

Issue 3: Was Mr X kicked after being dragged away from the driver's door?

- Officer E kicked Mr X after he was dragged away from the driver's door.

Analysis of the Issues

ISSUE 1: WERE OFFICERS A AND B JUSTIFIED IN PULLING AND STRIKING MR X WHILE HE WAS SEATED IN THE DRIVER'S SEAT OF THE STOLEN CAR?

Events prior to Mr X's apprehension

5. At about 11pm on 14 August 2022, Mr X was driving a Holden Trailblazer which had been stolen from New Plymouth earlier that day.
6. The car was sighted by Police in Manurewa. It did not stop when signalled to do so. It travelled through Manurewa before entering the southern motorway towards Auckland.
7. Despite having its tyres spiked, the car continued traveling on its rims along the motorway. Rather than pursuing it, Police units held back and formed a moving barrier to prevent members of the public from getting too close to the car which was now at risk of catching on fire.
8. As the car exited the off ramp at Lincoln Road, it was spiked again, causing it to stop at the intersection with Universal Drive. A number of Police units pulled beside and behind it as it came to a stop. Not all of the Police officers were from the same District, with some not knowing each other at all.
9. Officer A was first to the driver's door of the stolen car, followed closely by Officer B. Officer A opened the door and over the next 15 seconds or so, both officers struggled to pull Mr X out of the car.

Force used on Mr X while in the driver's seat

10. As Officers A and B were struggling to pull Mr X out of the driver's seat, the car moved forward a distance of about one metre. As it moved, another officer who was running around the front of it narrowly avoided being struck.
11. After the car had moved, Officer C arrived, and was positioned by the open driver's door. Fearing it might move again, he leant inside and turned the ignition off while also attempting to shift the gear stick into park.
12. At the same time, Officer A punched Mr X twice with a closed fist to the back of his head to assist in extracting him from the car. Officer B, who was still in the doorway area beside Officer A, also delivered two hand strikes to Mr X's torso.
13. Mr X was pulled to the ground where he landed on the road next to the driver's door. Officers A, B and other officers present, then restrained Mr X before he was handcuffed.

14. Officers A and B later completed their respective tactical options reports, as they are required to do under policy. They both acknowledged striking Mr X as described and provided their reasons for doing so.

Mr X's account

15. Mr X told us the first thing he did when the Trailblazer came to a stop was to unbuckle his seat belt. He said he then put both his arms out the driver's window and, with one hand, he opened the driver's door from the outside before a Police Officer arrived and pulled it wide open.
16. He said he was pulled out of the car onto the road where he was kicked and punched multiple times to the face and body by a number of officers. He believed one of these officers was the one who had pulled him out of the car, another was an officer who arrested him and explained his rights, and a third officer was a Sergeant.
17. Mr X could not recall the car moving forward. Nor could he recall being punched by Officers A and B while he was still in the driver's seat. He could only remember being punched and kicked when he was on the ground.

Officer A's account

18. Officer A confirmed he was first to the driver's door, joined soon after by another officer (Officer B). Contrary to Mr X's account, Officer A said the door was closed and he opened it. He said Mr X's hands were still on the steering wheel.
19. Officer A said he was in the process of attempting to pull Mr X out when the car moved forward. He said that when this happened he was concerned that he (and Officer B), and other officers in the immediate proximity, were at risk of being run over.
20. In response, Officer A struck the back of Mr X's head with the soft side of his fist. He said he did this not to cause him injury, but to distract him from driving. Officer A said it was then that he noticed Mr X still had his seatbelt on, so he unclipped it which allowed Mr X to be pulled out.
21. In relation to his justification for his use of force, Officer A said his action in attempting to pull Mr X out of the car was justified under s.39 Crimes Act 1961, and his action in twice striking Mr X was justified under s.40 and 48.
22. Officer A denied kicking or punching Mr X at any time when he was on the ground or seeing any other officer do so.

