



IPCA

Independent Police
Conduct Authority

Mana Whanonga Pirihiimana Motuhake

Unlawful arrest in Rotorua

Summary of the Incident

1. On 18 November 2019, Mr X was riding his bicycle, without a helmet, on Arawa Street in Rotorua. Officers who were passing noticed Mr X and stopped to talk to him.
2. Mr X refused to give his details to the officer and became abusive. Police told Mr X that he needed to wear a helmet if he was riding his bicycle, otherwise he would need to walk.
3. As the officers were getting back into the Police car, Mr X yelled abuse at them and was arrested for disorderly behaviour. He was also charged with resisting arrest. Police later withdrew both charges.

Issues examined by the Authority

- Issue 1:** Was Officer A legally justified in arresting Mr X?
- Issue 2:** Was the use of force against Mr X during his arrest justified?
- Issue 3:** Was Mr X's care while in custody appropriate?

The Authority's Findings

4. The Authority found Mr X's arrest for disorderly behaviour was unlawful.
5. We also concluded that:
 - 1) The use of force against Mr X was not justified; and
 - 2) Mr X should have been seen by a doctor while in Police custody.

Analysis of the Issues

ISSUE 1: WAS OFFICER A LEGALLY JUSTIFIED IN ARRESTING MR X?

6. Section 4 of the Summary Offences Act 1981 says it is an offence to behave “*in an offensive or disorderly manner*” in public or use words that threaten, alarm, insult or offend a person.

Mr X’s account

7. Mr X says he was near a bus stop in Rotorua. He was riding his bicycle and although he had his helmet with him, he had forgotten to put it on. He was approached by three Police officers who Mr X knew from previous dealings. Mr X says one of the officers said that he should learn to keep his mouth shut. When Mr X replied, “*you should shut your mouth*”, he was arrested for disorderly behaviour.
8. Mr X believes that the officers do not like him. He says he had been arrested by one of the officers on an earlier occasion for disorderly behaviour, which had been resolved with a pre-charge warning.

Officer A’s account

9. Officer A says he was with two other staff driving on Arawa Street in Rotorua. Officer B noticed a man (Mr X) riding a bicycle without a helmet outside the bus stop. Officer B said they should stop to chat to him about not wearing his helmet.
10. Officer A recognized Mr X but could not recall his name. He knew that Mr X had a history of abusive, aggressive, and belligerent behaviour.
11. Officer A told Mr X that he was only stopping him because he needed to put his helmet on. When Officer A asked who he was, Mr X replied that Police were harassing him. He was again asked for his name and Mr X replied that the last time he spoke to Police he was arrested for no reason.
12. Officer A says he told Mr X to walk off and warned him that if he continued his behaviour he would be arrested. As Officer A turned away from Mr X and walked back towards the Police car, he heard Mr X yell out repeatedly, telling him to “*piss off*” and to stop harassing people. Mr X was being quite animated, waving his arms around.
13. Officer A says he took into account what the people who were standing around would think of their actions and said he thought about a poster in the Police station that says: “*see something, do something*”. He decided that he needed to do something about Mr X’s behaviour and so arrested him for disorderly behaviour.
14. When interviewed, Officer A could not remember how many other members of the public were present but said the area is used by a wide range of people including children, the elderly, and tourists.

15. Officer A says he was concerned that if did nothing, members of the public may become Mr X's target. He was also concerned about the public perception if he left without taking any action. He says he believed Mr X's behaviour would stop when he thought Police were leaving but it did not. He also stated that a previous Area Commander had an opinion that people who do not wear helmets are burglars and need to be spoken to.
16. Officer A says he was satisfied that Mr X's behaviour was disorderly because Mr X was loud, swearing, agitated and abusive, and there were members of the public around who could have seen or heard it.

Officer B's account

17. Officer B says he was the passenger in a Police vehicle, being driven by Officer C. Officer A was also present.
18. As they passed the main bus stop on Arawa Street, he noticed Mr X riding his bicycle on the footpath. He knew Mr X but couldn't recall his name. He saw that Mr X had a helmet hanging from the handlebars. He recalls there were "quite a few" other people around.
19. Officer B knows Mr X from several previous interactions with him. He described him as anti-Police, belligerent, uncooperative and obstructive.
20. Officer B got out of the car with Officer A and spoke to Mr X. He told Mr X that he had stopped him because he needed to put the helmet on his head, not on the handlebars. He says he was calm and professional when speaking with Mr X. He says Mr X instantly became hostile and obstructive and said that Police were harassing him. Officer B says members of the public could hear Mr X verbally abusing Police.
21. After a brief time, the officers warned Mr X for his behaviour and told him to put his helmet on and move away.
22. As the officers moved towards their car to leave, Officer B was concerned that Mr X's behaviour would interfere with the members of the public who were nearby. He says some of them were telling Mr X to stop swearing at Police.
23. Officer B decided that members of the public were watching Mr X being uncooperative, impolite, and obstructive and he believed he needed to do something about it. He heard Officer A tell Mr X he was under arrest. Officer B didn't hear what he had been arrested for but believed disorderly behaviour was the most appropriate reason.
24. Officer B says Mr X's behaviour was disorderly because he was in a public place with lots of members of public present. He was swearing at and abusing Police and his posture was aggressive and threatening.
25. Officer B says that Mr X was focused on abusing the officers present and he did not recall any attempt by Mr X to engage with other members of the public present.

