

REPORT OF THE POLICE COMPLAINTS AUTHORITY ON THE NON-FATAL SHOOTING OF MICHAEL CHEO ALI'IMATAFITAFI AT AUCKLAND ON 20 APRIL 2004

Introduction

At about 4.00pm on 20 April 2004 a security guard acting for the North Shore City Council attended at 113A Eskdale Road, Birkdale, Auckland, following complaints about loud music coming from that address.

113A Eskdale Road is a one and a half storey bungalow situated down a moderately inclined concrete driveway, shared with 113B Eskdale Road. Front entry to the house is from a deck that faces the driveway.

The security guard spoke to two men sitting on the deck. They were Michael Cheo Ali'imatafitafi, aged 37, and his father Iao Ali'imatafitafi. The security guard explained that he was there because of complaints about the noise. He was abused and told to get off the property. As he left the address, the security guard wrote a noise abatement notice and placed it in the letter box. Iao Ali'imatafitafi followed the security guard, took the notice from the letterbox, and ripped it up.

As a result of further complaints, the security guard returned to the address with another security guard about thirty minutes later. The Police had also been requested to attend by the security company and two constables dispatched to the address met with the security guards on the street outside.

Events at 113A Eskdale Road, Birkdale after the arrival of Police

The constables were briefed by the first of the security guards, who explained that the source of the noise, a stereo radio, was going to be seized. The officers were asked to accompany the security guards onto the property because it was believed that there might be some conflict with the men who had been spoken to earlier.

The constables believed they were empowered to enter the property with the security guards to seize the radio pursuant to the Resource Management Act 1991, Section 328 of which provides, inter alia:

(3) If a person against whom an excessive noise direction is made fails to comply immediately with the notice, an enforcement officer (accompanied by a constable), or a constable may enter the place without further notice and—

(a) Seize and remove from that place...

any instrument, appliance...that is producing or contributing to the excessive noise.

It was subsequently established that the security guard who placed the noise abatement notice in the letterbox of 113A Eskdale Road was not warranted and thus not authorised to issue a notice. As a consequence, the officers were not empowered to go onto the property under the provisions of Section 328. However, in an opinion provided to the Police, a Crown Solicitor expressed the view that while there may have been a technical trespass, entry onto the property by the Police officers was made in good faith.

The officers spoke with Michael Ali'imatafitafi, who was still sitting on the deck. He directed them to the back of the house to speak with his father, Iao Ali'imatafitafi, the owner of the property.

The officers and security guards went down the driveway to the lower level of the house. One officer knocked on a glass door that was partly open. It appeared to give access to a lounge room. A stereo radio, assumed to be the source of the loud music earlier complained about, could be seen in the room.

One of the Police officers called out, *"Police, is anyone here?"* and opened the door a little further. Michael Ali'imatafitafi was standing inside. One of the security guards shouted out, *"He's got a machete!"* The officers and security guards immediately retreated. The door was slammed shut from inside, breaking the glass.

The Police officers and security guards gathered on the street outside the address. At 5.33pm a call was made by one of the officers to the Police Northern Communications Centre (NorthComms) advising that they were dealing with a person armed with a machete and that assistance was required. The officer also requested the attendance of the acting sectional sergeant, whom he knew would be carrying a firearm in his patrol vehicle's security cabinet.

Police General Instruction F060 provides for the carriage of firearms in Police vehicles as follows:

District Commanders may authorise the carriage of Police approved firearms in Police vehicles, as necessary to ensure members have ready access to firearms should the circumstances dictate. NCO patrols, first response units, CIB patrols, dog patrols and single crewed patrols are examples where such authorisation should be considered.

North Shore/Waitakere/Rodney Police District Protocol 11, issued by the District Commander on 5 February 2004, authorised the carriage of firearms in certain Police vehicles, including that used by sectional sergeants.

NorthComms called for units to assist at Eskdale Road. Units responding to such a call would normally include a Police dog handler but at that time the closest dog team was in central Auckland. The Police have explained that dog teams had been deployed in the greater Auckland area as the work load demanded and at that time no closer team was available. Recognising the potential value of Police dogs in such situations, arrangements were in train to ferry the dog team to Eskdale Road by helicopter; however events there overtook any such arrangement.

The acting sergeant, an officer with almost nine years uniform and CIB experience, and with Armed Offenders Squad training, heard the radio call from NorthComms. At that time he was patrolling a short distance away. He informed NorthComms that he would go to the location.

