

Force during arrest by a Rotorua Dog Handler justified

Summary of the Incident

1. At 11.35pm on Friday 23 April 2021, Rotorua Police received notice that a Nissan motor vehicle, recently stolen from Auckland, was in their area. On two occasions Police attempted to stop the Nissan, but the driver, Mr X, drove away at speed.
2. Nearly four hours later, the Nissan was located between Rotorua and Taupo by Officer A, a Police dog handler who was working alone.
3. Mr X stopped the Nissan on a remote corner about 20 kilometres south of Rotorua, and Officer A attempted to arrest him. A violent struggle took place between Mr X, Officer A and his Police dog for nearly five minutes before Police assistance arrived.
4. There is a conflict of accounts between Mr X and Officer A as to how the struggle started and what transpired. Officer A said Mr X charged at him and attacked his Police dog. Mr X says he tried to give himself up and the Police dog was set upon him.
5. Mr X suffered dog bite injuries which required surgery. Due to these injuries, Police advised the Authority of the incident.

Issue examined by the Authority

Was Officer A's use of force lawful and reasonable in the circumstances?

The Authority's Findings

6. Officer A's use of force was justified pursuant to Section 39 of the Crimes Act, and it was reasonable in the circumstances.

Analysis of the Issues

The stolen Nissan

7. At 11.35pm on Friday 23 April 2021, Rotorua Police received notification via ANPR¹ that a Nissan motor vehicle, recorded as stolen from Auckland earlier in the day, had entered the outskirts of Rotorua. At that stage, details of the vehicle's occupants were not known to Police, but it was later established Mr X was the driver.
8. Over the next thirty minutes, two Police units attempted to stop Mr X within Rotorua, but Mr X sped away on each occasion. The officers reported at least two people in the car, and it transpired Mr X had a female passenger.
9. The Police Communications Centre ("Comms")² were advised and cordons were set up and patrols were alerted but the Nissan was not located.
10. Just over three hours later at 2.47am, the Nissan triggered another ANPR site on State Highway 5, travelling south towards Taupo.
11. Officer A, a dog handler working alone, began heading south when the Nissan again triggered the same ANPR site, indicating the Nissan was now heading back towards Rotorua.
12. At 3.25am, Officer A was parked on State Highway 5 when he saw the Nissan coming towards him. He saw the Nissan being driven erratically and it came close to colliding with a truck travelling in the same direction.
13. Officer A pulled in behind the Nissan and activated his emergency lights and siren to try to stop it, however Mr X again failed to stop. No pursuit was commenced, and Mr X sped away, still heading north. Officer A lost sight of the Nissan and advised Comms of the situation.

Final location of the Nissan

14. About ten minutes later, Officer A was parked at another location, still on State Highway 5, when he saw the Nissan again, driving north.
15. Officer A advised Comms and he began following the Nissan at a distance, without activating emergency lights or siren.
16. As the Nissan approached the junction of State Highways 5 and 38, about 20 kilometres south of Rotorua, Mr X pulled over to the side of the road. Officer A pulled in behind the Nissan and stopped about eight metres from it. He also requested assistance over the Police radio.

¹ Automatic Number Plate Recognition (ANPR) is an automated system which notifies Police when vehicles of interest (via the registration plate) are captured by a roadside camera.

² Police radio Communications centre (Comms) based at Auckland

17. Police units in Rotorua began driving to that location.

ISSUE BEING CONSIDERED: WAS THE USE OF FORCE IN ARRESTING MR X JUSTIFIED AND REASONABLE?

18. Officer A told the Authority he was alone and without assistance and could see at least two people in the Nissan, so was prepared to wait for back-up before approaching Mr X. However, Mr X got out of the Nissan and started to walk towards his dog van. He noted Mr X was a solidly built man and bigger than him.
19. Officer A said he did not know Mr X and because he appeared compliant, he thought Mr X was giving himself up. Therefore, Officer A got out of his dog van and spoke to Mr X, telling him he was under arrest.
20. There are varying accounts of what then took place.

A conflict of accounts

21. Officer A told us that as he got out of his dog van and closed the door, Mr X was walking towards him and appeared to be cooperative, but then Mr X's demeanour suddenly changed. He said:

"He's [Mr X] made a comment which I could not make out and began charging towards me with a fighting posture. His fists were clenched, and he was yelling something I was unable to understand. As he got closer, I could see his eyes were wide, like someone who had consumed illicit substances. I believed, without a doubt by his actions that he was about to assault me."