Officer C

26. Officer C was in the backseat of the Police car with Officers A and B. She did not get out of the car at first but recalls Officer A having a conversation with Mr X about not wearing his bicycle helmet. She could not hear the conversation but knew that is what it was about.
27. After a short time, Officers A and B came back towards the Police car but Mr X continued to mouth off and yell at Police. Officer C remained in the car while Mr X was arrested but got out to move Mr X's bicycle and give it to an associate of Mr X who was nearby.
28. She recalls a previous occasion where herself and Officer B arrested Mr X for similar behaviour.

What is considered to be disorderly behaviour?

29. The Supreme Court¹ considered a person's right to freedom of expression,² against the limitations section 4 of the Summary Offences Act places on a person's behaviour. The Court has reasoned that the legislation protects the public order and does not restrict any person's freedom of expression. It also does not forbid abusive or insulting language.
30. Further, it determined that if the behaviour is an expression of someone's opinion, it is not enough if it annoys or even wounds a person's feelings; it must be disruptive of public order. Causing annoyance, even serious annoyance, is insufficient if the public order is not affected. Essentially disorderly behaviour must be disruptive of the public order, as considered against circumstances such as the time and place where the behaviour occurs.
31. The Court agreed that such behaviour should largely disturb the normal functioning of life in the environs of that place.³ A high bar has been set for when a person's behaviour can be seen as disorderly; any disturbance caused by it must seriously violate the public order⁴ and be serious enough to justify the intervention of criminal law.⁵
32. The Authority does not believe that the act of someone misbehaving, being abusive or yelling in public, would automatically meet the threshold of disorderly behaviour. Clearly, the law requires the behaviour to seriously interfere with the rights of others, to risk a breakdown of good public order.
33. Importantly the Court also regarded that where a person's conduct is likely to cause a reaction from the Police only, it will not amount to disorderly behaviour. This is because the only effect of such behaviour is a Police response, and there is no actual threat to the public order.⁶
34. Mr X's yelling at the officers did not meet the elements for disorderly behaviour. There is also no evidence that Mr X was an actual threat to public order. Therefore, his arrest for disorderly behaviour was not justified.

¹ *Brooker v Police* [2007] NZSC 30

² Section 14 of the New Zealand Bill of Rights 1990

³ *Hooper v Police* [2017] NZDC 28741

⁴ *R v Lohnes* [1992] 1 SCR 167

⁵ *Melser v Police* [1967] NZLR 437

⁶ *R v Ali'Imatafitafi* [2007] NZCA 329

Power to Arrest

Legal authority to arrest

35. Section 315(2)(a) of the Crimes Act 1961 allows a Police officer to arrest any person without a warrant who disturbs the public peace or commits an offence punishable by imprisonment. This power to arrest someone without a warrant, deals with offences that are actively committed in the presence of an officer.
36. We do not believe Officer A could lawfully arrest Mr X under section 315(2)(a) because no offence was committed in his presence.
37. Similarly, section 39 of the Summary Offences Act allows a Police officer to arrest a person without a warrant if they have good cause to suspect a person has committed certain offences in terms of the Act (this includes offences of disorderly behaviour in terms of both sections 3 and 4 of the Act).
38. Section 4 of the Summary Offences Act is a comparatively minor offence which is not punishable by imprisonment;⁷ however, it is considered a breach of the peace and, therefore, an offence for which a person may be arrested without a warrant.
39. From the evidence available, it is clear Mr X's behaviour was a direct response to the Police stopping to talk to him about not wearing his bicycle helmet. It does not matter that Officer A mistakenly believed that the elements of the offence of disorderly behaviour were made out and he could arrest him. The facts and circumstances did not give sufficient grounds (or cause) for him to suspect the offence had been committed.
40. Police have the power to stop a person riding a bicycle on a road and speak to that person under section 114 of the Land Transport Act 1988. Under this section a person is required to provide their personal details to Police when asked. Officer A says Mr X refused to provide his name when asked. If Mr X had continued to refuse to provide his details, the officers could have arrested him for the Summary Offences Act offence of obstruction. This offence was not considered by the officers, who were focused on Mr X's behaviour.
41. Overall, we find that the actions of the officers were not only unlawful but undesirable and counterproductive to the Commissioners intent of "*Policing by consent*" and "*to have the trust and confidence of all*".
42. Actions such as these generate and feed a lack of respect and co-operation from members of the public to Police. When taking everything into account, the overall result is resoundingly negative.

