

## דלמא במקום סייף נקב הוה –

### Perhaps there was a puncture in the place of the sword

#### OVERVIEW

סנהדרין stated in the משנה that if they would have been in the טרפון (they would question the witnesses in such a way that) the death penalty would never be enacted. ר' עקיבא and ר' טרפון gave an example; they would say, 'perhaps there was a puncture in in a certain organ (which makes the victim a טריפה)<sup>1</sup>, and the sword (which killed him) pierced him in that very same spot' (so it is not apparent that he was a טריפה even before he was killed). תוספות discusses this exemption.

asks: תוספות

קשה לרבינו תם דאמרין פרק קמא דחולין (דף יא,ב ושם) ומפיק ליה מקרא<sup>2</sup> -

The ר"ת has a difficulty, for the גמרא states in the first פרק of חלין and they derive it from a פסוק -

דלא חיישינן להא דאזלינן בתר רובא<sup>3</sup> -

That we are not concerned for this (that הוה נקב סייף במקום סייף), for we follow the majority of people who are not טריפה. So why are we concerned here?

answers: תוספות

ואומר רבינו תם דודאי<sup>4</sup> לא חיישינן אלא היה שואל להם -

And the ר"ת explained that certainly [if we did not ask the עדים (whether he was a טריפה or הוה נקב סייף במקום סייף)] we are not concerned for the מיעוט, however - עדים would ask this to the ר"ע and ר"ט

(כדי) שאם (יכחישו זה את זה<sup>5</sup> או) אמרו דלא ידעינן<sup>6</sup> יבטל העדות<sup>7</sup> -

<sup>1</sup> One is not liable for the death penalty for killing a person who is a טריפה (terminally diseased).

<sup>2</sup> The תורה teaches that if one kills another he is חייב מיתה, and we are not concerned that perhaps the victim was a טריפה or הוה נקב סייף במקום סייף, because we follow the majority that most people are not טריפה.

<sup>3</sup> How can we exempt the killer from execution by asking that perhaps there was a נקב במקום סייף (which we cannot verify in any case), when the rule is we are not concerned for this, as is evident by the fact that a murderer is put to death, even though there is this (highly unlikely) doubt.

<sup>4</sup> The דודאי לא (instead of לא שילינן להו לא, amends this to read, דודאי לא).

<sup>5</sup> This is referring to the asking of perhaps he was a טריפה (where the עדות can verify and contradict each other).

<sup>6</sup> This is referring to the question of perhaps there was a נקב במקום סייף which is not verifiable, and all the עדים can say is that we do not know (see מהר"ם).

<sup>7</sup> The answer is that we are not required to ask the עדים whether he was a טריפה (or maybe נקב במקום סייף) because we assume that he is not a טריפה, and the killer is put to death (this explains the תורה rule). However, should בי"ד choose to ask the עדים whether the עדים can certify that he was not a טריפה (etc.) and the עדים (either contradicted each other, or) said they do not know, the killer is released, for their testimony is voided.

**(In order) that if (they would contradict each other, or) they would say, 'we do not know', the עדות would be voided -**

תוספות offers an example to support this distinction:

**מידי דהוה אסייף וארירן<sup>8</sup> דאי דלא שיילינן חייב -**

**This is similar to a סייף וארירן, where if we do not ask the עדים what type of weapon was used; it does not matter; the killer is liable in any event -**

**וזה אומר בסייף וזה אומר בארירן אין זה נכון<sup>9</sup> -**

**However, if the עדים were asked, and this one עד said he was killed בסייף, and the other עד said it was בארירן, this is not a proper testimony and the עדות is void.**

תוספות anticipates a question:

**אף על גב דבסייף וארירן כולי אמרו אין אנו יודעין הרי זה נכון -**

**Even though that by סייף וארירן, etc. if the עדים said, 'we do not know' whether it was a סייף or 'ארירן', nevertheless it is a proper עדות and the killer is executed, so why here by הוה נקב סייף במקום סייף נקב הוה, דלמא במקום סייף נקב הוה, does the ר"ת maintain that if the עדים said 'we do not know', the עדות is בטל. What is the difference between the two cases?!**

תוספות replies:

**זה גרוע הואיל ובהרוג גופיה<sup>10</sup> אין יודעים<sup>11</sup> -**

**This case (of נקב במקום סייף) is worse than בארירן וארירן, since the עדים do not know something about the victim, so in order to disqualify the עדים [we do not require that they contradict each other (as by בארירן וארירן), but they can be disqualified] by merely not knowing.**

ר"ת disagrees with the תוספות:

**ומיהו טעם זה אינו מיושב ומאיזה טעם הוא זה -**

**However, this reason is not satisfying, and what type of reasoning is this -**

**דאם לא נשאל להם יהא חייב ואם נשאל ואמרו אין אנו יודעין יהיה פטור<sup>12</sup> -**

<sup>8</sup> סייף and ארירן are two different types of weapons. We will refer to them as such.

