

## קודם שיבא לידי איסור סקילה –

**Before he will come to transgress a סקילה prohibition**

### OVERVIEW

The גמרא amended the query of רב ביבי that the question is regarding one who placed dough in an oven במזיד on שבת; if he may be רודה the פת before it is baked which will cause him to transgress an איסור סקילה. Our תוספות discusses the consequences if we do not allow him to be רודה (and the bread is baked), whether he will be מייחייב סקילה or not.

תוספות asks:

ואם תאמר מאי בעיא היא זו אם התירו לרדותה פשיטא שלא ישמע לנו אם נאסור לו.  
**And if you will say; what sort of query is this, whether they permitted him to scrape off the bread; it is obvious that if we prohibit him he will not heed us?!<sup>1</sup>**

תוספות answers:

ותירץ רבינו יצחק בן אשר דאם לא התירו לא מייחייב סקילה –  
**And the ריב"א answered that if the חכמים do not permit him to be רודה, then he will not be liable for the סקילה punishment -**  
**כיון שמניח מלרדות על ידי מה שאנו אוסרין לו –**  
**since he is holding back from being רודה because we forbid him.<sup>2</sup>**

תוספות cites similar cases:

וכן בפסחים בסוף פרק האשה (דף צב, א ושם) –  
**And similarly in מסכת פסחים at the end of פרק האשה the גמרא states that regarding -**  
**ערל<sup>3</sup> הזאה<sup>4</sup> ואיזמל<sup>5</sup> העמידו דבריהם במקום כרת –**

<sup>1</sup> The query is impractical. If the ruling would be that the חכמים forbid him to be רודה the פת, he will still be רודה the פת, because otherwise he will be facing a חיוב סקילה when the bread is baked (for he did it במזיד)! See 'Thinking it over' # 1.

<sup>2</sup> The query then is whether we permit him to be רודה (and if he is not רודה he will be מייחייב סקילה), or whether we do not permit him to be רודה and therefore (since he is not רודה because the חכמים forbade him) he will not be מייחייב סקילה.

<sup>3</sup> ערל refers to the case of a נכרי that was ערב פסח. According to ב"ה one who ceases to be an ערל (as in the case of a גר שנתגייר and performs מילה), he is like one who is separating from a קבר and requires מדרבנן (before he is considered טהור) as if he were a מת. Therefore מדרבנן he cannot bring his פסח.

<sup>4</sup> הזאה (sprinkling of the חטאת מי חטאת) refers to a person whose seventh day of טומאת מת occurs on פסח. Normally he would receive the חטאת מי חטאת on the seventh day and would be able to bring his פסח. However, since the seventh day is on שבת, and הזאה מי חטאת is a שבות (for it is considered גברא) and is אסור מדרבנן, therefore we are not מזה on him and he cannot bring the פסח.

**An ערל and הזאה and איזמל the חכמים sustained their decree even in a כרת situation<sup>6</sup> -**

**אלמא<sup>7</sup> לא מיחייב כרת הואיל ורבנן הוא דאסרי ליה למיעבד פסח<sup>8</sup> -**

**It is evident that he is not מיחייב כרת since it is the רבנן who forbade him from offering the פסח קרבן פסח.** Similarly by us he will not be חייב סקילה since the רבנן prevent him from being רודה and preserving himself from סקילה.

ואם תאמר והיכי אתי לידי חיוב סקילה<sup>9</sup> והא התראת ספק<sup>10</sup> הוא -

**And if you will say; and how will he come to be liable for סקילה, since this is a התראת ספק -**

**דבשעה שהדביק פת בתנור שמא היה בדעתו לרדותה קודם שיבא לידי איסור סקילה -**

**For at the time he was מדביק the פת בתנור, perhaps he had in mind to be רודה the פת before it comes to an איסור סקילה (before it is baked)<sup>11</sup> -**

**ומה שלא רדה שמא שכח ההתראה<sup>12</sup> -**

**And the fact that he was not רודה is because perhaps he forgot the warning of the עדים.**

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<sup>5</sup> ער"פ שחל on מילה. If one has a child or slave that requires מילה, the master will not be permitted to bring the קרבן פסח, for he will be זכריו מעכבתו (and if there will be no מילה, the master will not be permitted to bring the קרבן פסח, for he will be זכריו מעכבתו). [see (שמות [בא] יב, מד)], and the איזמל is in a חצר, so that there is an איסור מדרבנן to carry it from that חצר to where the child is, one may not carry the איזמל and be עובר the איסור מדרבנן even though this will hold back the master from bringing a קרבן פסח.

<sup>6</sup> The punishment for not bringing a קרבן פסח is כרת. See יג ט, בהעלותך.

