



IPCA

Independent Police
Conduct Authority

Mana Whanonga Pirihiimana Motuhake

Use of force by Police during arrest in South Auckland unjustified

Summary of the Incident

1. At about 2.30am on 9 March 2021, Police arrested Mr Z outside Ms X's house in South Auckland, for an incident which had occurred in central Auckland, about 20 minutes earlier. Mr Z resisted the arrest and was taken to ground.
2. During the struggle to place Mr Z in handcuffs, an officer kned and punched Mr Z in the face. The officer, along with another officer, then used pepper spray on Mr Z.¹
3. Ms X (Mr Z's cousin) complained to the Authority that the force used on Mr Z was excessive.

The Authority's Findings

Issue: Was the forced used against Mr Z justified?

Officer D used excessive and unjustified force when he used knee strikes and punched Mr Z.

Officers D and E were justified in using pepper spray on Mr Z.

Analysis of the Issue

BACKGROUND

4. At about 2.10am on 9 March 2021, Mr Z was driving a car with his partner and two young children in central Auckland.

¹ Pepper spray is oleoresin capsicum.

5. For an unknown reason, Mr Z confronted a man in a van, stopping the van and demanding access to the back. The van driver did not know Mr Z or understand what he wanted. Mr Z used a wheel brace to smash a side window of the van before getting in and searching the back area.
6. When Police arrived, Mr Z drove off in his car. Police patrols did not pursue but the Police helicopter started tracking his car.
7. At 2.30am, helicopter staff saw Mr Z arrive at Ms X's house in Papatoetoe.
8. Officer A, a senior sergeant, was the first officer to arrive. He parked his patrol car directly behind Mr Z's vehicle and went over to speak with Mr Z, who was still sitting in the driver's seat. Mr Z was uncooperative and would not get out of the car. After some negotiating Mr Z agreed his partner and the two young children could leave the car and go inside, which they did.
9. While Officer A was speaking with Mr Z, 11 more officers arrived. A couple of them stood near Officer A to assist, however the remainder did not become directly involved in dealing with Mr Z.² The Police helicopter left the scene, therefore ending the Police video footage.
10. After a few further minutes, Mr Z got out of the car. Officer A told him he was under arrest regarding the incident with the van. Mr Z became more uncooperative and would not comply with instructions. He waved his arms about and yelled loudly, refusing to acknowledge he was under arrest.
11. Ms X began filming the incident on her cell phone.

WAS THE FORCE USED AGAINST MR Z JUSTIFIED?

12. Officer B, a Police dog handler, put a handcuff on Mr Z's right wrist but, due to Mr Z struggling, was not able to put one on the other wrist. Mr Z held his arms close to his body so that the second cuff could not be applied.
13. Officer C came to assist. Together, Officers B and C took Mr Z to the ground to get him under control and fully handcuffed. Mr Z ended up lying face down on the grass, with his hands and arms locked underneath him, close to his chest.
14. Mr Z continued struggling and tried to stand up, so three other officers then came to assist Officers B and C, one of these being Officer D.
15. Officer D recalls Mr Z was clenching his fists and attempting to get to his feet, propping himself onto his elbows and forearms. Officer D took hold of the handcuff on Mr Z's wrist and unsuccessfully tried to pull it out from under him.

² Some dog handlers stood back with their Police dogs, and other officers assisted in moving Mr Z's partner and children into the house.

16. In the use of force report completed by Officer D after the incident,³ he says Mr Z was not complying with instructions, so he struck him twice with his knee in the “*face area*”. Officer D later explained to us:

“I delivered a knee strike. I think I was aiming for his arm, to give him a dead arm and try collapse his body down from press-up position. I don’t know where the blow landed.”

17. The knee strikes caused Mr Z to fall back onto the ground where he still resisted officers, locking his arms in tightly to his chest. Officer D continued holding the handcuff on Mr Z’s wrist, trying to pull it free.
18. Officer D says he warned Mr Z for between 10 and 20 seconds that if he didn’t stop resisting, he would hit him again. Mr Z failed to comply, so he punched him twice in the face.
19. Officer D says he heard Officer B say Mr Z was trying to grab his (Officer B’s) Taser. Officer D felt distinctive tugs on his own Taser (which was mounted on his chest) but he did not know if this was from Mr Z or the Taser just being knocked during the struggle.
20. According to Officer D, Mr Z did not stop resisting and also appeared to be attempting to get the officers’ Tasers, so he warned him that he would use pepper spray if he did not stop resisting. Mr Z continued to be uncooperative, so Officer D sprayed Mr Z near to his face, against the side of his head so that the spray ran down into his eyes. After a further 30 seconds, and further warnings, Mr Z stopped resisting and was handcuffed.
21. Officer E also pepper-sprayed Mr Z, at about the same time as Officer D. Neither officer knew the other one was spraying. Officer E says he sprayed Mr Z about 30 centimetres away from Mr Z’s head after he had ignored several warnings to stop resisting.
22. Police later charged Mr Z in relation to the incident in central Auckland and resisting arrest and he was later convicted and sentenced.

