R. v. Michael Gilfillan [1998] EWCA Crim 3466

[This version of the judgment has been prepared by: Dr Robert N Moles and Bibi Sangha Underlining where it occurs is for editorial emphasis]

Court of Appeal - 7 December 1998

R v Michael Aubrey Gilfillan

The Lord Chief Justice

In January 1994 John Purbrick died in Cardiff Royal Infirmary. The cause of his death was internal bleeding due to lacerations of the pancreas and intestinal mesentery. Gilfillan was charged with his murder and was convicted by a majority of 10 to 2. He was sentenced to life imprisonment. His appeal to this court was dismissed on in April 1995.

The incident occurred in and outside a block of flats in Cardiff. Gilfillan had lived in a flat there for two years previously. He is now nearly 36. At No 113 there lived a woman named Lynette Jones who had moved into the flat at the end of 1993, where she was later joined by Purbrick. The flats were on the first floor and the doors of the two flats opened on to a common landing.

Gilfillan had a habit of playing music in his flat very loudly and late into the night. This aggravated his neighbours and led to complaints and friction.

On 11 January 1994 Purbrick left his flat during the morning. He habitually drank to excess. That left Lynette Jones alone in flat 113. At about lunch time she heard the noise of a fight on the landing, including threats, but prudently remained in her flat.

The evidence at trial made plain that there was a fight between Gilfillan and Purbrick which began inside the block of flats and in all probability inside Gilfillan's flat. The fight continued downstairs and out into the street. In the course of the incident Gilfillan made a number of accusations, which included the accusation that Purbrick had kicked in the door of his flat and called him a nigger. Gilfillan was said to have said that he did not mind if he did 25 years for this offence.

There was evidence at the trial of very severe kicking of Purbrick outside the flat. One of the witnesses, Mr Fish, described four or five punches and four or five kicks, and added, *The kicks were as I would kick a football -- hard. There were kicks about the body. He was punched in the head*. Gilfillan admitted kicking Purbrick outside, but denied kicking him inside.

Purbrick was crushed against the spine and there was also rupture of a vein. One of the doctors said, *A great deal of force would be required to crush the pancreas against the spine. You see it in road accidents from the seat-belt. This would be a kick of some nature equal with the conversion of a rugby ball.* At trial the main issues were self-defence, and whether Gilfillan had the requisite intent to support a count of murder and provocation. It was clear on the evidence, and indeed not in issue, that the blow or blows which killed Purbrick had been

struck by Gilfillan, but there were issues as to whether the fatal blow or blows were struck inside or outside the building and whether they were struck, or might have been struck, in self-defence, and whether Gilfillan had been provoked.

Gilfillan did not seek to contend that he should be convicted not of murder but of manslaughter on the grounds of diminished responsibility:

"Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

"On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder."

"A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

It would seem that there were two reasons why reliance was not placed at the trial on this section of the Act. Gilfillan gave no instructions to his legal advisers which would have supported such a plea; nor did he make any disclosure to those who examined him medically which would have supported such a plea. There was no medical evidence in support of a defence.

Before trial the defence originally obtained a report from a Dr Keen, who gave a written report although there was a change of solicitors and this report was not available to the solicitors who represented Gilfillan at trial. The report gave no support to a defence of diminished responsibility.

The Crown obtained a report from Dr Tegwyn Williams, who reported in May 1994. He does not rule out the possibility of Gilfillan's responsibility having been diminished, but he understood that that defence was not being advanced and there is nothing in his report to support it. It now appears plain that, because of Gilfillan's instructions at the time of the trial and because of his failure to disclose matters which came to light later, the issue of diminished responsibility was not fully explored before the trial took place.

In April 1995, at the invitation of prison authorities, Gilfillan was examined again by Dr Tegwyn Williams. As a result of this later examination his view of Gilfillan's condition became somewhat different. In April 1996 Dr Williams wrote a letter in which he expressed the firm opinion based on information unavailable to him at the date of trial that, at the material time when he committed the offence of which he had been convicted, Gilfillan was suffering from a severe mental illness which would qualify as an abnormality of mind under the terms of the Homicide Act. He went on very properly to observe:

"Whilst of course a question of diminished responsibility is for the court to determine, had I been aware of these facts at the time of his trial I would have strongly supported the proposition that the abnormality of mind was such as to substantially diminish his responsibility for his actions."

That letter was written with the authority of a psychiatrist who at the time had had the care of Gilfillan for a matter of months.

