

Use of force in Auckland unjustified

Summary of the Incident

1. Shortly after midnight on 7 March 2020, Mr X was riding his bicycle on Redmond Street in central Auckland. He was not wearing his helmet correctly, and the lights on his bike were not working. He was stopped by Police who were conducting a checkpoint.
2. Officer A spoke with Mr X and asked for his personal details. Mr X replied aggressively and began to ride away on his bicycle. He was pulled from his bike, arrested, and placed in handcuffs.
3. Mr X was leant against the back of the Police van to be searched. Officer A believed that Mr X was going to spit at him, so he punched Mr X once in the face, causing a cut on Mr X's cheek.
4. Mr X was taken to the Auckland Custody Unit where he was later released without charge.
5. Mr X made a complaint to the Authority about being punched. Despite attempts by the Authority to meet with Mr X, he did not respond to our requests. He did however agree to be interviewed by Police.

Issues examined by the Authority

- Issue 1:** Were Police justified in arresting Mr X?
- Issue 2:** Were Police justified in using force against Mr X to effect his arrest?
- Issue 3:** Were Police justified in using force against Mr X during the roadside search?

The Authority's Findings

6. The Authority found that Mr X's arrest was justified.
7. We also concluded that:
 - 1) the use of force during the arrest of Mr X was justified;

- 2) punching Mr X in the face during the roadside search was excessive; and
- 3) Police should have had access to a spit hood.

Analysis of the Issues

ISSUE 1: WERE POLICE JUSTIFIED IN ARRESTING MR X?

Mr X's account

8. When interviewed by Police, Mr X said he had been drinking at a friend's house and was on his way home, riding his bike on Redmond Street, Auckland. He saw a Police checkpoint and was waved down by officers.
9. Mr X was questioned about why he did not have a light on his bike. He explained that he did have lights, they just did not have batteries in them at that time. He was asked for his name and date of birth which he said he gave. He was also asked for his phone number and told officers he did not know what it was. He said he had just got the phone and stated that he genuinely did not know what the number was.
10. An officer said to him: *'what's your phone number, or I'll lock you up for obstruction'*. He saw that the officer had his personal details and photograph on his phone, confirming who he was. He acknowledged that he became verbally abusive towards the officer as he was concerned about being arrested for not providing his phone number. He said to the officer: *'you've got my details, send me the fine, I wanna go'*.
11. Mr X says he was told he was not going anywhere, and two more officers moved towards him. He tried to leave on his bike and was tackled. He could not describe how this occurred except to say that his bike went to the side, his leg got caught, and he fell to the ground. He says he was thrashing about on the ground and was verbally abusing and threatening the officers. He was handcuffed and taken to the prison van.

Officer A's account

12. Officer A was conducting the checkpoint with six other members of his section. The checkpoint had been set up primarily to conduct breath alcohol and driver licence checks.
13. Officer A says he saw Mr X riding his bicycle in a northerly direction towards him. Mr X had a helmet strapped around his neck, but it was hanging from the back of head. The bicycle did not have any lights.
14. On stopping Mr X, he was immediately hostile, and Officer A could tell he was heavily intoxicated. He described Mr X's speech as being slurred, his eyes bloodshot, and he had trouble maintaining a conversation.
15. Officers B and C noticed Mr X's behaviour and moved towards Officer A to assist him.

16. Officer A says that Mr X provided his name and date of birth but refused to give any other personal details. He warned Mr X that if he continued to refuse to provide his details he would be arrested. He completed a check on his mobile phone, which displayed a screen showing a photograph of Mr X and his personal details.¹
17. A notebook entry that Officer A says he completed at the time of initially dealing with Mr X, shows that he had recorded Mr X's name and date of birth but no further details.
18. Officer A says he needed advice about what to do, so left Mr X with Officers B and C while he went to find Officer D, the acting sergeant for the group.
19. As Officer A turned to walk away, he heard Officer C yell out. He turned back and saw Mr X trying to cycle away. Officer B grabbed at the handlebars of the bicycle while Officer A grabbed Mr X's backpack. Officer A pulled the backpack towards him, which caused Mr X to fall from his bicycle.
20. Officer A says Mr X was aggressive, abusive, and threatening.
21. The three officers took Mr X to the ground and put his hands in handcuffs behind his back. Mr X was told he was under arrest for obstruction.
22. Officer A says that his knowledge of the law of obstruction as it related to this situation, is that if an offence has been committed and the person provides false or misleading details, they can be given a warning and if they continue to do so, they can be arrested for obstruction.