What did other officers see?

23. Officer A says once Officers B and C had taken Mr Z to the ground, he scanned, looking for other threats, so “*wasn’t particularly watching*” what occurred on the ground. He did not see any punches or blows given to Mr Z. However, once the situation was controlled, he was approached by Officer D, who told him he had punched Mr Z because he had grabbed at his Taser. Officer D implied Mr Z had his hand on the Taser. Officer A told Officer D to record it in his use of force report.
24. We spoke to Officer B, who could not recall the incident with any detail. He could not recall seeing punches or knees being used on Mr Z.
25. Officer C says, during the incident, he heard Officer D say something along the lines of: “*if you don’t comply, I will knee you in the head again*” and then, almost immediately, saw him punch

³ By policy, officers are required to submit a Tactical Options Report (TOR) when they have used force on a person.

Mr Z's face three times in quick succession. He also recalls hearing Officer B say Mr Z was reaching for his Taser but did not actually see this.

26. After the incident, Officer C expressed concerns to Officer D about his actions. Following their discussion, he accepted Officer D may have interpreted the situation differently to him. However, we note Officer C also discussed his concerns with his supervisor a month after the incident. Given this, we find his account to be credible.
27. Officer E said he was very focused on trying to stop Mr Z from resisting, however, recalls seeing Officer D throw a punch and knee strike upon Mr Z. He was not aware if these strikes connected, and if so, where they struck Mr Z's body.
28. We were able to speak to ten of the 11 officers (one officer has since left Police). Apart from the detail recorded above, no other officer outlined anything of relevance.

What does Mr Z say happened?

29. Mr Z did not wish to speak to Police about the matter and only spoke with us briefly. He acknowledges his arrest for the van matter was appropriate but says he did not try to get away from Police or resist.
30. Mr Z says an officer, who he did not see, punched him with uppercuts. He says:

"They manhandled me... I got pepper sprayed when I was in a choker hold..."

31. Mr Z says he knew his cousin had filmed his arrest but he did not want to see the footage and did not want to make a complaint.

What does Ms X say happened?

32. Ms X agrees Mr Z was resisting the Police officers. She says:

"They had got [Mr Z] to the ground and then by that point there were multiple cops around so I stood there just watching and then I saw one cop kick him and I was like, oh, okay he must have to, you know, he must have needed to do that but then there was the second cop that just came in from nowhere and started punching him."

33. Based on Officer D's and other accounts, we believe the kick and punches were both delivered by him, rather than two separate officers.

What does Mr X's video footage show?

34. Ms X took three short videos on her cell phone. Due to a lack of light and a fence obstructing the view, the officers cannot be easily identified.

35. On the third video, which is 18 seconds in duration, the following audio is captured between Officer D and Mr Z:

Officer D: [yelling] *"Give me your hand now! Give it to now or I'll spray you again!"*
Mr Z: [muffled] *"Okay"*
Officer D: [yelling] *"Stop resisting!"*
Mr Z: [muffled] *"Can you please... "I can't breathe... [unclear] boss."*
Officer D: *"Give me your hand now!"*
Mr Z: *"I'm sorry Sir, I'm sorry."*
Officer D: *"I'll punch you in the face again."*
Mr Z: *"Nah, nah, I'm good, I'm listening."*

36. Officer D's comment in this audio clip, *"I'll punch you in the face again"*, is inconsistent with his statement to us that he only later became aware that the punches landed on Mr Z's face. When we queried Officer D about this inconsistency, he said that at the time of the incident he must have just assumed the punches had landed on Mr Z's face.

Were officers justified in using force to effect Mr Z's arrest?