<sup>9</sup> Similarly here, we do not need to ask them if he was a טריפה (etc.), however if they were asked and they contradicted each other [or they said, we do not know], the עדות is בטל. The expression 'אין זה נכון', and the following expression 'הרי זה נכון' is used in סנהדרין מא,א based on the פסוק (in יג,טו) [ראה] which states ונהגה אמת נכון. The word נכון means that the עדות coincides, they are both agreeing.

<sup>10</sup> In the case of סייף וארירן it is basically irrelevant which weapon was used, for in either case the killer is liable (therefore if the witnesses did not pay that close attention it does not matter), however regarding טריפה which is relevant in implementing the death penalty, if the עדים do not know. they are not proper עדים.

<sup>11</sup> The הגהות הב"ח amends this to read, (יודעין ומיהו) לא בעינן מכחישין זה את זה ומיהו, (instead of יודעין ומיהו).

<sup>12</sup> Seemingly in both cases we have the same lack of knowledge, why should one case be חייב and the other פטור.

**That if we do not ask the עדים, the killer is liable, but if we ask the עדים and they say we do not know, the killer should be exempt from punishment?!**

ר"ת refutes the proof of the תוספות:

**וראיה שהביא מסייף וארירן<sup>13</sup> אין הנדון דומה לראיה -**

**And regarding the proof that the ר"ת brought from סייף וארירן; our case is not similar to the proof,** so it is an invalid proof, as תוספות continues to explain -

**דהתם כל כמה דלא שיילינן להו אין לבדות מהלב שיכחישו זה את זה -**

**For there (by סייף וארירן) as long as we do not ask the עדים what weapon was used, there is no reason to assume that they will contradict each other, therefore we need not ask them -**

**אבל כשמכחישין בהדיא דומה שקר -**

**However when they explicitly contradict each other, it seems that their testimony is false -**

**שדבר זה אדם רגיל לעלות בדעתו במה הרגו טפי מכליו שחורים<sup>14</sup> או מכליו לבנים -**

**For in this matter it is usual for a person to be cognizant with what weapon did he kill, more than whether his clothes were black or his clothes were white -**

**אבל דבר שפירש רבינו תם בלא טעם הוא -**

**However the matter which the ר"ת explained is without reason -**

**שכשאין שואלים להם ואין אנו יודעים אם טריפה<sup>15</sup> הוא או שלם נהרג חייב -**

**For if when we do not ask the עדים, and we do not know whether he killed a טריפה or whether he killed a whole person, the murderer is liable -**

**ובשביל שנשאל להם ואמרו אין אנו יודעים יהיה פטור<sup>16</sup> -**

<sup>13</sup> The rule is if the עדים were asked what color clothes did the killer wear, and they contradicted each other, the עדות is valid and the killer is still liable. However by סייף וארירן (even though if they do not know what weapon was used, the killer is liable, but) if the עדים contradict each other the עדות is בטל. This seems to prove that the more relevant the issue is to the murder, the witnesses are required to pay closer attention. Therefore regarding their clothes, which is totally irrelevant, the rule is that even if they contradict each other the עדות is valid, however by סייף וארירן, which is more relevant (than the clothes they were wearing), if they contradict each other, the עדות is בטל. It would then follow that by סייף וארירן, which is most relevant, even if they do not know the עדות should be בטל. תוספות rejects this reasoning.

<sup>14</sup> When one עד says he killed with a סייף and the other says with an ארירן, it is very likely that one is lying; he claims to know what weapon was used because he paid attention, but he is contradicted by the other עד. However by clothes (since it is totally irrelevant to the case) even though he says it was white, and he is contradicted, it does not matter, since the color of the clothes is completely irrelevant; when he said white, he meant that he thought it was white, so they do not appear to be false witnesses. [תוספות is seemingly negating the assumption (mentioned in footnote # 13) that the more relevant the issue, the more the עדות should pay attention. Rather the reason the עדים are פסול by זה is because since they are contradicting each other in something which is (somewhat) relevant it is דומה לשקר, but not knowing is never דומה לשקר.]

<sup>15</sup> The טריפה הוא או שלם נהרג amends this to read, הרג או שלם הרג, (instead of נהרג או שלם נהרג).

<sup>16</sup> See footnote # 12.

