

# In Shocking Decision, Appeals Court Calls for Harsher Sentence for Rabbi Eisemann

BY RABBI CHAIM SEREBROWSKI

In a decision that shook the Lakewood community and surprised legal experts, the Appellate Division of the Superior Court of New Jersey rejected an appeal filed on behalf of SCHI founder Rabbi Osher Eisemann, while granting the appeal presented by the prosecutors asking for a harsher sentence.

The decision shocked legal experts who were familiar with the case, and who had considered Rabbi Eisemann's appeal to be well-grounded and persuasive, portraying how Rabbi Eisemann had been singled out for persecution and charged with crimes that were never committed, and that an elaborate string of injustices were perpetrated by prosecutors in order for them to wrangle guilty convictions on an innocent person. Additionally, legal experts and retired judges that were consulted by Rabbi Eisemann's legal team considered the prosecutor's appeal – which included a virtually unprecedented request that a new judge be assigned for resentencing – to be weak and without merit.

Rabbi Eisemann's appeal outlined eight reasons for the case to be tossed out and for Rabbi Eisemann's record to be wiped clean. The appellate court refused to grant the appeal and opted to uphold the convictions.

The court addressed the prosecutor's appeal, which claimed that the circumstances of the case were not extraordinary enough to allow for the trial judge to grant a probationary sentence – as is allowed by New Jersey law for certain cases – and that the judge showed bias towards Rabbi Eisemann with his perfunctory praise for the rabbi during sentencing. The appellate court, whose job it generally is to accept the trial judge's fact-finding and to rule if those facts fit with the law, ruled that Rabbi Eisemann's situation didn't merit to have the law allowing for probation to apply. (Rabbi Eisemann's attorneys assert that the court overstepped its legal purview – see sidebar "Interview with Attorney Lee Vartan.")

Furthermore, the appellate court wrote that the judge's comments show that he believed Rabbi Eisemann was innocent, and that his light sentence was a reflection of his belief that there was no crime committed, but, they wrote, the trial judge is not allowed to disregard the jury's guilty verdict, even if he knows that the defendant is completely innocent.

The Appellate Division also questioned the various mitigating factors cited by the judge as reasons for leniency. They disagreed with some of the factors, and dismissed other mitigating factors, saying that although they may be true, they were "not supported by the record," meaning that basis for them was not found in the official court transcripts.

"What the court essentially said is that although the judge believed that Rabbi Eisemann was innocent of wrongdoing, the judge is still forced by sentencing guidelines to give Rabbi Eisemann a jail sentence," an activist involved in the case told the *Yated*.

The Appellate Division concluded that the case be remanded to a new judge for resen-

tencing.

Based on the appeal court's ruling, in which they denied numerous mitigating factors, it would seem like they tied the hands of any new judge that will be assigned to the case, and are pressing for an extended prison term. If the allowance for a probationary sentence is not imposed, and the counts are sentenced as second-degree crimes, the guidelines would dictate a sentence of 10-to-20 years in prison. Prosecutors have asked for a 12-year sentence in their previous sentencing briefs, and presumably a judge will not exceed that sentence.

The defense team is planning to appeal the case to the state's Supreme Court, though it could be an uphill battle, as the Court has discretion on which cases they take, and they reject roughly 95 percent of cases presented. However, the defense believes that there are a number of factors to this case that may increase the odds of the state Supreme Court showing interest in it. (See sidebar for more details.)

Community activists are considering the notion that a pardon should be sought from New Jersey Governor Phil Murphy. As this case is a state case, the governor would be the only person who can grant such a pardon.

A date has not yet been set for resentencing; that hearing is expected to take place within the next few months.

## A BRIEF HISTORY

In 1995, after the birth of his son who had special needs, Rabbi Osher Eisemann founded the School for Children with Hidden Intelligence, or SCHI. Recognizing that there was no institution that could fully meet the needs of many of New Jersey's special needs children, he founded his own, with five students, in a small storefront on Route 9. The school became an amazing success story, as Rabbi Eisemann's determination to see each child reach their full potential garnered results that exceeded everyone's expectations. The school quickly grew into a New Jersey landmark, currently serving over 500 students, with a state-of-the-art facility to allow every special needs child to properly thrive. The school has been visited and praised by every New Jersey governor since the year 2000, as to celebrate SCHI's worldwide impact to the special needs community and to honor the extraordinary work the SCHI School does with 100's of severely disabled children, adults, and their families.

