וספק נפשות להקל –

And a doubt in **capital** offences is judged **leniently.**

Overview

Our גמרא states that if a person intended to kill someone out of a group of ten people; then even if there were five ישראלים and five כנענים in the group he would be פטור ממיתה. Since there is a ספק whether he would kill a ישראל or not (when he throws the stone in their midst), the rule is that we are lenient by a ספק נפשות.

There is a dispute between רבי יוחנן and ריש לקיש concerning התראת ספק.[1] If witnesses warn someone not to do a specific act; however there is a possibility that even if he does that act, he will not have transgressed an איסור (to the extent that he should be punished); this warning is called התראת ספק.[2] If the person disregarded the warning, preformed the act and transgressed the איסור, then according to ר"י who maintains שמיה התראה he will be punished accordingly, while ר"ל maintains that he will be exempt from punishment, since at the time of warning there was a ספק if he will be liable for this act. תוספות will discuss which of these two opinions our גמרא is following.

תוספות asks:

ותימה למאן דאמר התראת ספק לא שמה התראה -

And it is astounding! If we follow the view **of the one who maintains that a doubtful warning is not considered a** valid **warning**, then –

אפילו ספק נפשות להחמיר פטור משום דהתראת ספק הוא -

Even if we would maintain that **a doubt concerning capital** offences are dealt with **stringency,** nevertheless he would be **exempt** from receiving capital punishment, **since it is a doubtful warning.**[3] Doubtful warnings are not sufficient to enact any penalty.

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[1] See מכות טו,ב.

[2] A classic example is the case of שילוח הקן. The עדים warned him not to take the אם על הבנים, which is prohibited. However even if he takes the אם על הבנים he is not חייב מלקות, for he can still send away the אם. He is מחוייב מלקות only when it becomes impossible to send away the אם (according to one מ"ד בטלו ולא בטלו]. Therefore this התראה not to take the אם על הבנים is a התראת ספק. (In a regular התראה, even though the עדים do not know whether the מותרה will do the transgression, nevertheless that is not a התראת ספק. We are certain that if he does what the עדים are warning him not to do, then he will certainly be עובר an איסור.)

[3] It is a התראת ספק because even if he will throw the stone we do not know that he will kill a ישראל.

ואי למאן דאמר שמה התראה היכי פטרינן ליה כשנמצא שישראל הרג -

And if we are following the view of the **one who maintains that a התראת ספק is a valid התראה,** then **how can we exempt** the murderer from the death penalty, **when it turns out that he murdered a Jew?!**

תוספות will clarify this last point by citing two examples. If we maintain התראת ספק שמה התראה then he should be חייב -

הא מיחייב בהכה את זה וחזר והכה את זה[4] -

for he is sentenced to death **when he hit this one and he continued and hit the other one.** If he hit both 'possible fathers' (and drew blood) [even if it was[5]] one after the other, he is מחויב מיתה, if we maintain that התראת ספק שמיה התראה.[6] תוספות offers another similar case:

ובנותר כשאמרו לו אל תותיר[7] אף על גב דספק הוא -

And similarly **concerning נותר if the** witnesses **warned him 'do not leave over'** the food of the קרבן past the deadline; **even though that** when they warned him **it was doubtful** whether he would leave it over or not,[8] nevertheless it is considered a valid התראה according to the מ"ד that התראת ספק שמיה התראה. We can derive from these two גמרות that if we maintain that התראת ספק שמיה התראה, the person who received this התראה is punished; regardless that it is a ספק. Similarly here too if a ישראל was eventually killed, the original התראה should be considered a valid התראה to hold the murderer liable.

תוספות answers:

ויש לומר דשאני התם שיודע בודאי שיבא לידי איסור אם יותיר או יכה שניהם -

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[4] See יבמות קא,א מכות טז,א. The גמרא there is discussing the case of a woman who remarried within three months of her divorce. The subsequent child (who was born within seven months of the remarriage) is not certain if his father is the first husband (בן תשעה לראשון) or the second husband (בן שבעה לאחרון). This son was warned not to cause a wound to either of his 'possible fathers'. He did not heed this warning and wounded each one of them after the appropriate warning was given. Wounding one's father is a capital crime.

[5] If he hit (and was warned about) both 'fathers' simultaneously, then even according to the מ"ד התראת ספק לא שמה התראה, he will be חייב. There is no ספק in his act of הכאה.

[6] Each time that he was warned not to hit his father; it was a התראת ספק, for we are not sure that this indeed is his father. However since he hit them both and was warned for each one, he ultimately transgressed a capital crime after a warning was given. One of them was certainly his father. If we were to maintain התראת ספק לא שמיה התראה, then he would not be liable; for there never was a proper התראה, merely a ספק התראה.

[7] All (edible) קרבנות must be eaten by a specific time (that day and the following night, or two days and the night in between). Failing to do so is a תורה transgression.

[8] See מכות טז,א. The עדים are required to warn him while there is still sufficient time for him to eat the remains; otherwise there is no point in the warning. The מותיר could therefore claim that since there was still time left he thought he would eat it shortly, and then he forgot the התראה, rendering the התראה ineffective. Therefore this is (also) considered a התראת ספק.

And one can say; that the two cited cases (מכה אביו and נותר) **are different** than our case. **For there** the transgressor **knows with certainty that he will commit a transgression if he will leave over** the קרבן; **or if he will hit both** 'fathers'

משום הכי שמה התראה -

Therefore it is considered a התראה. Even though the עדים were not sure (by each התראה) that he is committing an איסור; however the transgressor himself knows that his actions (or inaction) will lead to an איסור.

אבל הכא אינו יודע שודאי יבוא לידי איסור שאינו יודע את מי יכה:

However here the murderer **does not know with certainty that he will commit a transgression for he does not know whom he will murder;** it could be a ישראל but it could be a כנעני. Therefore in our case even if התראת ספק שמה התראה he is פטור (since ספק נפשות להקל).[9]

Summary

Even if we maintain that התראת ספק שמיה התראה, nevertheless in a case where there מותרה is not certain that his action will lead to an איסור it is not a התראה.

Thinking it over

1. תוספות answers that even according to the מ"ד that התראת ספק שמה התראה; however in our case it is not שמה התראה.[10] If that is the case then the original question of תוספות returns; why is it necessary to state that he is פטור on account of ספק נפשות להקל, he is פטור because such a התראה is לא שמה התראה?![11]

2. תוספות told us the factual difference between the two התראות. Explain why this factual difference should have a bearing whether or not it is a valid התראה.

[9] See תוספות הרא"ש who adds that since it is a ספק נפשות, therefore it is not a valid התראה. See 'Thinking it over' # 1.

[10] See footnote # 9.

[11] See אילת השחר for an extensive discussion of the matter.