22. Officer A said that fortunately there was enough space between them that he was able to quickly retreat and get his dog from the rear of the Police van. He said he then noticed Mr X had not followed him but had gone back to the Nissan (Mr X later confirmed this). When Officer A saw this, he considered Mr X might be getting a weapon from the Nissan or try to flee.
23. Officer A led his Police dog towards Mr X and told him to cooperate, or the dog would be released. Officer A said Mr X then charged at him again, so he commanded his dog to apprehend him.
24. Officer A says Mr X then started punching and choking the dog, and when he intervened, Mr X assaulted him as well.

Mr X's account

25. Mr X told us he had decided to give up when he got out of the Nissan. He said he called out to Officer A that he was a heart patient, and he went to get down on the ground.

26. Mr X said:

“Well, I was getting on the ground, so why did he have to go and open – that’s what I’m wanting to know is, is that why he had to let his dog out when I was getting on the ground.”

27. Mr X said he went back to the Nissan to get away from the Police dog, saying:

“I ran to get away from the dog, of course, but that’s after I was ready to get on the ground.”

28. Mr X says he went to go to the ground again, when the officer put his dog onto him. When the dog bit him he tried to pull the dog away by grabbing its head. He denied punching the dog or Officer A.

Recorded Police radio transmissions

29. The Police radio recording obtained by the Authority capturing the entire event is 1 hour, 29 minutes, 24 seconds in duration. Relevant and decipherable transmissions from Officer A include (the number at left is the time into the recording):

53:20 Officer A *“He’s turned into 38 Comms, he’s got his lights off”*

53:31 Officer A *“Car’s coming to a stop Comms, car’s coming to a stop”*

53:41 Other Police units advise they are heading in that direction

53:55 Officer A (yelling and with urgency) *“... stay there, stay there, stay there now”*

54:02 Other Police units are urgently directed to that location by Comms

55:00 Officer A (with urgency) *“can someone get here now”*

55:48 Officer A (panting) *“I’m still fighting with him, he’s fighting me and the dog”*

30. 4 minutes, 30 seconds after Officer A broadcast the command, *“... stay there, stay there...”* the radio transmission records:

58:25 Officer A (panting) *“Comms [from] dogs, I’ve got dog off, he’s ah, he’s just lying there, he’s heard the siren”* [of the backup patrols arriving].

58:46 First backup patrols arrive.

31. Our assessment of this recording makes it clear there was a prolonged struggle between Mr X, the Police dog and Officer A. Officer A can be heard repeatedly calling for assistance with what we consider to be a sense of urgency, and for Mr X to stop attacking his dog.
32. Officer A acknowledges setting his dog on Mr X when he charged him the second time, and Mr X acknowledges grabbing the dog (by its head to pull it away), but not to the extent that is apparent from Officer A's account and the radio recording.
33. Officer A also acknowledges punching Mr X and trying to gain control of him during their struggle. He said he quickly considered there was a need to defend himself, saying:

"... my life at that point in time depended on it. If it wasn't for the dog, it would have been a very – set of different circumstances. I have no doubt that I would have come off second best purely from the way that he was acting, the fact that he didn't register pain."

Who do we believe?

34. We consider Officer A's radio broadcasts significant. The broadcast at 53:55 - (yelling) "... stay there, stay there, stay there now," is consistent with his account that Mr X was 'charging' towards him. That at 55:48 - (panting) "I'm still fighting with him, he's fighting me and the dog" - tends to confirm Mr X was fighting Officer A, which is in turn inconsistent with Mr X's statement that he intended to surrender. Officer A's heightened sense of emotion and urgency are also compelling in our view.
35. It was later established that Mr X had consumed alcohol, marijuana, and methamphetamine that evening and although this was not known to Officer A at the time (who only suspected that Mr X was on drugs), we consider this may have distorted Mr X's recollection of events.
36. We also note Mr X was wanted to arrest on warrant at the time and has a lengthy criminal history including convictions for violent offending.
37. For these reasons we find Officer A's account more reliable.

Was the force reasonable and necessary?

38. Section 39 of the Crimes Act³ provides that when arresting someone, Police may use "such force as may be necessary to overcome any force used in resisting" the arrest, unless there is a less violent means of effecting the arrest.
39. To rely on section 39, Officer A's actions must be assessed on the following:
 - Did Officer A use force to overcome force which he believed was being used to resist arrest?

³ As detailed in paragraph 53.

- Was Officer A's belief that Mr X was using force to resist arrest reasonable?
- If Officer A's belief was reasonable, was his use of force reasonable (i.e., proportionate to the force being used to resist)?
- If the use of force was reasonable, could Mr X's arrest have been effected in a less violent manner?

Did Officer A use force to overcome force which he had a reasonable belief was being used to resist arrest?

40. After Officer A told Mr X he was under arrest, Mr X changed from appearing compliant to charging towards him with clenched fists. Officer A quickly obtained his Police dog from the rear of the dog van.
41. Officer A then went forward with his Police dog to arrest Mr X, who again charged towards him. During the arrest, Officer A assessed Mr X's behaviour as actively resistant and assaultive.
42. We accept Officer A believed Mr X was resisting arrest and that he needed to use force to overcome that resistance.

