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TRANSCRIPT OF "FILE ON 4" – "LOCKED UP IN LOCKDOWN"

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EDITOR: Hugh Levinson

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MUSIC

GRADY: When the pandemic hit the UK, Michael was nineteen years old and in prison.

MICHAEL: The word got round quite quick. At this time, I was on the main wing, so a lot of people had TVs and newspapers and whatnot. And we started seeing stuff about coronavirus, Covid-19, and no one really understood what it was.

GRADY: Michael hadn't been convicted. He was on remand - in jail awaiting trial. For legal reasons, we can't tell you what charges he was facing, but he'd been there for six months when he first heard about the virus.

MICHAEL: Obviously, the prison staff, the officers on the wing, they sort of was the ones telling people about it, saying, 'You're all going to get it, it's just when you get it and how bad you get it,' because I mean, we were all in sort of a confined space.

GRADY: Prison governors like Andrea Albutt were planning for the worst.

ALBUTT: You're kind of watching the news, and you see it starting to gain momentum and then the conversations started to become more and more important and more to the forefront. We realised, yeah, we've really got to get ourselves organised for this, because it was gaining such momentum. You know, Public Health England was saying, in the initial advice, that we could have 3,000 prisoner deaths from Covid-19.

GRADY: Prisons were the perfect breeding ground for the virus. Half were overcrowded. Many cells meant for one were shared by two. And some jails had dormitories, with up to 15 people in one room. Andrea Albutt is Head of the Prison Governors Association in England and Wales. She says experts warned that, without drastic action, the virus would rip through the prison population.

ALBUTT: The risk that prison governors were managing, just leading up to the pandemic, was massive anyway. We had record high safety statistics of violence, of self-harm, of suicide and governors were managing that risk. So, I think the concern was, how are we going to, in a closed environment, in an overcrowded system, how are we going to manage the impact of Covid - how are we going to do it?

GRADY: And with family, lawyers, prison officers, chaplains and volunteers coming in and out of prison every day, it wasn't long before the virus started to move through Michael's wing.

MICHAEL: It started off on the first floor and then it just sort of started doing a zigzag and then went all the way up to the fourth floor, and then started going from cell 1, 2, 3, 4, 5,6, 7 just down. So, everyone was sort of panicking a little bit, like, hold on, they're not letting us out for fresh air, but then they're keeping us in here and people on the landing have got it, so everyone was sort of thinking that someone was going to die.

MUSIC

GRADY: So far, 23 prisoners in England and Wales have died with Covid - nowhere near the 3,000 deaths predicted. It's a remarkable achievement - an unsung victory in the pandemic. But that preservation of life has come at a cost. To keep

GRADY cont: people safe, the whole justice system locked down - not only the prisons, but the courts too. Michael was expecting to be tried before a judge and jury in the summer, but his trial and hundreds of others were postponed. That's left remand prisoners stuck in jail, during a pandemic, with no idea when their trial might be. Seven months on, the justice system still hasn't recovered. This is the story of what happened when criminal justice got locked down - how witnesses and victims of crime are facing long waits for justice, and how some prisoners are choosing to plead guilty to things they say they didn't do, just to escape being locked up in lockdown.

ROSS: The current situation, the backlog, represents a fundamental threat to the rule of law and our commitment to justice. I would go as far as to say it represents an existential threat to our system of justice and public confidence in it.

ANNOUNCEMENT OVER LOUDSPEAKER

ANNOUNCER: For the safety of other court users, please avoid contact with others and keep at least two metres apart. You must wear a face covering in all public areas of this building. Thank you.

GRADY: These days, magistrates' courts are the only place where Emma Lewis can meet her clients face to face. Between cases, she ducks into an office to tell us how the lockdown in London changed her work as a criminal solicitor.