Dr Williams elaborated those views in a report of July 1996. Dr Williams alluded to an aspect of Gilfillan's deluded state when he described how a belief which Gilfillan had originally entertained concerning a family named 'Mason' was exaggerated during the more extreme phases of Gilfillan's illness into a belief about conspiratorial behaviour on the part of Freemasons more generally.

The Commission invited a report from Dr Donovan, a consultant forensic psychiatrist. He wrote a lengthy report in January 1998, which covers the ground with considerable detail and care. Particularly significant is Dr Donovan's account of his interview with Gilfillan's parents who disclosed a history of delusion and hallucination on the part of Gilfillan which, however, they had thought that in fairness to him they should not reveal against his wishes. They also produced a diary in Gilfillan's handwriting, not seen or available at the time of trial, which strongly reinforced the view that Gilfillan was suffering from delusions. There is, for example, one entry which says:

"I am getting a lot of bad vibes from this gadget which is reading my thoughts. Firstly, I thought there was a telepathy mind reading. Alas I was told it is a gadget."

This refers to a belief that Gilfillan had (and still has) that in some way a gadget had been inserted into his brain which was used by others to control his thinking and his behaviour. Dr Donovan's conclusion, expressed at the end of his report, was to the effect that Gilfillan suffered from paranoid schizophrenia, although his symptoms had to some extent abated, and he considered that he would need continuing hospital treatment for the foreseeable future. He summarised his view as being that Gilfillan had a history of mental illness of long duration which could not be explained totally by his use of illicit drugs.

A report was obtained from a consultant, Dr Hunter, who, in a report of June 1998, expressed the conclusion that Gilfillan clearly suffers from the mental illness of schizophrenia and in his view was suffering similarly at the time of the offence. We have a more recent report from Dr Hunter, which expresses complete agreement with the views of Dr Williams. Dr Williams for his part has written a further report of November 1998. The conclusion in that report, consistent with his report since 1996, is to the effect that Gilfillan

"has for the last five years, and probably longer, suffered with the mental illness of schizophrenia, characterised in his case by hallucinations (hearing voices), delusions (fixed false beliefs unamenable to reason), thought insertion (believing thoughts are being placed in your head by an external source), thought withdrawal (believing your thoughts are being taken away), thought broadcasting (believing your thoughts are being broadcasted to those about you), ideas of reference (believing everyday situations have particular reference to you) and mood disturbance characterised by increased irritability."

The first question which arises on this appeal concerns the reception of new evidence. Section 23 of the Criminal Appeal Act 1968 so far as relevant provides:

"(1) For the purposes of an appeal under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice
(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to

(a) whether the evidence appears to the Court to be capable of belief;
(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

So far as the four matters which the court is required to consider are concerned, we are quite satisfied that the evidence of Dr Williams appears to the court to be capable of belief. It appears to the court that his evidence may afford a ground for allowing the appeal. His evidence would, unquestionably have been admissible in the proceedings from which the appeal lies, and it appears to us that there is a reasonable explanation for the failure to adduce the evidence at the trial. That explanation is to be found in the very mental condition of Gilfillan which gives rise to the ground of the appeal.

A rational person with ordinary insight would no doubt have made full disclosure of his mental condition as apparent to him both to his medical and to his legal advisers, and sought advice as to the availability of any relevant defences. The evidence, however, shows that this appellant was fearful of the possible consequences of a finding that he was mentally ill and, more importantly, did not consider that he was. He accordingly concealed his mental condition from those who examined him and prevailed on his parents similarly to make no relevant disclosure. The result is that the medical reports did not alert those acting for Gilfillan to the possible relevance of section 2, and no reliance was placed on that defence.

Even if, however, it should be found that there is no reasonable explanation for the failure to adduce the evidence at the proceedings, our duty is nonetheless to have regard to what we consider necessary or expedient in the interests of justice. We consider that in all the circumstances we certainly should receive this evidence which is tendered on behalf of Gilfillan from Dr Williams, and we have heard his oral evidence. It should be made plain that that course has not been opposed by the Crown.

Dr Williams told us that his original examination concerned Gilfillan's fitness to plead. At that stage Gilfillan made no complaints of abnormal feelings. The doctor did not detect signs or symptoms of mental illness. He was aware of a previous history of admissions to hospital on occasions, but attributed those to the drug abuse of which Gilfillan had undoubtedly been guilty. When he again saw him in April 1995 at Wormwood Scrubs he found to his surprise at the end of a long and difficult interview that Gilfillan entertained the notion of a gadget in his brain; that he heard voices; that he thought others were reading his thoughts; and that others were controlling his behaviour. He considered Gilfillan to be floridly mentally ill. He explored why this question had not come to light before, and the answers given by Gilfillan were that he had discussed it with others and was told that he sounded mad and that he had been fearful of what would happen if he were to mention these matters at trial. He was also sceptical as to the ability of psychiatrists to help him.