He arrived a few minutes later and parked his vehicle one house away from number 113. He had already equipped himself with a standard Police-issue 9mm semi-automatic Glock pistol, which he had taken from the secure gun cabinet in his vehicle and readied by chambering a round. He placed the pistol in a holster strapped to his leg. On his duty belt he carried oleoresin capicum (OC) spray and an extendable baton.

On the street outside 113 Eskdale Road, the acting sergeant was briefed by the constables who had already been onto the property.

At that point, had a more senior officer been in charge, it would have been timely for the acting sergeant to receive fire orders from that officer. Similarly, had other armed officers been at the scene, the acting sergeant would have had responsibility for issuing fire orders to them. In the circumstances, there being no more senior officer present and no other armed officers, fire orders were not required. The acting sergeant was personally responsible, as outlined in item 2 of General Instruction F062, which states:

Every sworn member of the police who is issued with a firearm in the course of his duty is personally responsible for ensuring that he or she is thoroughly conversant with relevant law, particularly sections 39 ,40, 41 ,48 and 62 of the Crimes Act 1961, and policy as outlined in General Instruction F061.

In a subsequent interview the acting sergeant demonstrated that he was conversant with the relevant law and General Instructions.

Events following the arrival of the acting sergeant at 113 Eskdale Road

At this stage there was no sign of the occupants of the address. The acting sergeant directed constables to take up observation positions from neighbouring properties. He then began to prepare a plan to contain the property so that the Police were ready to respond if a person armed with a weapon emerged from the house. NorthComms arranged for other units to set up cordons to prevent traffic entering the area.

While the acting sergeant was discussing tactics with other officers at the top of the driveway, lao Ali'imatafitafi came out of the house and approached the group. He was carrying a stereo radio above his head, which, upon reaching the group of officers, he smashed onto the footpath.

lao Ali'imatafitafi was clearly angry. He was shouting abuse and was aggressive in his language and demeanour. The Police were not able to calm him. He told them he was going back inside the house.

In the acting sergeant's view, his return to the house in his angry and aggressive mood might escalate the aggression earlier displayed by Michael Ali'imatafitafi. The acting sergeant therefore decided that lao Ali'imatafitafi's action in smashing the stereo on to the street and his aggressive and abusive behaviour warranted his arrest. With another officer, the acting sergeant took hold of lao Ali'imatafitafi, telling him he was under arrest. lao Ali'imatafitafi resisted vigorously.

[lao Ali'imatafitafi was subsequently charged with disorderly behaviour and resisting arrest in respect of his conduct at that point. Those charges were dismissed following a defended hearing in the Auckland District Court; however the Crown Solicitor expressed the opinion that:

"I do not consider that decision in the District Court to have any significant bearing on whether Acting Sergeant A's actions were justified. The events leading up to the shooting are largely immaterial to the question of the

circumstances that existed at the time the shots were fired, which is the primary concern.”]

During their struggle with Iao Ali'imatafitafi, the two Police officers heard the security guards shout out and saw them pointing down the driveway. They saw Michael Ali'imatafitafi running up the driveway towards them. He had a machete raised above his head and a meat cleaver in his other hand. He was advancing quickly. The Police officers let go of Iao Ali'imatafitafi and, with the security guards, retreated down the street.

The shooting of Michael Ali'imatafitafi

The acting sergeant, the only armed officer present, has said that he realised that Michael Ali'imatafitafi posed a real risk to the Police and also to the public, many of whom were neighbours who had gone into the street drawn by the commotion. Although Police were by then preventing traffic from going into the area, some motorists had already managed to stop nearby to watch events.

The acting sergeant has said that he considered that he had to take immediate action to stop Michael Ali'imatafitafi. He said that he feared for his life and the safety of everyone else in the area as Michael Ali'imatafitafi quickly advanced. To use his words:

“I am unsure exactly what distance apart we were. His facial expression was that of a person who was very angry or enraged. His face was distorted and twisted. It was clear to me that he was very very angry and upset about something. I have never seen anyone look like this before in my life. When he was moving off on a tangent to my left he was still brandishing the machete in his right hand above his head like he was going to swing it in a chopping motion. I believe he was tracking the ‘blue blur’ which had gone down my left side possibly down onto the road and definitely downhill. He then swerved and began heading towards me.”

The “blue blur” the acting sergeant was describing was his peripheral vision of Police officers running from the immediate danger.