LEWIS: Almost immediately, the prisons shut down, which meant that anybody who was waiting to stand trial or waiting to be sentenced couldn't have any access to legal advice. All of the visits that had been booked were cancelled. And then effectively, the courts just stopped overnight and any trial dates that had been set disappeared. Any ongoing trials were halted in the middle of the trial and adjourned indefinitely, so you find this backlog almost immediately building up on the first day of the lockdown.

GRADY: So how were you able to take instruction from your clients if you weren't able to get into the prisons? How were you managing?

LEWIS: I think the long and short of it is that we aren't managing. I had a gentleman who was remanded in custody last week. I'm looking at a visit for 12 weeks' time, so that's 12 weeks to see the defendant for the first opportunity, and that's over a video link for one hour to take instructions, by which point he will have already appeared in court for his plea hearing.

GRADY: So, hang on, people will be going to court, being asked to plead guilty or not guilty, and they will not have been able to talk to their solicitor before that hearing?

LEWIS: Exactly. Often it's a case of explaining to the court the situation and asking for the case effectively to be adjourned. So effectively, you're just pushing cases off for no real good reason other than to be able to have one fruitful conversation with your clients.

GRADY: The criminal justice system is different in Scotland and Northern Ireland, so mostly in this programme we are talking about England and Wales. James Mulholland QC is chair of their Criminal Bar Association. He says there's another reason cases were being postponed. Even when courts did start to reopen, they struggled to become Covid secure.

MULHOLLAND: The existing court estate is filled with buildings that aren't really ready or capable of dealing with the social distancing required in this virus. So, you are having a situation where perhaps two defendants are in the courtroom with the jury and two defendants are in a separate courtroom watching proceedings on video link until it becomes relevant, and they are then transferred to the courtroom number one, as it were, to deal with their evidence or cross-examination, matters of that nature. So, what you're finding is that one trial may take up two to three courtrooms. The real problem is as you get more and more defendants. Currently, there are in the region of 130 cases where you have seven defendants or more, and these are wandering nomads throughout the system, they just don't have a home, because there's no court realistically currently that can try seven plus defendants who are in custody.

GRADY: Many of these 'nomad' cases involve defendants on remand. These are people who've been refused bail and so have to wait for their trial in prison. Usually this is to protect the public or to make sure defendants don't disappear or try to influence witnesses. Until they can be tried, people on remand are stuck in prison where, as in the outside world, the pandemic has forced big changes to daily life.

MUSIC

MICHAEL: It was, like, literally like an overnight change. The next morning, everyone was sort of expecting to be out at 9 o'clock for social and domestics, and no-one's door opened. Everyone was on the bells asking what's going on, why have we not come out?

GRADY: In his prison cell in the south of England, Michael soon felt the impact of Covid restrictions.

MICHAEL: So, then obviously you had prison officers coming round sort of saying, 'We're on lockdown, we're not allowed to bring everyone out,' explaining sort of what measures they're going to be taking for this corona. And yeah, I think a few days after that, they sort of said, 'What we're going to do is, we're going to bring fifteen people out at a time to go and shower, use the phone, use the kiosk and just get some exercise on the wing,' sort of thing.

GRADY: So, you went from being able to move around the wing quite a lot to just suddenly being in your cell?

MICHAEL: Yeah. 23 hours and 45 minute lockdown every day.

GRADY: So only 15 minutes outside your cell each day?

MICHAEL: Only 15 minutes to go and shower, make a phone call if you didn't have one of the phones in your cell, order your canteen and order your menu. And obviously, if they're taking quite long to get down to you to unlock you, then it's cutting into your time out of your cell as well, so ...

GRADY: So, it might not even be 15 minutes?

MICHAEL: It might not even be 15 minutes, you might end up getting 10 minutes.

GRADY: What about fresh air? Did you get out for some exercise in the exercise yard?

MICHAEL: During the lockdown, no, it was, like, rare. I've fully gone a whole week without being allowed out. It was all cooped up. Obviously, we've got a little window in the cell, but you can't put your head out of the window, so you can just open it and sort of stand next to it for some fresh air.

GRADY: Is that what you did? You just opened the window just for a bit of breeze?