<sup>7</sup> It is only in our case of מדביק פת בתנור במזיד that we can entertain the thought that if לא התירו לרדותה, he will receive סקילה since he was מדביק במזיד. However in the three cases of ערל הזאה ואיזמל where the person did nothing wrong, we cannot even entertain the thought that the חכמים will prevent him from bringing a קרבן פסח because of a שבות, and that he should receive כרת through no fault of his own. We must therefore conclude that he will not receive כרת, and the only explanation is that he was prevented from bringing the ק"פ because of the איסור מדרבנן. This indicates that if the רבנן prevent someone from performing an act, then there is no consequence, for his lack of performance. (See מנחת אריאל אות טז.)

<sup>8</sup> See 'Thinking it over' #2.

<sup>9</sup> The actual דרב ביבי עדים is not necessarily in a case where there were עדים and התראה; rather it is merely an איסור (see previous ד"ה ואלא תוספות); however it is understood by referring to it as איסור סקילה, that if it would have been בעדים ובהתראה there would be a חיוב סקילה. (See מהר"ם.)

<sup>10</sup> One is liable for the death penalty only if עדים warned him before the act and said that if you will perform this act, you will be מחייב מיתה. However, if there is a possibility that even if he performs this act he will not be מחייב מיתה (for he is able to undo this act, etc.), this is called a התראת ספק (a 'doubtful warning'), and there is no חיוב מיתה (because the person did not take the התראה seriously, for he knows that even if he does this act, he can still avoid חיוב מיתה, by reversing the act, etc.).

<sup>11</sup> When the עדים warned him not to put the bread in the oven, they could not be sure that if he does put it in the oven that he will be מחייב סקילה, since he has the option of removing the bread before it is baked.

<sup>12</sup> See 'Thinking it over' # 3.

answers: תוספות

ותירץ רבינו יצחק בן אשר דכיון שהדביק תוך כדי דבור של התראה –

**And the answer; since he attached the dough to the oven within the time span of saying 'שלום עליך רבי', after the warning from the witnesses**

ובודאי תאפה אם לא ירדנה לאו התראת ספק הוא –

**And the dough will certainly be baked if he does not scrape it off; it is not a - התראת ספק**

דודאי לא היה בדעתו לרדות קודם אפייה<sup>13</sup> –

**For he certainly had no intention of scraping it off before it is baked, therefore it is not a ספק (as the witnesses continues to explain).**

התראת ספק: תוספות explains what is considered a ספק:

ולא הוי התראת ספק אלא בלוקח אם על הבנים<sup>14</sup> –

**And a ספק is not considered as such, unless (for instance) by the case of - לוקח אם על הבנים**

למאן דאמר בפרק ואלו הן הלוקין (מכות דף טו,א) בטלו ולא בטלו<sup>15</sup> –

**According to the one who maintains בטלו ולא בטלו; there it is considered a ספק - דשמא לא ישבור כנפיה או לא ישחטנה<sup>16</sup>**

**For perhaps he will not break its wings or he will not slaughter it -**

ועכשיו שמשבר כנפיה אין יכולין להתרותו –

**And now when he breaks its wings the עדים cannot warn him do not break the wings for if you do break the wings, you will transgress the לאו of תקח-**

דלא הויא התראה אלא על הלאו<sup>17</sup> והלאו כבר עבר –

<sup>13</sup> See 'Thinking it over' # 4.

<sup>14</sup> The תורה tells us (דברים [תצא] כב,ו-ז) that if one chances on a bird sitting on her chicks or eggs he may not take the mother bird with the chicks; rather he should send away the mother and then take the chicks. This is called a לאו of תקח, a prohibition that can be cancelled through an action. If one takes the mother he is עובר the לאו. However, if he then sends away the mother he has corrected this לאו by observing the עשה of תשלח. The issue is, whether it is considered that he transgressed the לאו if he still has the opportunity to correct it. ר' יוחנן maintains that as soon as he took the mother he transgressed the לאו and is מחוייב מלקות, if he sends away the mother bird before ב"ד punished him, he is פטור from מלקות. This is referred to as קיימו ולא קיימו. See following footnote # 15.

<sup>15</sup> בטלו means he nullified or destroyed any chance of fulfilling the עשה; while לא בטלו means that there is still a possibility of fulfilling the עשה. It is יוחנן ר' who maintains that there is no מלקות unless it is impossible for him to do the עשה of תשלח; for instance if he killed the mother (this is called בטלו), then he will receive מלקות, however if there is still a possibility that he can fulfill the עשה (it was לא בטלו), then there is no מלקות.

<sup>16</sup> When the עדים warned him not to take the mother it was not certain whether by taking the mother he will transgress the לאו of תקח since (according to this מ"ד) he is not עובר the לאו unless he was מבטל the mother by incapacitating the mother; which we are not sure that he will do, therefore it is a ספק.