In 2016, the state opened an investigation into SCHI. After a two-year investigation, which included school-day raids at six locations to seize records, the state garnered an indictment, and later a second indictment, against Rabbi Eisemann. Their charge: he stole and misused nearly a million dollars of school money for purposes not allowed by state law. These charges were outlined in three counts on the indictment – one first-degree charge and two second-degree charges – and were the focus of a three-page press release

by the state's attorney general. Tacked onto the indictment were two additional charges: money laundering, in which the state alleged that Rabbi Eisemann had attempted to conceal or facilitate the criminal activity outlined in the previous charges; and misconduct by a corporate official, in which the state alleged that Rabbi Eisemann used his corporation to commit the aforementioned crimes. The SCHI Foundation was also charged as a codefendant on four of the five charges.

Rabbi Eisemann's defense lawyers filed numerous pre-trial motions seeking to have the charges dismissed, pointing out the underhanded tactics utilized by the prosecution to build their case. One motion revolved around wrongdoings in the method of evidence collection, which included extremely broad search warrants. A second mo-



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**—ATTORNEY LEE VARTAN**

tion focused on the fact that the state's detective lied to two grand juries in order to secure the indictments. The judge assigned to the case, Superior Court Judge Ben Bucca Jr., denied the motions and indicated that he wished for a jury to hear the case.

## A REVEALING TRIAL

It was during a three-week trial in February 2019 when the state's case began to publicly unravel. While on the witness stand, the state's detective admitted that he left out crucial bank accounts when he conducted his investigation and that had he looked at those accounts he may have concluded that no criminal activity was done. Another state-called witness, a veteran accountant who served as SCHI's independent auditor, asserted that the activity that the state was alleging as criminal was in fact completely legal according to state guidelines, and that even if Rabbi Eisemann had done what the state was alleging, it was not criminal activity. A third witness at the trial, a former Deputy Commissioner of Education for the state of New Jersey, backed up the independent auditor's assertion that the activity was indeed legal.

After four days of deliberation, the jury returned with a verdict. They unanimously declared Rabbi Eisemann innocent of all charges relating to the theft or misuse of public funds. However, they returned a guilty verdict on the charges of money laundering and misconduct by a corporate official. The Foundation was acquitted of all charges.

The money laundering charge, which was intricate and confusing – the state even wrote contradictory details in different briefs – alleged that Rabbi Eisemann had tried to conceal a \$200,000 loan from the school, which they alleged was misuse of public funds, despite the fact that witnesses testified that the loan was legal. This \$200,000 was included in two other counts on the indictment, theft and misapplication of entrusted property – of which Rabbi Eisemann was declared innocent of, and was the basis for the money laundering charge.

Even before the jury began their deliberations, the defense attorneys spent much time arguing before the judge that such a verdict, then a mere hypothetical, would be technically impossible. Their argument was that money laundering is legally defined as the concealment of the origins of illegally obtained money and it hinged on having committed another crime. Since the indictment noted that the crime was concealing money obtained in one of the other counts on the indictment, he would first have to be convicted of one of the counts of theft or misuse of public funds for the charge of money laundering to stand. If Rabbi Eisemann would be deemed not guilty on those counts, then by default the money allegedly laundered was not of illegal origin. Hiding money that was legally obtained is not a crime. Thus, the defense urged the judge to make the jury instructions clearer, to include explicitly that such a verdict cannot be delivered.

The judge conjectured that perhaps the charge of money laundering was also aimed at an independent, incidental crime, of loaning private funds – a notion that contradicts testimony given by state witnesses. Additionally, if this is true then the same \$200,000 identified in some counts as being public money would need to be categorized a private money in the money laundering count – which is physically impossible. Nevertheless, the judge asserted that he did not want to preclude the jury from convicting for money laundering alone. (The judge went as far as to ponder whether his decision in this would stand upon appeal.)

The last count – misconduct by a corporate official – is also contingent on a guilty verdict being returned on one of the other counts. If a corporate official is found guilty of using his corporation to commit a crime, he can then be found guilty of misconduct by a corporate official. Without a predicate crime, this count too would fall away. This contingency was agreed on by the prosecutors, though they did not concede on the money laundering count being contingent.

These objections, as well as others, were outlined in a pre-sentencing motion to dismiss filed by Rabbi Eisemann's lawyers, but the judge rejected the motion.

In sentencing motions later submitted, prosecutors asked that Rabbi Eisemann be sentenced to 12 years in state prison, while the defense asked for a sentence of probation.

### A UNIQUE SENTENCING

On April 29, 2019, Judge Bucca sentenced Rabbi Eisemann to 60 days in jail, two-years of parole, and a \$250,000 fine.

During the sentencing hearing, the judge provided extensive background in explaining how he reached the decision.

