

Zera Shimshon

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Published Mantua 1778*

Chapter XLVIII: Shoftim (Deut. 16:18–21:9)

Essay 5. Punishment of scheming witnesses

This essay discusses the *zomemim*, a pair of “scheming [witnesses]” who give false testimony in order to have someone convicted and executed by a court. If a first pair of witnesses testifies that they saw a defendant murder someone at one location, and then a second pair of witnesses came and testified that the defendant had been with them at the time at a second location, that does not render the first pair of witnesses as scheming witnesses. That is, the facts are in dispute, and we understand that one of the pair of witnesses has not testified truthfully, but we don’t know which one. For example, perhaps the first pair of witnesses saw the murder, and the killer looked just like the defendant, but it was actually a different person. That would be an innocent mistake, not a case of scheming witnesses.¹

However, if the second pair of witnesses testified that at the time of the murder, the first pair of witnesses had been with them at a location different than the scene of the crime, then the second pair is believed and the first pair of witnesses are considered to be scheming witnesses.²

The halacha is that: If a court sentences a defendant to death based on the testimony of a first set of witnesses, but before the defendant is executed, a second set of witnesses comes and discredits the first set of witnesses as scheming witnesses, then the first set of witnesses is put to death by the court.³ The Gemara further clarifies that if the defendant is put to death before the first set of witnesses is discredited, then they are not put to death.⁴

”וַעֲשִׂיתֶם לוֹ כַּאֲשֶׁר זָמַם,” פֶּרֶשׁ רַשִׁי י "כַּאֲשֶׁר זָמַם" וְלֹא כַּאֲשֶׁר עָשָׂה, מִכָּאֵן אָמְרוּ הַרְגוּ אִין נְהַרְגִין.

“You shall do to him as he schemed to do / to your brother” (Deut. 19:19). Rashi explained in his commentary on the Torah, “As he schemed to do, and not as he did. Hence, [the rabbis] said, if [the scheming witnesses] have [already] killed [by their false testimony], they are not put to death.”

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¹ Mishnah Makkot 1:4; Makkot 5a.

² *Ibid.*

³ Mishnah Makkot 1:6; Makkot 5b.

⁴ Makkot 5b.

וְכַתּוּב הַלְוִיָּת חָן תִּימָא כִּי לֹא נִמְצָא לְרִבּוּתָנּוּ ז"ל בְּשׁוּם מְקוֹם שֶׁאָמְרוּ זֶה מִן פְּאֻשֶׁר זָמַם וְלֹא פְּאֻשֶׁר עָשָׂה, אֲלָא בְּמִשְׁנָה בְּפֶרֶק קַמָּא דְּמִכּוֹת הֵכִי אֵיתָא אִין הַעֲדִים זִמְמִים וְכֹו' וְהֵלֵא וְכֹו' "לְעֵשׂוֹת לְאָחִיו" וְהֵרִי אָחִיו קִיָּים, וּפְרָשׁ רַשִׁי "לְעֵשׂוֹת לְאָחִיו" מִשְׁמַע שֶׁאָחִיו עָדִיין קִיָּים. וּמִכֶּחָ קוּשְׁיָא זֶה תִּירָץ וְהַעֲלָה דָּאִי אָפְשֶׁר לְלַמֵּד זֶה מִ"פְּאֻשֶׁר זָמַם" אֲלָא מִ"לְאָחִיו".

The Livyat Chen⁵ writes, “You can say that nowhere is it found that the rabbis of blessed memory said this statement,” that if the scheming witnesses have already killed by their false testimony, they are not put to death, as being **based upon** Rashi’s comment on Deut. 19:19, “**as he schemed to do,**’ and not as he did.”

Rather, in the Mishnah in the first chapter of Makkot, isn’t it said that: “The scheming witnesses are executed only [after] the verdict [of the accused] is concluded. [This contrasts what] the Sadducees say: [Scheming witnesses are executed] only [after the accused] is killed [on the basis of their testimony] The Rabbis said to [the Sadducees]: **But wasn’t it** already stated: ‘And you shall do to him as he conspired **to do to his brother**’ (Deut. 19:19), **and his brother is alive?**”⁶

In his commentary to Makkot 5b, Rashi explains that the conclusion “his brother is alive” is derived because when the Torah uses the term, “his brother,” it has the meaning that his brother is still alive.⁷ From the strength of this difficulty, [the Livyat Chen] concludes and raises [the question] that it’s impossible to learn [the halachic ruling] from “**as he schemed to do,**” as Rashi’s Torah commentary noted on Deut. 19:19, **but rather only from the term, “to his brother,”** as the rabbis explain in the Gemara.