<sup>17</sup> The עדים are required to warn him before he does the act of the לאו, which is taking the mother, but there can be no valid התראה after the act of the לאו was done.

**for it is not considered a proper warning** (to receive מלקות), **unless it is regarding the prohibition** (which is לא תקח), **and he already transgressed the prohibition**, for he already took the mother and at that point there was no certainty that he would break the wings of the mother. Therefore that is a התראת ספק.

התראת ספק offers another example where there is תוספות

וכן בשבועה שלא אוכל ככר זו אם אוכל זו –

**And similarly regarding the oath that I will not eat this loaf if I eat this other loaf -**

ואכליה לאיסוריה<sup>18</sup> והדר אכליה לתנאיה<sup>19</sup> –

**And he first ate the prohibited loaf and he then ate the conditional loaf -**

דכשמתרין בו בשעת אכילת איסור –

**So when the עדים warned him at the time he ate the prohibited loaf -**

עדיין מחוסר מעשה אכילה של תנאי קודם שיתחייב מלקות –

**It was still lacking the act of eating the conditional loaf before he can be liable for מלקות** and we do not know whether he will eat the conditional loaf, therefore it is התראת ספק -

אבל הכא כשמדביק פת בתנור אין האפייה מחוסרת מעשה<sup>20</sup>:

**However here when he attached the bread to the oven, the baking process lacks no further action;** it will be baked (and he will be מיהייב סקילה) if nothing else is done.

## **SUMMARY**

There is no punishment for transgressing an איסור if בי"ד prohibits us from acting in a way to prevent this punishment. התראת ספק is only where an action is required to activate the punishment; if the איסור will be done unless an action is taken then it is not התראת ספק.

## **THINKING IT OVER**

1. תוספות asks that he will certainly not listen to us (so what is the purpose of the

<sup>18</sup> This is the loaf he swore he would not eat.

<sup>19</sup> This is loaf which he said that if he eats it, he will not eat the other (the prohibited) loaf.

<sup>20</sup> When in order that the איסור be done (and punishment be meted out) it is necessary that another action take place (incapacitating the mother, eating the loaf), we assume that these actions will not take place (for why should he harm himself), therefore it is a התראת ספק. The perpetrator is not concerned about the התראה because he knows that to be held liable he has to take further action and he can decide not to take that action. However, if in order for the איסור to take place no additional action is required (it is only to prevent the איסור from taking place that action is required) then we assume the status quo that no additional action will take place and therefore it is התראת ודאי. If the perpetrator is planning to be רודה the פת, why put it in, in the first place.

query).<sup>21</sup> This indicates that the query remains (whether התיירו or not), but תוספות asks that it is not a practical query. However, why should there be a query; since if we forbid him he will be מיהייב סקילה, it is therefore a question of נפש ופקוח, and therefore we should permit him to be רודה?!!<sup>22</sup>

2. תוספות cited cases where העמידו דבריהם במקום כרת.<sup>23</sup> Why cannot we resolve the query?<sup>24</sup> [And if those cases are different from רדיית הפת, how can תוספות compare the cases?]

3. תוספות asks that by רדיית הפת it is התראת ספק and תוספות concludes his question saying, 'ומה שלא רדה שמא שכח ההתראה'.<sup>25</sup> Seemingly these words are superfluous! Since at the time of the התראה the עדים do not know whether or not he will be רודה, it is a התראת ספק. What difference does it make why he was not רודה later?!!<sup>26</sup>

4. תוספות initially states that by רדיית הפת it is not a התראת ספק since 'he certainly did not have in mind to be רודה before it is baked';<sup>27</sup> indicating that it is not a התראת ספק because we assume that he will not be רודה. However, תוספות concludes that the criterion whether it is a התראת ספק or not depends (only) on whether if it is מחוסר מעשה (as by שלוח הקן) or not (as by רדיית הפת). How can we reconcile these two conflicting ideas?!!<sup>28</sup>

5. Why did not תוספות ask his question on the משנה which counts אופה as one of the לט מלאכות; that it is a התראת ספק?!!<sup>29</sup>

<sup>21</sup> See footnote # 1.

<sup>22</sup> See מנחת אריאל אות טו and שפ"א.

<sup>23</sup> See footnote # 8.

<sup>24</sup> See קיקיון דיונה [and מנחת אריאל אות טז].

<sup>25</sup> See footnote # 12.

<sup>26</sup> See מנחת אריאל אות יז and מהר"ם.

<sup>27</sup> See footnote # 13.

<sup>28</sup> See אור החמה (and גליון הש"ס, מנחת אריאל אות יח).

<sup>29</sup> See מהרש"א [הארון].