Officer B's account

23. Officer B recalls hearing Mr X arguing with Officer A as he walked over to assist. He says Mr X tried to cycle away from them as soon as Officer A started to walk away. He grabbed the handlebars of the bicycle and it stopped.
24. He says that when Mr X was on the ground, they struggled to get the handcuffs on him and described Mr X as '*swearing, shouting and being belligerent.*'

Officer C's account

25. Officer C says that he was dealing with a driver at the checkpoint when he heard some yelling and went over to assist. He saw Mr X on his bicycle and Officers A and B trying to grab him. He says Mr X was yelling and was extremely abusive.
26. He ran over and used his handcuffs to secure Mr X's hand behind his back. He says Mr X was on the ground when he was being handcuffed. He could not provide any further detail of how Mr X came to be on the ground, or the force used in handcuffing him.

¹ Police each have a mobile telephone that provides access to the Police information database known as National Intelligence Application (NIA). This database holds information about all individuals that have come into contact with Police.

Officer D's account

27. Officer D described Mr X as being grossly intoxicated, saying he could not form sentences properly. He described him as '*resistive, anti-authoritative and aggressive.*'
28. Officer D says that he was told that Mr X was warned multiple times for obstruction and then tried to leave without providing the required details and so was arrested.
29. When asked if there was an option to tell Mr X to put his helmet on and send him home, Officer D says he did not feel it would be safe for Mr X or members of the public to allow him to do so, given his level of intoxication and aggression.

Analysis

30. Police have the power to stop a person riding a bike on a road and speak to that person under section 114 of the Land Transport Act 1988.
31. Mr X committed two offences under the Land Transport (Road User) Rule 2004:²
 - riding a bike on a road without wearing a safety helmet (of an approved standard) securely fastened; and
 - riding a bike on a road during the hours of darkness without using a headlamp, reflector, and a rearward-facing light.
32. Officer A had the lawful right to stop Mr X and speak with him. Both offences are punishable by a \$55 infringement notice and there is no power of arrest for these offences.
33. In this case, Officer A relied on the Summary Offences Act 1981 offence of obstruction, which prescribes an offence to resist or intentionally obstruct any officer acting in the execution of his duty.³
34. From both Mr X's and Officer A's accounts, NIA was used to confirm Mr X's identity at the roadside. Mr X says it was his telephone number that Officer A was demanding from him which he could not provide.
35. Officer A says that for him to be able to take enforcement action, in the form of issuing infringement notices for the offences committed, Mr X needed to provide the officers with confirmation of his home address.
36. Officers A and D told us that due to Mr X's aggressive demeanour, his level of intoxication, and his refusal to provide details, they believed they had no other choice but to arrest him.
37. The Authority is satisfied that Mr X failed to provide Police with his home address upon request as required by law and therefore his arrest was justified.

² Rules 11.8(1) and 11.12(1) Land Transport (Road User) Rule 2004

³ Section 23 Summary Offences Act 1988

FINDING ON ISSUE 1

Officer A was justified in arresting Mr X for obstruction.

ISSUE 2: WERE POLICE JUSTIFIED IN USING FORCE AGAINST MR X TO EFFECT HIS ARREST?

Was the use of force at the time of Mr X's arrest justified?

38. Mr X said that he was tackled to the ground by the officers but was unable to recall any more detail about it. Once on the ground he was thrashing around, resisting the officers and threatening them.
39. Officer A says that once Mr X was pulled from his bike he immediately got back up and brought his hands up. Officer A took this to mean he was going to try and fight or run away. Mr X was swearing and threatening Police. Officer A says Mr X 'went for' him and so he and Officer C each grabbed one of Mr X's arms and Officer B secured his head.
40. Officer A says Officer B held Mr X's head against his chest with his fingers interlocked behind Mr X's head. Mr X's body was guided to the ground to stop him from landing on his head.
41. Officer A says that this is not a manoeuvre that he had been taught during staff training days, but he had learnt it in training that his workgroup had undertaken.
42. Once on the ground, Officers A and B continued to hold Mr X's arms, while Officer C handcuffed him. Mr X was placed under arrest at this time. Officer A says that Mr X continued to struggle and tried to kick out at the officers. They rolled him up into a sitting position, before lifting him to his feet.
43. Officer A believes he was justified in using this force under section 40 of the Crimes Act 1961.
44. 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. The proportionality of an officer's use of force under section 40 should be assessed against two factors:
 - a) the seriousness of the offence for which the person is to be apprehended (and the consequent public interest in detaining them in order to bring them to justice); and
 - b) the likelihood and degree of risk the person poses if escape is not prevented.