Even though his belief was reasonable, was Officer A's use of force reasonable (i.e., proportionate to the force being used to resist)?


43. Officer A says when Mr X charged towards him with clenched fists, he believed he was about to be assaulted (we note Officer A is of significantly smaller stature than Mr X). Officer A, who was alone, immediately went to the rear of his van to obtain his dog. We think that was a reasonable thing to do.
44. When Mr X charged a second time, Officer A now had his dog immediately available, so he commanded it to apprehend Mr X. We accept this happened very quickly and although other tactical options might have been available to Officer A (such as physically apprehending Mr X, using his baton, pepper spray or Taser), we consider he had to make an immediate decision and the release of the dog was reasonable and proportionate in the circumstances.

What was the incident outcome?

45. Mr X was charged in relation to the stolen Nissan as well as resisting and assaulting Officer A and his dog.
46. Mr X required surgery for a dog bite wound which had become infected and he was released from hospital shortly after.
47. Mr X's female passenger in the Nissan was a person Mr X had recently met in Auckland. She was not otherwise involved in the incident and the Authority has not been able to locate her for interview.

FINDINGS ON ISSUE

Officer A was justified in using force to arrest Mr X.

A handwritten signature in black ink, appearing to read 'C. Doherty', with a horizontal line underneath.

Judge Colin Doherty

Chair
Independent Police Conduct Authority

20 September 2022

IPCA: 21-7580

Appendix – Laws and Policies

LAW

Crimes Act 1961

48. Section 39 provides for law enforcement officers to use reasonable force in the execution of their duties such as arrest and enforcement of warrants. Specifically, it provides that officers may use “such force as may be necessary” to overcome any force used in resisting the law enforcement process unless the process “can be carried out by reasonable means in a less violent manner.”

POLICIES

‘Use of force’ policy

49. The Police’s ‘Use of Force’ policy provides guidance to Police officers about the use of force. The policy sets out the options available to Police officers when responding to a situation. Police officers have a range of tactical options available to them to help de-escalate a situation, restrain a person, effect an arrest, or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), OC spray, batons, Police dogs, tasers and firearms.
50. Police policy provides a Tactical Options Framework (TOF) for officers to assess, reassess, manage and respond to use of force situations, ensuring the response (use of force) is necessary and proportionate given the level of threat and risk to themselves and the public. Police refer to this assessment as the TENR (Threat, Exposure, Necessity and Response).
51. Police officers must also constantly assess an incident based on information they know about the situation and the behaviour of the people involved; and the potential for de-escalation or escalation. The officer must choose the most reasonable option (use of force), given all the circumstances known to them at the time. This may include information on: the incident type, location and time; the officer and subject’s abilities; emotional state, the influence of drugs and alcohol, and the presence or proximity of weapons; similar previous experiences; and environmental conditions. Police refer to this assessment as an officer’s Perceived Cumulative Assessment (PCA).
52. A key part of an officer’s decision to decide when, how, and at what level to use force depends on the actions of, or potential actions of, the people involved, and depends on whether they are; cooperative; passively resisting (refuses verbally or with physical inactivity); actively resisting (pulls, pushes or runs away); assaultive (showing an intent to cause harm, expressed verbally or through body language or physical action); or presenting a threat of grievous bodily harm or death to any person. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

53. The policy states any force must be considered, timely, proportionate and appropriate given the circumstances known at the time. Victim, public, and Police safety always take precedence, and every effort must be taken to minimise harm and maximise safety.

'Use of force with Police dogs' policy

54. Dog handlers are personally responsible for force used by the dog. The law sees little difference between dogs, when used as a means of force, and other methods and implement used by Police, such as firearms, Taser and batons. Dog handlers must believe the use of force is justified, and that the forced used is as minimal as possible in the circumstances.
55. A Police dog should only be used if the offender cannot be apprehended by other means. Dog handlers must consider all tactical options when considering the use of force. Just because the handler has a Police dog with them, does not mean they should use the dog as a means of force instead of a more appropriate option. According to the Tactical Options Framework, Police dogs can be used if the suspect is considered Assaultive.
56. Dog handlers must usually issue a warning before instructing a dog to bite a person, however, policy notes that a challenge may not be given in AOS or other critical situations "if it is not practicable or would be dangerous to do so."
57. Police dog handlers must always have control of their dog during deployment. Control means that the dog is under immediate physical, or voice control and the dog responds to that control. The extent of the force used by the dog must be kept to the minimum possible in the circumstances.
58. Policy dictates that all people bitten by Police dogs are to receive appropriate medical treatment.

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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