FINDING ON ISSUE 1

Mr X's arrest for disorderly behaviour was unlawful.

⁷ *Brooker v Police*

ISSUE 2: WAS THE USE OF FORCE AGAINST MR X DURING HIS ARREST JUSTIFIED?

43. Mr X says that when he was told he was under arrest he wanted to put his bike against a nearby pole. He says the Police *“took him to the ground”* and choked him. He told the officers that he could not breathe. One of them replied: *“you must be able to breathe, you’re talking to me”*. Mr X says all three officers were on top of him on the ground, and one of the officers had his hands around his throat.
44. Mr X says when he was almost passing out, he was handcuffed and put into the back of the Police car. The officer that was sitting beside him pulled on the handcuffs, causing him pain. Mr X felt the officer who was driving the car turned a blind eye to what was happening.
45. Mr X suffers from Chronic Obstructive Pulmonary Disease (COPD).⁸ He says what the officers did to him effected his breathing. Officer C noticed Mr X was struggling for breath and said that she would provide him with an asthma inhaler once they arrived back at the Police station. Mr X says one of the other officers made a joke, saying his breathing sounded like them when they rode their bikes.
46. Mr X sought medical attention three days after this incident. He says he has been left with numbness in both hands which he believes was from the pulling of the handcuffs as described above. He denies having any symptoms prior to the incident with Police. The doctor who assessed him noted that the nerve neuropraxia was likely due to the application of the handcuffs.⁹ Mr X was seen by a surgeon who made plans to operate to correct the damage.
47. Officer A says when he told Mr X he was under arrest, Mr X started to move away while saying that he was going to lock his bike up. Officer A advised Mr X that another one of the officers present would look after his bike and that he was going to be handcuffed.
48. Officer A says Mr X continued to move away from him, so he grabbed him by the left hand. Mr X started to struggle and so Officer B grabbed Mr X’s other hand. At that same time, Officer A let go of Mr X’s hand and *“put him in a headlock”*.
49. Officer A says he was behind Mr X with his left arm around Mr X’s body and his right arm making a V shape around Mr X’s chest. He says there was no pressure on Mr X’s neck or throat and the hold was not restricting his airway.
50. Officer A says he used this method to calm Mr X down and control his movements. He says he was constantly communicating with Mr X, giving him instructions.
51. Officer A recalls Mr X saying *“I can’t breathe”* at one point. He says he would have responded with words to the effect of: *“If you’re yelling out abuse, you’re obviously breathing”*.

⁸ Chronic obstructive pulmonary disease (COPD) is a chronic inflammatory lung disease that causes obstructed airflow from the lungs

⁹ Neuropraxia is a disorder of the peripheral nervous system in which there is a temporary loss of motor and sensory function.

52. Officer A says that Mr X began to struggle more aggressively and so was taken to the ground. Mr X continued to struggle for a brief time on the ground but was eventually handcuffed. Officer A could not provide any more detail about how the officers got Mr X onto the ground.
53. Officer A says that the force he used was the least violent option available to overcome the resistance Mr X was offering.
54. Officer A says it was most likely him that was sitting beside Mr X in the car on the way to the station because he was the arresting officer. He strongly denies pulling on Mr X's handcuffs.
55. Officer A recalls Mr X being short of breath but says they probably all were from the energy they had used during the struggle. He does not recall Mr X complaining of any illness or injury.
56. Officer B says that when Mr X was placed under arrest, he had his bicycle between him and the officers. He reached out to grab Mr X's wrist with the intention of putting the handcuffs on him. He says Mr X pulled his hand away and at the time Officer B saw Mr X as actively resisting them.
57. Officer B saw Officer A place Mr X in a headlock to try to control Mr X's movements. Officer B was able to get one handcuff on Mr X at this time. He cannot recall if they took Mr X to the ground or not but says they were able to overpower him quickly and he placed the second handcuff on him. He described the headlock the same way Officer A did.
58. Officer B does not recall Mr X saying that he could not breathe and says he would find that difficult to believe given that Mr X continued to verbally abuse the officers until he was in custody at Rotorua Police Station.
59. Officer C was not involved in the arrest process and only got out of the Police car after Mr X was in handcuffs.
60. When Mr X was received into custody at the station, it was noted on the evaluation that he was breathing heavily and was complaining of bruises on his wrists from the handcuffs.
61. Because we found that Mr X's arrest was unlawful, it follows that the use of force against him during the arrest was also unlawful.
62. However, we will further consider whether the use of force against Mr X was legally justified because Mr X specifically complained about it.
63. The following provisions of the Crimes Act 1961 provide legal justification for using force in certain circumstances:
 - a) Section 39 empowers Police to use "*such force as may be necessary*" to overcome any force used in resisting an arrest or the execution of any sentence, warrant, or process.
 - b) Section 40 empowers Police to use "*such force as may be necessary*" to prevent the escape of someone who takes to flight in order to avoid arrest.