MICHAEL: Yeah, just some fresh air in the cell really.

ALBUTT: I think it would be fair to say that they would be locked up virtually all of the day and they had no access to their families. We stopped visits.

GRADY: That's the Chair of the Prison Governors Association, Andrea Albutt. Faced with predictions of three thousand deaths, her members were told to separate inmates into three groups known as cohorts. Anyone entering was to go into quarantine for 14 days. Anyone showing symptoms should be placed in a protective unit, and there had to be separate accommodation for those at high risk from the virus. The problem was, they just didn't have the space.

ALBUTT: We were saying we couldn't do the cohorting without reducing the population. We saw the Public Health advice to government around prisons, and they stated that we should reduce the prison population by 15,000. And a policy came out where we could have end of custody early release. The Government announced this policy, claiming that they would release four thousand prisoners. That was never going to be the case.

GRADY: Why not?

ALBUTT: Because the rules around who could and who could not be released early were so stringent that virtually all prisoners weren't eligible, and that's why it didn't work.

GRADY: So far, 262 people have qualified for the early release scheme. But prisons have made space for cohorting through a mixture of temporary buildings and a drop in the prison population.

ALBUTT: Luckily, because we had such a sluggish court system, because it closed down, but we had to continue to release prisoners at the end of their sentence, so the people coming into prison, you know, virtually stopped, but we continued to release people, so that was the way that the prison population was reduced.

GRADY: It also helped that judges were directed to avoid imposing jail terms where possible and to offer 'Covid credit' - shorter sentences in recognition of the tough conditions in prisons, with extra credit for guilty pleas. But that was just for convicted prisoners. Unconvicted prisoners, like Michael - still legally innocent, still stuck on remand until their trial - didn't get any Covid credit and they had no idea when their cases might be heard.

MICHAEL: Once the pandemic hit, my solicitor did say, 'Be prepared for it to be maybe 2022, because they're going to have a huge backlog. Some of the more serious cases are going to get dealt with first and you're going to get pushed back,' sort of thing.

GRADY: What Michael didn't know was that the Covid backlog was only part of the problem. Until last month, His Honour Peter Ross was a circuit judge, hearing criminal cases at Oxford Crown Court. He says the backlog in trials built up long before the pandemic.

ROSS: We went into the lockdown when Covid hit with already a backlog of 37,000 cases. That backlog was created when judges were on holiday,

ROSS cont: part time judges were not brought in to cover the work. And on other occasions, when we were actually at work, we were not permitted to sit. We had to spend time in our rooms. But in the meantime, that backlog just simply ticked upwards and upwards.

GRADY: The Ministry of Justice says sitting hours were cut to make Crown Courts more efficient as they had fewer cases to deal with. But this meant that, when the pandemic hit, there was no slack in the system. James Mulholland QC says it didn't help that the MOJ had mothballed or sold off some court buildings.

MULHOLLAND: The Government has sold off, certainly in the last decade, somewhere in the region of 41% of the existing criminal court estate, magistrates' courts and Crown Courts with secure docks, so those courtrooms would clearly be able to do Crown Court trials, and they would also be able to do Crown Court trials certainly with more than one defendant, depending upon their size, so they would have undoubtedly provided a great deal of assistance in the current pandemic.

GRADY: Would any of those buildings that were sold off have been useful now?

MULHOLLAND: Well, many of those courtrooms, one would anticipate, would have been able to deal with trials of more than one defendant, even with social distancing. You know, you're talking about magistrates' courts and Crown Courts being sold off, the last being Blackfriars Crown Court last year. So of course, these are courtrooms equipped to deal with criminal cases and courtrooms equipped to deal with those in custody, and consequently, they would have easily reduced the pressures currently upon the system.

GRADY: In the first three months of the pandemic, the backlog grew by a thousand cases every month and it now stands at 48,713. Some of those affected by court delays are under-18s – legally children, some as young as 14. A third of children in custody are on remand – an all-time high - and most of those won't receive a custodial sentence. But, along with convicted juvenile offenders, many have spent months alone in their cells.

