heard from the קומנטריסין (the executioners) תומו מסיח לפי תומו that he is יוצא ליהרג (and is not presumed dead). In the question תוספות assumed that תומו נאמן means that in all cases (even by יוצא ליהרג) it is as if we know that he is יוצא ליהרג, in which case the ברייתא contradicts רב יוסף. The ר"י answers that it is not so, rather the rule of תומו מסיח לפי תומו is only when they say מת (as the plain meaning of the ברייתא indicates), however when it is a case of יוצא ליהרג (the manner in which we interpreted the ברייתא), a נכרי מסיח לפי תומו is not believed. Therefore the case of the ברייתא (where we are not sure that יוצא ליהרג) is different from the case of רב יוסף (where we know that יוצא ליהרג), so there is no contradiction..

That ruling is when he testified that he already died, for they do not make a mistake between one who died and one who did not die, however when they testify that someone is going out to die or to be killed, he is not believed⁴ even if he is מסיה לפי תומו.

SUMMARY

We can either establish the ברייתא before it was signed by פורסי שנמג, or we can say that we do not apply the rule of נאמן לפי תומו נאמן, by יוצא ליהרג (only by נהרג).

THINKING IT OVER

answers that we can establish the ברייתא before the פורסי שנמג signed.⁵ If even in this case it is considered יוצא ליהרג (as the ברייתא states), why was it necessary for רב יוסף to establish the משנה only by ישראל של בי"ד, when it could have been even by בי"ד של עכו"ם, but where ליחתם פורסי שנמג?!⁶

⁴ He is not believed, not because we are concerned that he is lying (since מסיה לפי תומו is נאמן), rather he is not believed because he may be mistaken in his observation that this person is יוצא ליהרג, however when he says מת there is no room for mistakes; dead is dead!

⁵ See footnote # 2.

⁶ See מהרש"א הארוך.