This Authority has considered what options the acting sergeant had at that time and has reached the same conclusions as the Crown Solicitor, who noted:

“OC Spray was not a reasonable tactical option for ensuring the safety of the Acting Sergeant and others present at the scene. ...the use of OC Spray would have required Acting Sergeant A to come unacceptably close to Michael Ali'imatafitafi in circumstances where he was advancing brandishing a machete and demonstrating an intention to use it.

...the use of a baton would have exposed Acting Sergeant A to unnecessary risk of serious harm and therefore was not a realistically available option.”

The Authority has concluded that the only other option available to the acting sergeant at that point – that of retreating further, was not viable, given the imminent danger posed by Michael Ali'imatafitafi to everyone in the immediate vicinity.

The acting sergeant, directly in the path of Michael Ali'imatafitafi, aimed his pistol at him – at the same time shouting, *“Drop the knife; drop the weapons!”* Other Police nearby were also shouting at Ali'imatafitafi to drop the weapons. He did not comply.

Although Michael Ali'imatafitafi had a hearing impairment, earlier interactions between him and Police officers and security guards at a moderate voice level had indicated that he was able to hear what was being said to him. Witnesses say that when the Police officers called on Michael Ali'imatafitafi to *“Drop the knife; drop the weapons!”* their voices could be heard clearly some distance away.

At about this time other Police officers attempted to OC spray Michael Ali'imatafitafi from the side, without effect. Tests later established that some spray had struck Ali'imatafitafi on the side of the face but it is probable, because the officers had to maintain a safe distance, that very little of it reached the target. It is also recognised that OC spray is not always effective against people who are highly agitated.

The acting sergeant has said that when Michael Ali'imatafitafi continued to advance he fired three times at him, aiming, as taught in Police firearms training, at the centre mass of the body, by which he meant the stomach and lower torso.

The time was then 5.40pm, confirmed by the NorthComms recording of a Police radio call from the scene which said, *"The male's just come out of the address with a machete. Shots have been fired."* This message was seven minutes after the first radio call advising that a person was armed with a machete.

There is some variance between witnesses as to the distance between Michael Ali'imatafitafi and the acting sergeant when the shots were fired.

On the basis of witnesses' accounts and the Police scene examination, it appears that the first shot was fired when Michael Ali'imatafitafi was about six metres from the acting sergeant and the final shot when he was about two metres away.

The acting sergeant's account, which is consistent with those of witnesses in this regard, indicates that the shots were spaced and deliberate, with Michael Ali'imatafitafi continuing to advance after each shot. Michael Ali'imatafitafi collapsed to the ground after the third shot. He had been hit three times, two shots striking him in the mid abdomen and one slightly higher in the lower trunk. Although his injuries were serious they were not life threatening. As he dropped to the ground, Michael Ali'imatafitafi was still clutching the machete and meat cleaver.

Iao Ali'imatafitafi, who was nearby, went straight to Michael Ali'imatafitafi and picked up the weapons that his son had been holding. He was directed to drop the weapons but did not do so and was arrested. He again resisted vigorously and was sprayed with OC spray. He then threw the weapons back towards the house.

[Iao Ali'imatafitafi was subsequently convicted of disorderly behaviour and resisting arrest as a result of his conduct at that point.]

Witnesses to the shooting

Iao Ali'imatafitafi has asserted that he had taken the weapons away from Michael before the Police shot him, and that the Police unnecessarily shot his unarmed son.

Thirty-nine people, Police and civilians, witnessed all or part of the events at 113 Eskdale Road. The overwhelming evidence is that Michael Ali'imatafitafi was advancing aggressively on the acting sergeant, armed with a machete and meat cleaver, when he was shot.

No witness was critical of the conduct of the acting sergeant or any other Police officer. Most expressed the view that the acting sergeant had no option but to immediately disable Michael Ali'imatafitafi.

Matters relating to justification for shooting Michael Ali'imatafitafi

On 28 July 2005, part way through his trial in the Auckland District Court, Michael Ali'imatafitafi pleaded guilty to assaulting the acting sergeant with a machete. He was sentenced to 2 years imprisonment. At sentencing, Judge Roderick Joyce QC commented:

“... the officer having felt himself, in my consideration entirely justifiably, bound in the end to draw his weapon in order to prevent a result that would have been entirely regrettable; to draw his weapon and to fire at the prisoner in terms finally felling him, but, in the ultimate, not, in relative terms, seriously injuring him.”