Judge Bucca noted that according to the law, the two second-degree offenses would each carry a minimum of five years in prison, which would not be allowed to run concurrently, making it an effective sentence of 10 years in jail. He explained that if the mitigating factors (for example, no chance of recommitting the crime, being needed by others, etc.) overwhelmed the aggravating factors (for example, the need for a deterrent), then he could apply a sentence of one degree lower, albeit with the original guidelines. Meaning, if the factors for leniency are much more prominent than the factors for harshness, he would be able to impose a third-degree sentence – which is a minimum of three years per count – but he would have to still use the second-degree guidelines, which would keep the sentences from running concurrently. This would effectively make the minimum sentence six years imprisonment, if he followed the official guidelines.

He quoted a statute (NJSA 2C:44:1d) that says that the presumption of imprisonment is not absolute, as it leaves “a residuum of power in the sentencing court not to imprison in those few cases where it would be entirely inappropriate to do so.” He continued by quoting a case law (NJ vs. Roth), that the residuum of power is to be exercised only in the narrow exception that “having regard to the character and condition of the defendant, [the court] is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.”

The judge then reviewing all the mitigating and aggravating factors, approving most of the mitigating factors put forth by the defense and denying most of the aggravating factors put forth by the prosecution. He then ruled that based on all the factor involved, it would be unconscionable for him to sentence jail time, which would be a minimum of six years.

“In this court's opinion, that is excessive, and would shock the conscience of the court if it had to impose it,” he said.

The judge also noted Rabbi Eisemann's unique character, pointed out that the crime was much less serious than other second-degree crimes, repeated that “there were substantial grounds tending to excuse or justify his conduct,” and added that Rabbi Eisemann was crucially needed at SCHI. After summing up all these factors, the judge wrote that the six-

year minimum prison term would be extremely excessive, and he therefore handed down a sentence of two-years probation, which would include a 60-day incarceration, and a \$250,000 fine.

After issuing the sentence, the judge spoke at length about the need for Rabbi Eisemann to return to SCHI. He said that despite the normal protocol of the Department of Education not to allow an offender to work at SCHI, he personally would recommend to the state to override their standard practice and allow him back.

### PROSECUTORS FILE APPEAL, PROMPTING DEFENSE TO FILE

Just days after the sentencing, the prosecutors filed an appeal. The

prosecutors asserted that the 60-day jail time, 2-year probation sentence was too lenient, and they wished for the appellate court to mandate the 12-year prison sentence they sought. In their briefs, they maintained that this case was not unique enough for the presumption of incarceration to be overcome, and that Rabbi Eisemann's character was not extraordinary.

Even though the defense team were perturbed by the guilty verdicts in the case, they were hesitant to appeal after receiving such a light sentence. However, the prosecutor's appeal cemented their need to appeal the convictions, so that they would have an upper hand while attempting to ward off the prosecutor's quest for a harsh sentence.

In subsequent briefs, the defense laid out eight reasons why the con-

victions must be vacated and why the case should be thrown out. The appeal stated that the charges were ridiculous, and that prosecutors knew that Rabbi Eisemann was innocent when they misled the jury to obtain a conviction. It also highlighted that the case against Rabbi Eisemann from the start was a fishing expedition that could just have well been carried out against any guiltless citizen.

The prosecutors asserted in their appeals brief that Rabbi Eisemann should have been given an extended prison term, and that he was not suited to have the exception that allowed for a probationary sentence to be applied to him. Prosecutors also cited the complimentary comments made by the judge at sentencing as basis to request that should their appeal be accepted, a new judge should

be assigned for resentencing, as “the judge's personal views about [the] defendant and case make clear that no impartial and fair resentencing could occur.”

After months of extensions between briefs and a half-year delay due to the coronavirus, a virtual hearing took place in October of this year, during which a panel of two appellate division judges heard oral arguments on the case and probed attorneys from both parties.

Last week, on December 31, they released their decision: to “affirm the convictions, but vacate and remand for resentencing before another judge.”

### THE APPELLATE DECISION

In a 49-page decision brief, Appellate Judges Carmen Alvarez and Thomas Summers touched on



the numerous points raised by the defense and attempted to deflect the reasoning presented. They addressed the defense's assertion that the same \$200,000 was charged as public funds in some counts and as private money when it came to money laundering by saying that "nothing in New Jersey law prohibits the State from charging inconsistent offenses." When addressing the need for a predicate crime for money laundering, they echoed the judge's sentiment that "an independent predicate offense is not necessary," and although here a specific predicate offense was listed – the

counts he was acquitted of – it still should not be overturned because "the trial court's instruction was not 'clearly incorrect'." Meaning, that it is not the court's job to identify a crime that Rabbi Eisemann had been concealing or facilitating for the money laundering charge, since the jury presumably concluded that there was some crime being committed, the jury's decision must stand, and be accepted blindly.