In November 1995 Gilfillan was transferred to the Caswell Clinic under the care of Dr Williams. It is plain that he was capable on occasion, and superficially, of presenting a favourable impression. For example, he was able to play chess. He did however betray the same symptoms as had been found in April. He complained of hearing voices; he did not see any need for medication; and it was plain that the symptoms from which he suffered had on

occasion caused him acute distress. He had on occasion banged his head against the wall until it bled and had tried to dig out the gadget which he believe to be embedded in his brain. The doctors tried hard and patiently to wean him away from these delusions and to accept the need for medication, and had a measure of success. He became less troubled, but still apparently to this day thinks that the gadget remains in place. His symptoms wax and wane. Very recently he has suffered something of a relapse.

Dr Williams made a diagnosis shortly after transfer and had no doubt, as he has stated in his reports that Gilfillan suffered from paranoid schizophrenia. The doctor describes this as a severe mental illness and repeated in his oral evidence the symptoms described at some of length in his written reports. He also explains that, while in 1994 he considered Gilfillan's admissions to hospital to be attributable to his drug abuse, he is now satisfied that that is by no means the full explanation of Gilfillan's state both now and at the time of the killing.

He describes the effect of this illness as rendering Gilfillan more easily irritated, more impulsive, as impairing his judgment, and as causing him to play music longer and louder. That is a fact of some relevance in the context of this offence. In short, the doctor concluded that the mental illness was directly related to the commission of the offence and could have affected Gilfillan's response to what he saw as provocation. He describes Gilfillan as a man without insight, not believing that he is mentally disordered, suspicious, and still with an impaired capacity to make judgments. He describes the sense of persecution and of being under constant surveillance as a characteristic delusion of those suffering from this illness.

Those findings are not challenged on behalf of the Crown and are accepted with impressive unanimity by the other doctors who have had occasion recently to consider this matter. It accordingly appears to us that had the material which is now before us been available and presented to the jury at the trial, it is at the very least probable that the jury would have concluded, and properly concluded, that the responsibility of this appellant for his acts and omissions in doing and being a party to the killing were substantially impaired by an abnormality of mind which resulted from acute mental illness.

That has caused us to consider, in the light of the medical recommendations, the course which should now be followed. That again is the subject of agreement among the doctors. Dr Williams, speaking for a consensus of medical opinion, tells us that the condition from which Gilfillan suffers is amenable to treatment and that although relapses occur from time to time, Gilfillan has got better and does respond to treatment. He is in no doubt that, because of mental illness of the nature and degree described, Gilfillan is a suitable subject of an order under the Mental Health Act 1983. In his judgment, which we accept, Gilfillan fulfils all the criteria for making such an order.

He does, however, make plain his opinion, which again we share, that it is in all the circumstances desirable that a restriction order be made under section 41 of the Act without limit of time. His reason for making that recommendation is that such an order allows external audit of the decision to release Gilfillan, such audit focusing on issues of public safety. It also has the advantage of allowing statutory support and supervision of Gilfillan by the mental health and social services authorities, again directed towards protection of the public. The regime which follows release where orders are made under these sections allows close control of a patient and calls for a measure of co-operation on the part of the patient which may be enforced. Dr Williams has made plain his belief that Gilfillan is not now well enough to be discharged into the community, and is not likely to be well enough in the

foreseeable future, although he does consider that release is likely at some stage in the future, whenever that may be. Gilfillan is currently a patient at the Caswell Clinic, and the bed which he currently occupies is available for his accommodation.

The Crown has not challenged in any radical way the evidence of Dr Williams but has, very properly, been at pains to draw from the doctor a clear expression of opinion that Gilfillan remains at present a danger to the public and should not be released until he can safely be released.

Having decided for reasons already indicated to receive the evidence of Dr Williams, and having accepted it, we consider that the appropriate course is to allow the appeal, quash the conviction of murder, record a verdict of not guilty of murder, but substitute a verdict of guilty of manslaughter on grounds of diminished responsibility. We make an order under section 37 of the Mental Health Act 1983 that Gilfillan be confined at the Caswell Clinic, Bridgend, where a bed is available for him, and we make a restriction order under section 41 of the Mental Health Act without limit of time.

http://netk.net.au/UK/Gilfillan.asp