In other words, Deut. 19:19 reads, “You shall do to him as he schemed to do / to your brother.” The Mishnah explains that the testifying witnesses are killed if, after the conviction of the accused but before his execution, the witnesses are proven to be scheming witnesses. The Gemara clarifies that if the conspiracy wasn’t uncovered until after the execution, then the scheming witnesses are not put to death. The Mishnah explains that the halacha is determined from the term, “to his brother,” whereas Rashi says that the halacha is determined from the term, “as he schemed to do.” That is, the halacha is determined by the interpretation of the complete sentence, but the rabbis of the Mishnah cite one term, “to your brother,” whereas Rashi cites another term, “as he schemed to do.” The Livyat Chen questions why this is so.

⁵ Aryeh Yehuda Leib ben Shmuel Gershon, Livyat Chen v’Or Yekarot (Venice 1742).

⁶ Mishnah Makkot 1:5; Makkot 5b.

⁷ The Torah uses the term “his brother” in some cases involving a dead man, but that is when referring to an actual sibling. When “his brother” is used to refer to a fellow Jew, it is always referring to a live person.

ואדרבא נראה להפך שאי אפשר ללמוד זה מ"לאחיו", שהרי "לאחיו" איצטרייך לדרשא אחריתי, כדאמרינן בסוף הגמנאקין (דף צ') דמ"לאחיו" גמרינן שזוממי בת פהו הם אינם בשרפה, דאמר קרא "לאחיו" ולא לאחותו, ואם כן הדין דהרגו אין נהרגין אי אפשר תו למילף ליה מ"לאחיו", ועל פרתה דנפקא לן מ"פאשר זמם". ומאי דתנן בפרק קמא דמכות, הם דברי חכמים שהשיבו לצדוקים לפי דבריהם, שהרי הצדוקים בנדאי לא יאמינו בדרשת חכמים שזוממי בת פהו לא יהיו בשריפה. ומשום הכי אייתר להו "לאחיו", ולעולם שעקר הראיה הוא מ"פאשר זמם" וכמו שפרש רש"י ז"ל, וכן פסק הרמב"ם (בפרק עשרים מהלכות עדות הלכה א') ועיי"ש.

To the contrary, it appears the opposite, that it's impossible to learn this from “to his brother,” for “to his brother” is needed for a later explanation, as is written at the end of the chapter “one who is strangled”⁸ (Sanhedrin page 90a). The Gemara derives that those who schemed against a [married] daughter of a priest [by accusing her of adultery] are not [punished] with burning [which would have been her punishment, if found guilty], but with the death penalty to which the alleged adulterer would have been subject, which is strangulation, for Scripture says “to his brother,” and not “to his sister.”⁹

If so, the law, “as he schemed to do, and not as he did,” is impossible to infer from the term “to his brother,” as we wouldn't learn two laws from the same Scriptural term. Thus, you must necessarily derive if from the term, “as he schemed to do.”

What was taught in the first chapter of Makkot were the words of the rabbis, who answered the Sadducees according to their words, for the Sadducees certainly didn't believe in the homiletical interpretation of the rabbis that those who schemed against a [married] daughter of a priest would not [be punished] with burning. Because of this, one other [interpretation] is left over for [the Sadducees] from the text “to his brother.” That is, the Sadducees said, scheming witnesses are executed only after the accused is killed based on their testimony, and the rabbis responded, no, for the term “to his brother” means that the fellow Jew is still alive. This answer was only meant for the consumption of the Sadducees, but the real basis for the halacha is “as he schemed to do.” Why didn't the rabbis tell the Sadducees the real basis? The fact that “as he schemed to do” means “and not as he did,” i.e., that the defendant still lives, is derived from the term “to his brother.” Thus, it was more direct to simply tell the Sadducees that support was derived from the term “to his brother.”

So the foundation of the proof of the halacha will always be, “As he schemed to do, and not as he did,” as Rashi explained, and thus the Rambam ruled in the Mishneh Torah (in chapter 20 of the Laws of Testimony, halacha 1) and see there.¹⁰

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⁸ Chapter 10 of tractate Sanhedrin, which runs from pages 84b through 90a.

⁹ Curiously, while Rashi's commentary on Makkot 5b said “to his brother” meant that the brother was still alive, his commentary on the Torah of Deut. 19:19 gave the explanation from Sanhedrin 90a, that those who plotted against a [married] daughter of a priest are not punished with burning but with strangulation.

¹⁰ The Mishneh Torah states: “Scheming witnesses are neither put to death, nor lashed, nor ordered to make restitution, unless the two of them are eligible witnesses, and both are found to be scheming, and the scheming is detected after sentence has been passed. But if only one of them was refuted, or if both were refuted before sentence was passed, or even if both were refuted after sentence had been passed, and it was discovered that one of them was a relative or disqualified, they are not punished, although they have been refuted and become ineligible to bear witness in whatever case mentioned in the Torah.”