In assessing the justification for the acting sergeant's actions, I note the provisions of Police General Instruction F061:

- (1) Members must always be aware of their personal responsibilities in the use of firearms. Under Section 62 of the Crimes Act 1961 a member is criminally liable for any excess force used. An overriding requirement in law is that minimum force must be applied to effect the purpose. Where practical Police should not use a firearm unless it can be done without endangering other persons.

- (2) Police members shall not use a firearm except in the following circumstances:
- (a) to defend themselves or others (Section 48 Crimes Act 1961) if they fear death or grievous bodily harm to themselves or others, and they cannot reasonably protect themselves, or others, in a less violent manner;
 - (b) to arrest an offender (Section 39 Crimes Act 1961) if they believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm in resisting his or her arrest;
and
the arrest cannot be reasonably effected in a less violent manner;
and
the arrest cannot be delayed without danger to other persons;
 - (c) to prevent the escape of an offender (Section 40 of the Crimes Act 1961) if it is believed on reasonable grounds that the offender poses a threat of death or grievous bodily harm to any person (whether an identifiable individual or members of the public at large)
and
he or she takes flight to avoid arrest, or he or she escapes after his or her arrest
and
such flight or escape cannot reasonably be prevented in a less violent manner.
- (3) In any case an offender is not to be shot:
- (a) until he or she has first been called upon to surrender, unless in the circumstances it is impractical and unsafe to do so
and

- (b) it is clear that he or she cannot be disarmed or arrested without first being shot
and
- (c) in the circumstances further delay in apprehending him or her would be dangerous or impracticable.

Section 39 of the Crimes Act 1961 provides:

Where any person is justified, or protected from criminal responsibility, in executing or assisting to execute any sentence, warrant, or process, or in making or assisting to make any arrest, that justification or protection shall extend and apply to the use by him of such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, warrant, or process can be executed or the arrest made by reasonable means in a less violent manner.

Section 48 provides:

Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

On the questions of reasonableness and justification, the Crown Solicitor expressed the opinion:

“...it is apparent that more than one shot was fired because Michael Ali’imatafitafi continued to advance on the acting sergeant. Acting Sergeant A’s statement and those of the witnesses confirm that when Michael Ali’imatafitafi stopped advancing Acting Sergeant A stopped firing. For this reason I am of the opinion that the shooting of Michael Ali’imatafitafi three times was reasonable and does not amount to excessive force in these circumstances.”

And

“I am of the opinion that Acting Sergeant A was justified in using the force he did both in effecting the arrest of Michael Aliimatafitafi and in defence of

himself and others. The force used was reasonable and cannot be described as excessive.”

Conclusions

Following the shooting of Michael Ali'imatafitafi, the Police carried out a thorough investigation during which twenty-nine civilian witnesses and ten Police officers were interviewed. Investigators of this Authority also carried out an independent investigation into the incident.

The Police investigation concluded that the shooting of Michael Ali'imatafitafi was justified and that the force used was not excessive, having regard to the speed at which he was advancing on the acting sergeant.

Having reviewed that investigation and having the benefit of the additional work carried out by this Authority's investigators, I have concluded that the acting sergeant was justified in shooting Michael Ali'imatafitafi in terms of Sections 39 and 48 of the Crimes Act 1961 and that he complied with Police General Instructions in every respect.

I find that the Police did not *“shoot an unarmed man”* as claimed by Michael Ali'imatafitafi. Michael Ali'imatafitafi was clearly armed with a machete and meat cleaver when he was shot.

Michael Ali'imatafitafi's actions put the acting sergeant in the position of having to respond with potentially lethal force. In taking that action the acting sergeant very likely prevented serious harm to himself and others.

At the time of this incident the Police did not have available to them any means of overpowering Michael Ali'imatafitafi other than, on the one hand the close quarters options of baton and OC Spray, and on the other the use of a firearm. It was an incident that might have been dealt with effectively by the deployment of a Police dog, had a dog team been available.

I note that the Police are presently conducting a trial of an electro-muscular disruptive device (Taser). It is not for this Authority to express a view on that particular device

but, as the Authority observed in its recent report on the fatal shooting of Haidar Ebbadi Mahdi, it supports the consideration by the Police of non-lethal alternatives to the use of firearms for the protection of the public, Police officers and offenders during violent confrontations.

Judge I A Borrin
POLICE COMPLAINTS AUTHORITY

5 February 2007