What was the seriousness of the offence that Mr X was liable for?

45. As outlined above, there is no power of arrest for not wearing a helmet or not having a light while cycling at night. The offence of obstruction, which Mr X was liable for by refusing to provide his details, is punishable by imprisonment for a term not exceeding 3 months or a fine not exceeding \$2000.00. This is an arrestable offence but is deemed to be a low level, public order offence.

What was the likelihood and degree of risk Mr X posed, if escape was not prevented?

46. Officers A and D told us that due to Mr X's behaviour they thought he and other members of the public would be unsafe, if he were left to carry on his journey.
47. The officers did not know where Mr X was going and therefore how much more of a journey he would have undertaken if Police had let him go. Police have a duty of care to act to protect life and property. If it was judged by the officers that Mr X was intoxicated to a level where he could not properly care for himself while riding a bike at night, without lights and without his helmet properly affixed, it was reasonable to believe that he posed a risk to himself.
48. The risk he posed to members of the public is more difficult to determine. There is no evidence to suggest that Mr X intended to cause harm to any member of the public. His demeanour towards Police was most likely due to the interaction he had with them.
49. The officers had been using an alternative radio channel when conducting the check point. Therefore, if anyone had reported concerns about Mr X's behaviour prior to his arrival at the checkpoint, the staff would have been unaware.

Was the level of force proportionate in the circumstances?

50. Officer A says that the level of force he used was just enough to stop Mr X from escaping and to secure him. He was satisfied that the force he used was entirely reasonable in response to Mr X's attempt to escape.
51. The Authority is satisfied that Mr X had committed the offence of obstruction and, although this is a low level offence, it was reasonable for Police to prevent his attempt to escape arrest. We are also satisfied that due to Mr X's intoxication and demeanour, while riding a bicycle on the road at night without his helmet being secured and without lights, there was a risk to his safety. The level of force used by the officers against Mr X was reasonable to secure him and effect the arrest.

FINDING ON ISSUE 2

The use of force during the arrest of Mr X was justified.

ISSUE 3: WERE POLICE JUSTIFIED IN USING FORCE AGAINST MR X DURING THE ROADSIDE SEARCH?

52. Mr X says after he was arrested he was walked to the back of the prison van. He admitted he was resisting the officers but did not offer further detail of his actions. His recollection was that he was lying chest down on the ground near the back step of the van when he was punched on the right side of the face by one of the officers. He was unable to identify which of the officers it was.
53. Officer A says the three officers walked Mr X to the van which was parked in a large carpark area opposite to where the arrest occurred. During the walk across the road, Mr X was shouting and

swearing and was trying to kick out at the officers. On two or three occasions Mr X tried to turn and spit on them, but due to the position they were holding him in, he was unable to do so.

54. When they got to the back of the van, Mr X continued to push and kick. The officers positioned him with his chest leaning against the back of the van, with Officers A and C on either side of him. Each officer had one of their arms threaded through one of Mr X's arms and pushed against the van to secure him. They also had one of their feet held against each of his heels to prevent movement.
55. Officer A says he had the outside of his right forearm leaning against the van, with his hand in a fist, above and to the side of Mr X's head. Officer B conducted a pat down search of Mr X.
56. The left side of Mr X's face was against the van, facing towards Officer A. Officer A describes hearing Mr X make a sound like he was again preparing to spit. In response, Officer A swung his fist in a downward motion, hitting Mr X's right cheek.

Was Officer A justified in punching Mr X?

57. Officer A told the Authority that the legal justification he relied on for punching Mr X was section 48 of the Crimes Act 1961.
58. Section 48 of the Crimes Act provides that any person, including a Police officer, is legally justified in using reasonable force in defence of themselves or another.
59. 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 himself 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)

What did Officer A believe the circumstances to be?