Legal Analysis – Officer A

23. The following provisions of the Crimes Act 1961 provide legal justification for the use of 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 to avoid arrest.
 - c) Section 48 provides that any person is justified in using *“reasonable”* force in defence of themselves or another.
24. Officer A cited all three sections as justifying his use of force. In our assessment, only sections 39 and 48 are relevant to this case.

Was Officer A legally justified using force against Mr X to effect his arrest under section 39?

25. 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. *“Necessary”* force in this context is generally accepted as meaning *“reasonable”* and *“proportionate to the degree of force being used to resist”*.
26. Under section 39, the Authority must determine:
- whether the officer believed on reasonable grounds that the person was using force to resist arrest; and
 - if so, whether the degree of force used to overcome that resistance was proportionate and reasonable in the circumstances as the officer reasonably believed them to be (that is, whether the officer could reasonably have overcome the resistance and effected the arrest by using less force or some other method short of force such as tactical communications).
27. Officer A claims that he initially grabbed and pulled Mr X and that this was justified under s 39.

Did Officer A believe on reasonable grounds that Mr X was using force to resist arrest?

28. Officer A was the first to arrive at the car and told us that, once he opened the door, Mr X was holding onto the steering wheel refusing to move. It was reasonable to consider that Mr X was motivated to avoid arrest.
29. After the car had stopped, it moved forwards about one metre from its stopped position. Officer A claims this was because Mr X floored the accelerator in an attempt to flee. Mr X does not recall doing this nor did he recall the car moving forwards.
30. CCTV footage shows that the car did move and is consistent with Officer A’s account. We do not know what caused the car to move forward. However as the car had an automatic gearbox that must have been in drive or another forward gear, it could have been either Mr X accelerating or removing his foot from the brake. Although the car was partially blocked in by two Police cars, there was room for it to move between them.
31. We accept that Officer A believed on reasonable grounds that Mr X was using force - albeit minimum force of a passive nature - to resist arrest.

Was Officer A's use of force reasonable and proportionate?

32. In our view, Officer A's initial grabbing hold of Mr X's clothing was reasonable and proportionate to the force being used by Mr X.

Was Officer A legally justified in using force against Mr X to defend himself or another?

33. 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.
34. Under section 48, we must assess Officer A's actions on both:
- a subjective basis (that is, what Officer A genuinely believed); and
 - an objective basis (what a "reasonable" person would have done).
35. 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?

36. This is outlined above in paragraphs 18-22. We accept Officer A genuinely believed that Mr X was resisting arrest and operated the car's accelerator, risking injury to surrounding officers.

Was Officer A's use of force for the purpose of defending himself or another?

37. We accept that, due to the close proximity of surrounding officers, including one officer who was nearly struck by the car as it moved, Officer A's two strikes to Mr X's head were for the purpose of defending the other officers.

Was Officer A's use of force against Mr X reasonable in the circumstances as he believed them to be?

38. Although Mr X and Officer A have different accounts of what happened after the car had stopped, we note that Officer A told us he deliberately used the fleshy part of his hand to strike Mr X, so that it would not cause any significant injury. This is consistent with Mr X not recalling being struck in this way.
39. We certainly accept that Officer A had a genuine and reasonable belief that if he did not do something to remove Mr X from the car, other officers might be injured.
40. That being so, our view is that Officer A's use of two strikes with the fleshy side of his hand were justified under s.48.

Officer B's account

41. Officer B confirms he was second to arrive at the driver's door of the vehicle and assisted Officer A in attempting to pull Mr X out of the car. He said he grabbed Mr X by his clothing and tried to pull him out, but he wasn't moving. Officer B also thought Mr X had one hand on the steering wheel and the other fending them off.
42. Officer B describes the car moving forward and he believed Mr X was intentionally trying to drive away. He said that at the time, he saw through the windscreen an officer running around the front of the car and having to jump out of the way to avoid being hit.
43. Officer B said he then punched Mr X with his right fist to the rib area. He said the punches landed in the torso area but no higher than the shoulders.
44. After punching Mr X, Officer B continued pulling Mr X to remove him from the car, but Mr X wasn't moving. It was then that Officer B became aware that Mr X still had his seat belt on. This was then unclipped by Officer A.
45. In relation to his justification for his use of force, Officer B said his action in attempting to pull Mr X out of the car was justified under s.39 Crimes Act 1961 and his action in twice striking Mr X was justified under s.48.