In addressing the prosecutor's appeal, they wrote that "a judge may not disregard the jury's findings, as expressed in their verdict," and that "the judge was not free to

## INTERVIEW WITH ATTORNEY LEE VARTAN

The *Yated* spoke with Attorney Lee Vartan, of CSG Law, who is heading Rabbi Eisemann's defense team.

*What is the timeline going forward?*

The resentencing hearing date will probably be set sometime this month, with the resentencing taking place presumably next month or the month after. The new judge will need some time to get up to speed on the case, and that could take a month or two.

*Will there be a new set of sentencing briefs?*

We will certainly seek to file supplemental briefs. Much time has passed since the Rabbi's original sentencing date, and there is a lot of new information; obviously we would want the opportunity to bring that new information to the court.

*Does an appeal to the New Jersey Supreme Court have to wait for sentencing, or can that start immediately?*

That can start—and is starting—right away.

*What is the process for bringing the case to the New Jersey Supreme Court?*

Unlike an appeal to the appellate division, which is as of right, an appeal to the Supreme Court is not an automatic right, and the Supreme Court has discretion as to whether they will hear the appeal. The first step in the process is to file a cert petition, which is due the first week of February. This is a brief to essentially convince the Supreme Court that there are significant issues that merit the Court's attention.

Then the Supreme Court will decide if they wish to hear the case. If they grant the petition, we would then file a merits brief containing our legal arguments, and we would have the opportunity to argue orally before the Court as well. If the Court denies the cert petition, that would mean that we have exhausted all our appellate opportunities in New Jersey state court.

*New Jersey Supreme Court only takes about five percent of cases presented. Is there anything about this case that you think may persuade them to grant certiorari and accept the case?*

The short answer is yes. I do not want to preview our legal arguments, but we believe we have very solid grounds for appeal. Take, for example, the sentencing decision. There is a New Jersey statute that quite clearly gives trial courts the ability to sentence even first- and second- degree offenders to probationary terms. If that statute is ever to apply, it applies here. The trial court made a robust record explaining why. The appellate division, however, chose to find different facts from the trial court, which it is not permitted to do.

*Would the fact that they assigned it to a new judge, which is practically unprecedented, be a reason for the Supreme Court to take the case?*

I think it will cause the Supreme Court to look more closely, but it will not be dispositive. What will be dispositive are the arguments we will put forth in our petition for certification. However, as we noted in our arguments before the appellate division, the trial court was fair to both sides. No one objectively reviewing the record would say that the trial court favored the prosecution or the defense. Rather, the trial court heard the testimony, read the briefs, and made its sentencing decision based on that very complete record. Its probationary sentence was justified—even the state's own witness called the Rabbi a "secular saint."

*From my knowledge of the case, it seems to me that there are factual mistakes in the appellate division's decision brief. Is that indeed the case?*

There is a glaring mistake. The appellate division claimed that the Rabbi owed money to SCHI. He did not. That was an argument long ago abandoned by the state. Instead, the state alleged that the rabbi owed money to the Foundation, which was the reason for the "money laundering" transaction. This goes to a very basic point: still today, the state cannot provide a clear and cogent explanation of what the rabbi was convicted of and why.



impose a probationary term based on his disagreement with the jury's verdict." They conclude by writing, "The State requests that we remand to a different judge for resentencing based on the original sentencing judge's clear bias and disagreement with the jury verdict. We grant the State's request because this judge's comments throughout the sentencing established that his disagreement with the verdict would inhibit him from imposing a sentence in accordance with the Code."

### "WHAT CAN WE DO TO HELP?" THE COMMUNITY'S REACTION

The decision was greeted with

shock throughout the Lakewood community. The community has rallied previously in support of Rabbi Eisemann, and his supporters are not ready to abandon the man who has never turned away a child in need.

Hundreds of thousands of dollars are needed to fund the continued legal efforts. A central platform is available with updates on the case, where members of the community can turn to for new information or to donate to the costly legal efforts. The phone hotline can be reached by calling 732.363.1011, and donations can be given at 732.813.1212. Donations can also be made online at [pidyonshvuyim.com](http://pidyonshvuyim.com). Checks can

be made out to C.Z.R. and mailed to 307 Dewey Avenue in Lakewood, NJ 08701.

In light of the decision, Rav Yitzchok Sorotzkin is set to give *chizuk* to the community at this *Motzoei Shabbos* on the Chayeinu hotline, at 712.832.5656, conference code 500#. *Tehillim* will be said at 9:15, followed by Rav Sorotzkin's *divrei chizuk* at 9:30.

The Eisemann family asked that the *Yated* express their *hakoras hatov* to everyone for standing with them throughout this ordeal, and for never stopping to *daven* and accrue *zechusim* on their behalf. They also request that people continue to have in mind Osher *ben* Chana Frumet in their *tefillas*.

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