60. As outlined in paragraph 53, Officer A says during the walk across the road Mr X was shouting and swearing and was trying to kick out at the officers. He had seen Mr X spit at the officers.
61. Once at the van, all three officers were needed to secure and search Mr X.
62. When Officer A heard what he believed was Mr X preparing to spit at him, he had limited options. He did not believe he could have moved away in time to avoid the potential spit, as Officer B was behind him, and his arm was linked into Mr X's. If he stepped back, then Mr X could have directed the spit at either Officer B or C.
63. He did not feel he had time to communicate with the other officers to alert them to the risk, prior to Mr X being able to spit.

64. When asked if he could have used an open hand to divert the risk, Officer A stated that his hand was already held against the van in a fist and his immediate reaction was to bring it down against Mr X's face.

Was the force used for the purpose of defending himself?

65. Officer A says he was sure that Mr X was going to spit on his face and so struck him pre-emptively to prevent it from happening. We are satisfied that he was acting for the purpose of defending himself.

Was the force used reasonable in the circumstances?

66. Officer A says that at that time, the only training he had received about empty hand tactics, was during his recruit training at the Police College. The training provided included strikes as an option available to officers, if deemed necessary.
67. The Authority has sought clarification from Police about what is taught to officers about striking. They advise that general striking was taught many years ago but is no longer. Some palm strikes are still taught; however, this does not include striking to the face, head, or throat.
68. Officer B says he was not aware of Mr X spitting but believes he heard someone talk about spitting during the incident. Officer B was not aware that any force was used against Mr X at the time of the search and only became aware of his injury after the event.
69. Officer C says that Mr X's behaviour during the search was aggressive, and he was making threats to kill Officer A. He does not recall Mr X spitting but believes Officer A had mentioned it at the time. He says that during the search he had his head turned, facing away from Mr X. He did not see Officer A strike Mr X, but recalls Officer A saying later that he needed to complete a tactical options report, which officers complete when they have used force. He did not ask why.
70. Officer A says that after the punch, Mr X continued to shout and abuse the officers. A short time later he looked down and noticed some droplets of blood on the bumper of the prison van. At this time, he looked and saw that Mr X had a *'little cut on his cheek.'*
71. Mr X was in handcuffs and there were two other Police staff in the near vicinity. The Authority considers that the other options that were available to Officer A were:
- to use an open palm to push or hold Mr X's face away;
 - to turn his face away so any potential spit was unlikely to hit him in the face; or
 - to communicate with the other officers so that he could step back and change position to prevent Mr X being able to spit at him.
72. The Authority is concerned that Officer A's immediate response was to punch Mr X in the face. We understand that Mr X was actively resisting the arrest and threatening the officers, but the force used was excessive in the circumstances.
73. The Authority believes that Officer A was not justified in punching Mr X in the face.

Was there an opportunity to use a spit hood on Mr X?

74. A spit hood is approved Police equipment. It comes in one size and slips over a person's head. The top half of the hood is dark mesh so a person can still be seen, and the material used in the lower part stops the person from being able to spit, reducing the risk to others.
75. Officers are instructed to only use spit hoods if they have assessed and identified a risk of a person spitting or if a person has spat at Police.
76. On this occasion, the staff involved were using a vehicle that was not equipped with spit hoods, nor did the officers have their own personal supply.
77. Officer A stated that there was no discussion between the officers about using a spit hood on Mr X when moving him to the van. He explained this was because they all knew that they did not have any available for them to use.
78. Spit hoods should have been available in the vehicle or in the officer's personal equipment. Police have since remedied this, ensuring that spit hoods are available in all the vehicles used by this group.

FINDINGS ON ISSUE 3

Officer A was not justified in punching Mr X.

The officers should have had access to a spit hood.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

16 September 2021

IPCA: 20-3369

Appendix – Laws and Policies

LAW

Land Transport (Road User) Rule 2004

- 79. 11.8 (1) A person must not ride, or be carried on, a bicycle on a road unless the person is wearing a safety helmet of an approved standard that is securely fastened.
- 80. 11.1 (1) A person riding a cycle on a road must use a headlamp, reflector and rearward facing position lamp – (a) in a time between sunset and the following sunrise

Summary Offences Act 1981

- 81. Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who resists or intentionally obstructs, or incites or encourages any other person to resist or obstruct, (a) any constable or any authorised officer, or any prison officer, or any traffic officer, acting in the execution of his duty.

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 of investigators and managers. 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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