**And because that we asked them and they said we do not know, the killer should be exempt** from punishment?! The question remains how will they always exempt the killer from punishment by asking if he was a טריפה, etc. if the עדים will (usually) answer that they do not know.

תוספות offers an alternate explanation:

**לכן נראה דהא דקאמר לא נהרג אדם מעולם לאו דוקא אלא רוב פעמים לא היה נהרג -**  
**Therefore it seems to us that this which** ר"ט ור"ע **said, 'no one would ever be killed', was not exact, but rather they meant to say, most times the murderer would not be killed -**

**שעל ידי שהוא מרבה בבדיקות אי אפשר שלא יכחיש אחד מהם**<sup>17</sup> **חבירו**<sup>18</sup> -  
**That on account of the increased questioning of the עדים, it is impossible that one ע"ד should not contradict the other.**

תוספות anticipates (and rejects) an alternate explanation:

**אבל אין לומר דרבי עקיבא לטעמיה דחייש למיעוטא גבי חלב פוטר**<sup>19</sup> **(בכורות כ,ב) -**  
**However, we cannot say that ר"ע here follows his reasoning elsewhere that he is concerned for a minority, regarding the rule that a milking cow is exempt**  
from בכורה, therefore here too he is concerned for a מיעוט that perhaps the victim was a טריפה, and that is why we ask the עדים whether he was a טריפה, etc. -

תוספות rejects this explanation:

**דהא לא מצינו שום תנא דחייש למיעוטא טפי מרבי מאיר**<sup>20</sup> -  
**For we do not find any תנא who is concerned למיעוטא more than ר"מ -**  
**ואפלו הכי מודה**<sup>21</sup> **היכא דלא אפשר דלא חיישינן למיעוטא**<sup>22</sup> **בפרק קמא דחולין (דף יא,ב) -**  
**And nevertheless ר"מ agrees in the first פרק of מסכת חולין that wherever it is not possible to verify the status that we are not למיעוטא**  
**והכא היינו דלא אפשר**<sup>23</sup> -

<sup>17</sup> The הגהות הב"ה amends this to read, מהם את חבירו (instead of מהם חבירו).

<sup>18</sup> ר"ע will ask so many question (which are [somewhat] relevant like ורירין or סייף במקום סייף) that eventually the עדים will contradict each other and the alleged killer will be freed.

<sup>19</sup> The rule is if someone buys a cow from a gentile and he does not know whether the next calf born is a בכור or not; if the animal is producing milk, we assume she already had a calf, since a majority of cows do not give milk unless they bore a calf. However, ר"ע disagrees and is concerned for a minority of cows that give milk even if they did not give birth yet (and therefore the calf that is born is a בכור).

<sup>20</sup> The גמרא continuously states, 'ואפילו לר"מ דחייש למיעוטא' (see גיטין ב,ב; יבמות סא,ב; etc.).

<sup>21</sup> The הגהות הב"ה amends this to read, מודה דהיכא (instead of מודה היכא).

<sup>22</sup> The הגהות הב"ה amends this to read, למיעוטא בדאיתא פרק קמא (instead of למיעוטא בפרק).

<sup>23</sup> How can we verify if there was a במקום סייף?

And here by נקב במקום סייף it is a case of impossible to verify.

תוספות offers a possibility to accept the rejected interpretation:

מיהו יש לומר דאיכא למיקם עלה דמילתא –

However one can say that we can verify this matter whether there was a נקב במקום סייף -

כגון שהיה קרום של מוח מגולה<sup>24</sup> וראו שהיה שלם ובא זה ונקבו והרגו:

For instance if the membrane of the brain was revealed (open) and the עדים saw that it was whole (no punctures) and the killer came and perforated it and killed the victim. Therefore since הייש למיעוטא is ר"ע we have to ask the עדים to verify whether there was a נקב במקום סייף (in this type of a case), otherwise the killer is freed.

### SUMMARY

According to the ר"ת, if בי"ד would ask the עדים, whether there was a נקב במקום סייף and they answer, we do not know, the killer will be freed (even though the killer will be convicted if we do not ask him [for we go רוב]). However תוספות disagrees and maintains that not knowing is no cause to release the killer, but rather the גמרא meant that they would ask so many questions that eventually the עדים would contradict each other (and the killer will be freed).

### THINKING IT OVER

Why was it necessary for the ר"ת to say that if the עדים answered we do not know, whether בטל is טריפה הרג or שלם הרג, why could he not say that it is בטל if they are מכחיש one another (as תוספות maintains)?<sup>25</sup>

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<sup>24</sup> Part of the skull was missing and one could see the brain's outer membrane.

<sup>25</sup> See ערוך לנר.