Legal Analysis – Officer B

46. Officer B arrived at the vehicle soon after Officer A and his use of force was similar, although he used a closed fist on Mr X's torso/rib area.
47. Again, we do not consider s.40 has any application. However, both s.39 and 48 will be assessed below.

Was Officer B legally justified using force against Mr X to effect his arrest under section 39?

Did Officer B believe on reasonable grounds that Mr X was using force to resist arrest?

48. We consider that Officer B believed on reasonable grounds Mr X was using some force to resist arrest. Mr X was holding onto the steering wheel and had remained in the seat despite both Officers A and B trying to pull him out.
49. Officer B heard Officer A say that Mr X's seatbelt was still on. Once it was removed, they were able to pull him from the car.
50. We consider that Officer B had reasonable grounds to believe that Mr X was using force to resist arrest, although, as discussed above, any force Mr X used was at the lower end of the scale.

Was Officer B's use of force reasonable and proportionate?

51. We consider that Officer B striking Mr X twice in the torso was reasonable and proportionate to the force used by Mr X to resist arrest. Although Officer B struck with a closed fist, both blows landed below the shoulder and do not appear to have caused injury.

Was Officer B legally justified in using force against Mr X to defend himself or another?

What did Officer B believe the circumstances to be?

52. The scene as Officer B remembers was described at paragraphs 41-45. Officer B told us that his strikes were directly in response to the car moving forwards due to Mr X accelerating.

Was Officer B's use of force for the purpose of defending himself or another?

53. We consider that Officer B's strikes were for the purpose of defending the other officers surrounding the car. Officer B saw an officer jump out of the way when it moved forward and told us that he was concerned if it happened again, it may cause harm.

Was Officer B's use of force against Mr X reasonable in the circumstances as he believed them to be?

54. We consider that Officer B's use of force was reasonable in response to the risk of Mr X moving the car and hitting other officers. He told us that he thought it would be the most effective way of getting Mr X out.

FINDINGS ON ISSUE 1

Officers A and B were justified in pulling Mr X out of the car to overcome the force used by Mr X to prevent his arrest.

They were also justified in striking Mr X to defend the officers surrounding the car from it colliding with them.

If the officers had realised at an earlier stage Mr X had his seatbelt on, it may have removed the necessity for the strikes. However, that alone does not mean that the strikes were unjustified.

ISSUE 2: WAS MR X KICKED AND PUNCHED WHILE NEAR THE DRIVER'S DOOR?

Immediate proximity to the driver's door

55. When Mr X was pulled from the car, he landed on the ground by the driver's door. Officer B saw him land on his face or upper torso. By this time, a number of other Police officers had arrived and were assisting in restraining Mr X.
56. As part of our investigation, we reviewed footage from the Auckland Traffic Operations Centre camera situated at the intersection that recorded much of this activity. The footage shows Mr X's car coming to a stop, followed closely by Police patrols beside and behind. Officers A, B and C are seen to run to the driver's door, followed soon after by Officers G and H.

57. Unfortunately, the activity that occurs while Mr X is being extracted from the car, and when he is on the ground by the driver's door, is largely obscured by a traffic light pole. This is where Mr X said he was kicked and punched.
58. What can be seen, however, is consistent with the officer's accounts of there being a struggle to extract Mr X. The footage does capture the car moving forward as described, and an officer having to take evasive action to avoid being hit.