- c) Section 48 provides that any person is justified in using “reasonable” force in defence of themselves or another.
64. Both Officers A and B relied on section 39. “Necessary” force in the context of section 39 simply means such force as is reasonable in the circumstances.¹⁰
65. Under section 39, the Authority must determine:
- a) whether the officer believed on reasonable grounds that the person was using force to resist arrest; and if so
 - b) whether the degree of force used to overcome that resistance was proportionate and reasonable, i.e. whether the officer could reasonably have overcome the resistance and effected the arrest by using less force or some other method short of force (e.g. tactical communications).
66. There is sufficient available evidence that Mr X was using force, initially in the form of pulling his hands away and then physically struggling, for the purpose of resisting his arrest.
67. Both officers believed the force they used was the lowest level necessary to overcome the resistance from Mr X. Officer A says they used tactical communication but it had no effect on reducing Mr X’s resistance.
68. Both officers believe that the use of empty hand tactics was a lower level of force than using one of the other tactical options available to them such as pepper spray or baton.¹¹
69. Police staff have not been trained in the use of headlocks or neck holds since 2014. Police have acknowledged that a headlock may be used as an option, based on an officer’s assessment if the force was necessary, reasonable, and proportionate in the circumstances. The use of trachea and choke holds is strictly forbidden in policy.
70. It is our view that, although we agree that the use of empty hand tactics in this situation was appropriate, the use of the headlock was excessive and was not an appropriate option in this situation.
71. Officer A denies pulling on the handcuffs, although admits it was likely him who was sitting beside Mr X.
72. Mr X’s account is supported by him advising the custody staff of pain in his wrists and it being noted on custody documents and the medical attention that he sought in the days after.
73. We find it is likely there was some pressure applied to the handcuffs while they were on Mr X, which has caused him an injury. This was unnecessary and excessive.

¹⁰ R v Haddon [2007] NZAR 153 (CA) at [27].

¹¹ Pepper spray is also known as oleoresin capsicum or OC spray.

FINDINGS ON ISSUE 2

Due to his arrest being unlawful, the use of force against Mr X was also unlawful. Notwithstanding, the use of a headlock in these circumstances was excessive.

The pressure applied on the handcuffs was also excessive.

ISSUE 3: WAS MR X'S CARE WHILE IN CUSTODY APPROPRIATE?

74. Mr X was received into custody at Rotorua Police Station at 1.30pm. On his arrival, he was asked some questions by Officer D who was working within the custody unit. This is standard process within a custody unit.
75. In the "*Arresting members evaluation*" it was noted that Mr X may require special care or may be at risk, with the notation "*breathing heavily for a long period after arrest*" recorded.
76. Under "*physical health concerns present*" it is recorded that Mr X said he "*has some bruising from handcuffs*".
77. Overall, Mr X was assessed as not being in need of further care, which requires that checks are to be made on him every two hours while in custody. He was searched and placed in a holding cell.
78. The "People in Police custody" policy says that custody staff should call a health professional for advice/assistance if the detainee has been injured.
79. Despite the recorded concerns about his breathing and an injury, Mr X was not provided with an asthma inhaler or seen by a doctor.
80. When we interviewed the employee who had assessed Mr X while he was in custody, she had no memory of her interaction with him. Considerable time had passed since Mr X's arrest and the interview, and it is reasonable that she could not recall the details of his detainment. The details we have recorded are taken directly from the electronic custody records.
81. Mr X was fingerprinted and photographed at 3.22pm before being bailed from the Police station to appear in Court the following week.

FINDING ON ISSUE 3

Mr X should have been seen by a doctor while in Police custody.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

10 March 2022

IPCA: 20-3608

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

We are not part of the Police – the law requires us to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Colin Doherty.

Being independent means that the Authority makes its own findings based on the facts and the law. We do not answer to the Police, the Government or anyone else over those findings. In this way, our independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority receives and may choose to investigate:

- complaints alleging misconduct or neglect of duty by Police;
- complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- notifications of incidents in which Police actions have caused or appear to have caused death or serious bodily harm; and
- referrals by Police under a Memorandum of Understanding between the Authority and Police, which covers instances of potential reputational risk to Police (including serious offending by a Police officer or Police actions that may have an element of corruption).

The Authority's investigation may include visiting the scene of the incident, interviewing the officers involved and any witnesses, and reviewing evidence from the Police's investigation.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.

THIS REPORT

This report is the result of the work of a multi-disciplinary team. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.



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