GRADY: In adult prisons, even when visits resumed, many preferred not to see their family if they couldn't get close. And in Michael's jail, as in many others, inmates remained locked in their cells for all but 15 minutes a day. But Michael was eventually allowed out of his cell, in emergencies, to do his prison job as the violence reduction officer - a kind of mental health first-aider who calms down prisoners in a crisis. He couldn't enter other cells, but he could talk to inmates through their door, and this brought him into contact with people who were struggling with the new regime.

MICHAEL: People were just losing their mind. I mean, people were cutting themselves, self-harming and people were literally smashing up their cell or the toilet, causing floods, everything. We used to have to sort of talk them out of doing whatever they were going to do. Yeah, nah, it wasn't nice at all.

GRADY: And was that happening more during the hard lockdown?

MICHAEL: Yeah, yeah, quite a lot more people would come out of their cell and jump on the netting and someone even tried to hang themselves from the landing and we had to run out and sort of grab him and yeah, because 23 and 45 minutes, you know, you're going to lose your mind eventually.

MUSIC

GRADY: Prison officers say they've seen a drop in violence during the pandemic - that prisons have become calmer places, free from bullying. But in women's jails, self-harm has increased. And, in the final week of the strictest Covid regime, five inmates killed themselves. Last week, the Chief Inspector of Prisons for England and Wales said keeping people locked up for 23 hours a day is dangerous and that prisoners were losing hope.

FERRIS: Some trials are now not being set for until 2021, 2022 and even 2023, and defendants are being subject to repeated extensions of their time in custody, and some effectively being held indefinitely, with no fixed date for their trial.

GRADY: Griff Ferris works for the international criminal justice watchdog, Fair Trials. They did a survey to test how the legal safeguard, designed to prevent detention without trial, was holding up during the pandemic. These custody time limits mean that if someone in prison on remand can't be tried within a set period, prosecutors have to ask a judge for a kind of deadline extension, so the prisoner stays behind bars until their case is heard. Sometimes that extension benefits the defence - it can take time, for example, to process evidence from mobile phones. But the idea is to protect the unconvicted from long stints on remand.

FERRIS: We asked defence solicitors, barristers, what they were finding behind the scenes in the criminal justice system during the pandemic. One person said that, quite frankly, custody time limits may as well not exist. They're extended as a matter of routine in our local courts and any argument against them is met with incredulity that someone has dared advance that argument.

GRADY: But then, in July, a judge at Woolwich Crown Court did something unusual. His Honour Judge Keith Raynor ordered that a suspected drug dealer be released from prison after his trial was delayed for the third time. Judge Raynor said the shortage of courtrooms wasn't a good enough excuse to keep him in jail. In September, the Government announced plans to extend the custody time limit from six to eight months. A few days later, prosecutors asked Judge Raynor to extend another man's time on remand - a 19-year-old, who'd already been in prison for ten months because of delays. Griff Ferris from the criminal justice watchdog, Fair Trials.

FERRIS: Judge Raynor gave an incredibly damning indictment of the Government's response. He was heavily critical of the measures that the Government had taken to deal with the case backlogs and ultimately said that it just wasn't good enough and that defendants shouldn't be made to suffer as a result of this Government failure. And so he refused to grant an extended custody time limit and ultimately released them.

GRADY: In Oxford, His Honour Judge Peter Ross was preparing for retirement when he read his colleague's judgement.

ROSS: I think it was absolutely right for him to speak out in the way that he did. He was just saying, 'I am applying the law, and in my judgement, this is no longer an unusual or exceptional situation which justifies extending the custody time limits.' Justice delayed is justice denied. The Ministry of Justice could and should have taken much more sweeping measures to ensure trials could get on.

GRADY: If we go back to the weeks before lockdown, what kinds of preparations were being made in the court system to get it ready, to make it Covid secure?