Arrival of Officers D, E and F

59. While the officers were restraining Mr X on the road by the driver's door, further officers arrived to assist, including Officers D, E and F about 15 seconds later. Officer E was in front of Officer D and he saw the car move forward.
60. Officer D said that when he ran towards the car, he could see there was a struggle at the driver's door and there were three or four officers in the process of pulling Mr X out of the car. He said that when Mr X was pulled out, he had his hands on his head to protect himself. He said as Mr X went to the ground, he saw what he thought was two officers throw about five punches which landed on or around Mr X's head. He described them as *'swinging punches, and some were upper cuts....in total there may have been five, maybe less'*.
61. When Mr X was lying on the ground in what he described as the foetal position, Officer D saw 'one or two' kicks to his torso. Officer D said Mr X was not resisting and he thought the officers' actions were excessive. Other than describing them as wearing uniform, Officer D was unable to identify those who punched and kicked Mr X, because they were from another Police district and he did not know them.
62. Officer E arrived at the same time as Officer D. As he approached the stolen car, he also saw the officers at the driver's door struggling to pull Mr X out. As he approached, he saw the car move forward and when he saw this, he drew his baton in preparation to smash the car's window in the event that Mr X managed to drive off. This wasn't necessary however as Mr X was then extracted from the car and taken to the ground.
63. Officer E says that Mr X was on his feet momentarily before he went to the ground. In a witness statement later prepared by Officer E, he described seeing *"one, maybe two"* officers utilising what he believed to be knee strikes to Mr X's abdomen or legs as they were removing him from the car. Later, when he was interviewed by Police, and independently by the Authority, Officer E said the knee strikes may in fact have been more a case of the officers using their knees to restrain and hold Mr X on the ground.

Analysis

64. Other than the strikes to Mr X when he was still inside the car, as acknowledged and described by Officers A and B, none of the officers involved in Mr X's apprehension admit to kicking or punching him when he was apprehended or seeing anyone else do so. However, the evidence to the contrary is compelling.

65. Mr X says he was kicked and punched several times while on the ground being restrained and handcuffed.
66. When Mr X was received at the Counties-Manukau Custody Unit, a doctor was called to assess his facial injuries. Mr X had a subconjunctival haemorrhage (broken blood vessel) under his left eye and swelling to his left upper eye lid. He had tenderness on both sides of his forehead and a superficial abrasion on his left forehead which had the appearance of a friction abrasion. There was redness and bruising to his neck and to his mid and lower back. The examining Doctor was unable to state the cause of these injuries. While we accept that there is no conclusive evidence as to the cause of these injuries, it is clear that they were incurred during the Police engagement with Mr X.

On balance the Authority is satisfied that Mr X was punched and kicked as alleged, based on:

- Mr X's account about the strikes was clear.
 - Officer D and to a lesser extent Officer E's corroboration of Mr X's claims.
 - There was an opportunity for it to happen, outside the view of the cameras.
 - Mr X received injuries during his arrest.
67. We cannot say with any certainty which officers were involved in striking Mr X while he was on the ground and it would be entirely inappropriate to speculate.

FINDINGS ON ISSUE 2

Mr X was kicked and punched after being extracted from the stolen car. This was an unjustified and excessive use of force.

The identity of the officers who used this force cannot be established.

ISSUE 3: WAS MR X KICKED WHEN HE WAS DRAGGED AWAY FROM THE DRIVER'S DOOR?

68. While the officers were restraining Mr X, they decided to move him a little further away from the car. This was at the direction of Officer A who felt more space was needed to restrain him. Mr X was dragged about two metres towards the back of the car, closer to the back door.
69. While this was happening, the footage shows Officer E deliver what appears to be a kick to Mr X with his right leg while Mr X is still being restrained. It is not clear where on Mr X's body this kick connected.

70. When interviewed by us about this, Officer E strongly denied kicking Mr X. He said what the footage showed was not a kick but a 'stumble'. He could not elaborate or explain further. Having carefully assessed the footage, the Authority is satisfied it was a kick delivered to Mr X and this was an unjustified use of force.

FINDINGS ON ISSUE 3

Officer E kicked Mr X when he was being dragged away from the car. This was an unjustified use of force.



Judge Kenneth Johnston KC

Chair
Independent Police Conduct Authority

29 August 2023

IPCA: 22-14801

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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