37. Section 39 of the Crimes Act 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. *"Necessary"* force in this context is generally accepted as meaning *"reasonable"* and *"proportionate to the degree of force being used to resist"*.
38. To rely on section 39, the officers' actions must be assessed on the following:
- Did they believe (on reasonable grounds) that Mr Z was using force to resist arrest?
 - Were the uses of force to overcome that resistance proportionate and reasonable in the circumstances?

Did officers believe on reasonable grounds that Mr Z was using force to resist arrest?

39. Mr Z was uncooperative and trying to stop officers placing him in handcuffs. He was clenching his arms close to his body, then struggling to get back up when taken to the ground. This is active resistance.
40. It was reasonable for the officers to believe Mr Z was forcefully resisting arrest and that they were therefore justified in using reasonable force to overcome his resistance.

Were the uses of force reasonable and proportionate in the circumstances?

Was Officer D justified in punching and using his knee to strike Mr Z?

41. As there were 11 officers on the scene, we consider there were sufficient officers to overpower Mr Z, without Officer D needing to knee and punch Mr Z.

42. We also consider that pepper spray was a less violent, reasonable option which could and should have been used before resorting to the use of knee and fist. It was a less dangerous option than the blows to Mr Z's head.
43. We note, and agree with, Officer C's assessment at the time that Officer D's use of knee and fist did not match his interpretation of the incident.
44. Officer D's knee strikes and punches to Mr Z's face were disproportionate to the force being used by Mr Z to resist, given there were other options available.

Were Officers D and E justified in using pepper spray on Mr Z?

45. Officers D and E both acknowledge using pepper spray on Mr Z. Both officers say that during the struggle with Mr Z, they warned Mr Z that they would use the spray if he did not stop resisting. Officer D says he was also mindful Mr Z now appeared to be attempting to get a Taser. When Mr Z did not stop actively resisting, they each sprayed Mr Z either to the side of his face or close by.
46. Police policy states that officers may use pepper spray in situations where a person is actively resisting and where, before using the spray, officers have considered communication and other less serious tactical options, such as control and restraint techniques.⁴
47. Mr Z was actively (and forcefully) resisting arrest. The officers' attempts to use control and restraint techniques to subdue Mr Z had not succeeded. They also communicated to Mr Z that they would use pepper spray if he did not stop resisting, without success.
48. Due to Mr Z's ongoing resistance, the inability of up to five officers to physically gain control of him, and his non-responsiveness to the warning that he would be sprayed, we consider the use of the pepper spray by the two officers to be reasonable and proportionate in the circumstances.

Was Officer D legally justified in using force against Mr Z to defend himself or another?

49. Section 48 provides that any person, including a Police officer, is legally justified in using reasonable force in defence of themselves or another.
50. To rely on a defence under section 48, the individual officer's actions must be assessed on both a subjective and an objective basis. This assessment involves three questions:
 - a) What were the circumstances as he believed them to be? (a subjective test)
 - b) Was his use of force against Mr Z for the purpose of defending himself or another? (a subjective test)
 - c) Was his use of force against Mr Z reasonable in the circumstances as he believed them to be? (an objective test)

⁴ The use of pepper spray by Police is outlined in paragraphs 67 to 69.

What did Officer D believe the circumstances to be?

51. At various times Officer D cited detail that he acted in self-defence, or defence of another:
- he said that Mr Z had grabbed at his Taser;
 - he said that during the struggle he heard Officer B say that Mr Z had tried to grab his (Officer B's) Taser, saying this immediately after the incident; and
 - he told us he was concerned that the partially open handcuff attached to Mr Z's right wrist was about to be used as a weapon.
52. We accept that Officer D felt some contact with his Taser and could believe this may have been caused by Mr Z deliberately tugging on it. We also accept that Officer D heard Officer B say, during the struggle, that Mr Z had grabbed at Officer B's Taser. Officer C corroborates hearing Officer B say this. Given this, it was reasonable for Officer D to believe Mr Z may be attempting to grab a Taser, posing a threat to himself and his colleagues.
53. Officer D told us he initially went to assist Officers B and C because he saw Mr Z had a metal handcuff on one wrist, and the other end of the handcuff was open and potentially a dangerous weapon. He said, upon seeing the open handcuff, he believed he needed to act immediately to defend his colleague. While neither Officer D nor any of the other officers involved in the struggle described any actions by Mr Z indicating an intent on his part to use the handcuffs as a weapon, we accept Officer D could see this as a weapon of opportunity.

Was Officer D's use of force against Mr Z for the purpose of defending himself or another person?