ROSS: If there were arrangements, no one told us. I couldn't see any arrangements.

GRADY: And what about on the eve of the shutdown, I mean, was there a plan to keep the courts open?

ROSS: None whatsoever, and there was no communication with us. There was no preparation for using other buildings. And remember, there had been court buildings available before they sold them.

GRADY: The Ministry of Justice say they're investing £80 million in courts, recruiting 1,600 new staff and opening 16 Nightingale Courts by the end of October. But Judge Raynor questioned if that was enough and his judgement asked why English and Welsh courts didn't adopt measures like those used in South Korea, Spain and Italy, where courts had screening stations, temperature checks, face masks and hand gel. James Mulholland QC agrees there was no clear plan to keep the courts open and says the system was slow to respond to the pandemic.

MULHOLLAND: If you take, for example, the fact that high street shops were opening as soon as possible with plexiglass in place, it seems to me that the courts only got their idea as to plexiglass from shops in the high street. I and others said to them, you need to plan ahead, six months ahead, get every court available open, get more courts, get more judges ready to deal with the inevitable backlog upon backlog, because of course they knew in advance of the lockdown that there was a horrendous backlog in any event.

GRADY: So, you're saying that seven months after lockdown, there are Crown Courts in England and Wales that still do not have plexiglass fitted?

MULHOLLAND: There are, I think, somewhere in the region of 490 courtrooms in the existing court estate, and if we are lucky - and that's emphasis on that word - we will only have 250 installed with plexiglass by the end of October.

GRADY: When Judge Raynor criticised the justice system's response to the pandemic, senior judges reacted. He'd been due to hear another application to extend a custody time limit. That case was transferred to another judge. At 4.40 the following morning, Judge Raynor sent an email to colleagues saying he'd felt 'improper and undue pressure' from a senior judge to keep the 19-year-old defendant in prison. He's since made a formal complaint. For many in the legal world, the case has worrying implications for the independence of the judiciary. Retired judge Peter Ross.

ROSS: The removal of any judge from a case must be a cause for real concern. To have a judge removed from a case, to have interference from senior judges in the work of a Crown Court judge makes me feel queasy.

GRADY: Defendants are not supposed to spend more time on remand than they would serve if found guilty, and judges can and do release prisoners to avoid that. But every lawyer we've spoken to for this programme has come across cases where people faced such long court delays that, by the time their trial date comes round, they would have served any sentence that might be imposed. And they say that, combined with tough prison conditions, is influencing how defendants plead. Criminal solicitor Emma Lewis.

LEWIS: Ultimately as long as they have the mental capacity and we have advised them as to our position of pleading not guilty, then it's their decision and we can't go behind that. We can only kind of urge them to do the right thing and to plead not guilty.

GRADY: Have you had a case that you could tell us about where that's happened?

LEWIS: It has, and obviously I can't name any names or any of the detail of it, but I had somebody who was charged with assault, pleaded not guilty originally. It was sent to the Crown Court. He maintained a not guilty plea up until the point where we were actually able to have our first visit - I had a video link with him. And on the video link he said, 'Oh, I've been wanting to tell you for a while, but I want to change my plea, I want to plead guilty. I know what sentence I'm looking at and I've got too long a wait for the trial.' He decided to plead guilty. Mitigation was put forward to the court about his personal circumstances. He received the lesser sentence, which meant that he walked home and afterwards he smiled and told me that he told me so.

GRADY: Northern Ireland also has a backlog of criminal trials, although its Department of Justice says it is now catching up. Despite that, Belfast solicitor Paul Dougan is familiar with the dilemma long waits for trial create.

DOUGAN: We had a case just at the start of lockdown, it was a joint enterprise case, and he was being portrayed as being the ringleader of that particular assault. And we never believed that he was, he was emphatic from the outset that he wasn't. He had spent a significant period of time on remand and we were encouraging him to sit it out and to wait for his trial, because we thought that the prosecution would never have been in a position to prove the case. And he just said, 'I want to go home. I want to go home to my family. I want this over and done with.' At some point, he may look back and think, I really wish I had contested that. But in that particular case, I would say he would not have his trial on at least until February.

ROSS: Well, defendants can do the sums.

GRADY: Retired judge, Peter Ross.

ROSS: Their lawyers tell them what the likely sentence is. They can do the sums. And if a defendant thinks he will serve longer on remand than he

EVERS: Yes, so this is Quays theatre space. This is where the stalls would be ...

GRADY: The Government has created extra Nightingale Courts to help clear the backlog. I visited one at the Lowry Theatre in Salford. It can only hear trials where the defendant is on bail. The idea is that frees up other courts for defendants on remand. Trevor Evers from the theatre showed me around.

So, this is one of the smaller theatres here at the Lowry. So, I can see right in front of me there's the stage, the curtains and I guess where the actors would normally be, there's the crest of the Ministry of Justice. So, this is the dock?

EVERS: That's true, that's where the sound desk is often in a normal show in here, but all of this space here is also sort of stall seating, and then we have individual jury positions here to our left and then public seating in the circle and upper circle above.

GRADY: And then there's a big desk up here on the stage. Who's that for?

EVERS: So that would be for the judge, yeah, so they'll come through from the wing.

GRADY: Oh wow, so the judge is literally centre-stage.

EVERS: And very separate from the rest of them.

GRADY: Gosh, it's very different. I've actually been to this theatre to see a show and this is completely different from how it normally looks. How does it feel for you coming in?

EVERS: It's very different, yeah. We had Opera North in here the week or so just before the building was forced to close, so from opera as its last use to courts as its next use is quite a change.

GRADY: To a real-life legal drama.

EVERS: Yeah, indeed.

GRADY: The Ministry of Justice say they've kept the justice system moving to 'a world-leading degree' during the pandemic – 'accelerating the use of technology, prioritising urgent cases like domestic abuse and child protection, while safely resuming jury trials.' They say magistrates' court backlogs are falling and more than 250 Crown Court rooms will reopen by the end of this month. I asked retired judge Peter Ross if this was enough.

ROSS: Well, if the Government can point to reduction of the backlog by the creation of these courts, then they'll be right. But I suspect they can't.

GRADY: Some people listening might say, we're talking about prisoners on remand who are accused of very serious offences. Yes, they're having to wait longer for a trial, but we're all facing restrictions in a pandemic, you know, it's just tough. What would you say to those people?

ROSS: Well, justice is about ensuring that people are tried as soon as possible, that they don't languish unnecessarily for months and years in custody as happens, for instance, in totalitarian states. It recognises that witnesses and victims have a right, an absolute right to have their cases heard quickly so that they do not live with the consequences of a crime that has been committed upon them, and months, if not years, of waiting to relive what are traumatic events. Now imagine you are an elderly victim of a burglary and you know that your defendant has pleaded not guilty, is on bail and is not likely to be tried until 2022. Already, the effect of crime on the elderly is life shortening. Add into that the worry, the anxiety, frankly the terror of having to relive an event such as a burglary where they confronted the burglar - for the elderly that is simply dreadful.

MUSIC

GRADY: So how can the Government clear the backlog and make sure justice is done in a timely way? The Lord Chief Justice has called for 'blue sky thinking' and even floated the idea of using fewer jurors, which would be the biggest change to trials since World War Two. But retired judge Peter Ross goes further.

ROSS: I'm afraid someone has to look at the way in which we do cases. Should every trial in the Crown Court be heard by a judge and jury? I know there'll be howls of outrage if I were to say that we should look at trying some cases in the Crown Court without a jury - say a judge and two magistrates.

GRADY: Is that really how bad the backlog is? I mean, we're in a bad situation if you're facing a choice like that?

ROSS: We are in a terrible situation. The current situation, the backlog represents a fundamental threat to the rule of law and our commitment to justice. I would go as far as to say it represents an existential threat to our system of justice and public confidence in it.