54. All accounts indicate Mr Z was face down during most of the struggle, with his arms locked under his body, refusing to cooperate. Therefore, Mr Z's grabbing of Tasers would have occurred during the early stages of the struggle before being taken to the ground.
55. With regards to the potential threat posed by the handcuffs, Officer D told us:
- "I go and think is [Mr Z] about to go and smack that guy with the handcuff. [Officer B's] face is right there and so I've come in, I've delivered two underhooks aiming for his abdomen. The first one didn't connect with the abdomen area. I wanted to try and wind him. It connected with something hard... I don't know what it was, but I do know now, it was his face."*
56. However, Officer D told us he saw this early in the struggle, and because of that, he immediately tried to punch Mr Z in the abdomen, although missed and hit his face, twice. This conflicts with what he told Officer A at the scene (paragraph 23), his use of force report, and the account provided by Officer B, regarding his reason for punching Mr Z and the timing of the punches. We consider Officer D's change of account affords him less credibility.
57. The struggle lasted for some minutes, and we consider that any perception that there was a threat that Mr Z intended to grab an officer's Taser or use the handcuffs as a weapon would have passed by the time Officer D kned and punched Mr Z.

58. We consider that any perception that Officer D had that Mr Z grabbed his or another officer's Taser or that Mr Z could use a handcuff as a weapon, were not connected to his actions of kneeling and punching Mr Z in the face.
59. Officer D's own use of force report, the account of Officer C and the video audio, all have the punches by Officer D linked to endeavouring to stop Mr Z resisting, and not as a response to a Taser being grabbed or any potential for the handcuffs to be used as a weapon. Therefore, we believe the kneeling and punching actions of Officer D were to overcome the resistance of Mr Z.
60. On balance, we do not believe Officer D knelt and punched Mr Z to stop him from trying to grab a Taser or potentially using the handcuff as a weapon against him or the other officers. Therefore, his use of force was not justified in defence of himself or others.

Was Officer D's use of force against Mr Z reasonable in the circumstances he believed them to be?

61. As we have concluded that Officer D's use of force was not for the purpose of defending himself or the other officers, we do not need to consider whether the use of force was reasonable in the circumstances as he believed them to be.

FINDINGS

Officer D used excessive and unjustified force when he used knee strikes and punched Mr Z.

Officers D and E were justified in using pepper spray on Mr Z.

Other comments

62. While we consider that Officer D alone is responsible for his actions, there are wider learnings to be taken from the handling of this incident. As we have outlined, there were 11 officers on the scene during Mr Z's arrest, including two senior sergeants. This matter should not have escalated to the point where strikes to Mr Z's face by knee and fist were used. We would expect that with proactive management of the situation and effective communication between officers, this would not have occurred.
63. On 1 August 2022, Police concluded that Officer D was not to be charged with a criminal offence in relation to his actions and commenced an employment process.



Judge Colin Doherty
Chair
Independent Police Conduct Authority
6 December 2022
IPCA: 21-6824

Appendix – Laws and Policies

LAW

Crimes Act 1961

64. 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.”*
65. Section 48 provides that any person, including a Police officer, is legally justified in using reasonable force in defence of themselves or another.
66. To rely on a defence under section 48, the individual officer’s actions must be assessed on both a subjective and an objective basis. This assessment involves three questions:
 - a) What were the circumstances as the officer believed them to be? (a subjective test)
 - b) Was the officer’s use of force against Mr X for the purpose of defending themselves or another? (a subjective test)
 - c) Was the officer’s use of force against Mr X reasonable in the circumstances as the officer believed them to be? (an objective test)

POLICY

Oleoresin Capsicum (Pepper) spray

67. Pepper spray is used by Police to subdue people; it causes a stinging sensation and generally makes people compliant to avoid further aggressive behaviour.
68. Police policy states that OC spray may only be used on someone who is actively resisting and then only when the situation cannot be resolved by less forceful means. Active resistance includes physical actions such as pulling, pushing or running away – that is, *“more than verbal defiance.”*
69. Police training outlines that the minimum distance for spray deployment is one metre. The reasons for this being:
 - 69.1 Any closer and the residue from spatter or deflection is more likely to adversely affect the officer deploying the spray.

- 69.2 Deployment closer than one metre potentially puts the OC spray can within arm's reach of an offender, and hence increases the possibility that the spray could be taken from and used against the deploying officer.
- 69.3 The pressure of the spray, as it deploys, may cause abrasion or minor impact damage to the orbit of the recipient's eye.

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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