



IPCA

Independent Police
Conduct Authority

Mana Whanonga Pirihiimana Motuhake

Use of force against man in Auckland justified

Summary of the Incident

1. Just after midnight on 16 July 2019, Officers A and B noticed a Volkswagen Passat with a suspicious looking number plate parked at the Mangere Domain in Auckland.
2. The officers parked behind the Volkswagen and a passenger, Ms Y, got out of the front passenger seat. After confirming the car was stolen, Officer A arrested Mr Z, who was sitting in the driver's seat.
3. Mr Z became agitated and resisted arrest, leading to Officer A breaking the driver's window with his baton and pepper spraying him. This had little immediate effect, and Mr Z attempted to start the Volkswagen. Officer A believed Mr Z could not drive forward as there was a line of bollards in front of the car and was concerned Mr Z was going to reverse and run him over. To prevent Mr Z injuring him during his escape, Officer A tasered Mr Z three times while he was in the driver's seat.
4. Despite having been tasered, Mr Z drove forward, through the bollards and onto a grassed area before driving out of the reserve. Mr Z was located and arrested some days later by different officers.
5. It later transpired that there were two warrants for Mr Z's arrest at the time Officer A arrested him, although neither he nor Officer B were aware of this.

Issues examined by the Authority

Issue 1: Was Officer A justified in arresting Mr Z?

Issue 2: Were Officer A's uses of force justified and proportionate?

The Authority's Findings

6. The Authority found that Officer A was justified in arresting Mr Z.
7. Officer A was justified in using his baton to break the driver's window, pepper spraying Mr Z, and in discharging a Taser.

Analysis of the Issues

ISSUE 1: WAS OFFICER A JUSTIFIED IN ARRESTING MR Z?

8. Officers A and B were driving up Domain Road when they saw a Volkswagen parked in an angled parking space.¹ Officer A said the Volkswagen's number plate *"immediately stuck out, looked like it had been printed on paper"*. He checked the number plate in the Police database, and it came back connected to a truck.² Officer B separately checked the number plate, and confirmed the Volkswagen was stolen.
9. Officer A parked behind the Volkswagen to prevent the occupants leaving and notified the Northern Police Communications Centre (NorthComms). Officer B spoke to the passenger, Ms Y, who was *"very cooperative"*.
10. Officer A approached Mr Z, who was sitting in the driver's seat. Mr Z *"vigorously"* denied that the Volkswagen was stolen. Mr Z then gave a car key to Officer A without being prompted. Officer B described Mr Z as being *"very calm"* at this point.
11. At one point Mr Z stated that the Volkswagen was his nephew's car. However, Officer A was not satisfied that this was true and believed it was necessary to obtain Mr Z's correct details and speak to the registered owner. Ms Y told Officer B Mr Z's first name, but Officer B overheard Mr Z giving a different name to Officer A, which he was unable to confirm in the Police database. Officer A told the Authority this *"99% means someone's giving false details"*.
12. Officer A eventually advised Mr Z that if he would not provide his correct details, they would arrest him and take him to be fingerprinted. He said Mr Z was not relaxed but was not aggressive at this point.
13. Both officers separately telephoned their supervisor, Officer C, who was based at the station. Officer C confirmed that the Volkswagen was stolen, and said they should arrest Mr Z. He also said to Officer B that he would arrange for backup for them. Officer B could not recall whether she advised Officer A that backup was on its way.
14. Officer A then returned to the Volkswagen and advised Mr Z he was under arrest. Meanwhile, Ms Y was advised by Officer B that she needed to stay until the situation was resolved.

¹ Officer B had only graduated from Police college approximately five weeks prior to the incident.

² Officer A initially entered the number plate incorrectly.

Did Officer A have good cause to suspect Mr Z had committed an offence?

15. Section 31 of the Crimes Act 1961 ('the Act') provides that an officer is justified in arresting any person without warrant in accordance with the provisions of section 315 of the Act, or with any other enactment conferring them with a power to so arrest.
16. Section 315 of the Act provides that an officer can arrest any person without a warrant if the officer has good cause to suspect that person has committed an offence punishable by imprisonment.
17. Mr Z appeared to be the driver of a car that had been confirmed to be stolen. Therefore, Officer A had good cause to suspect he had committed an imprisonable offence. Mr Z could have been charged with unlawfully taking a vehicle under section 219(1) of the Act, or conversion under section 226(1) of the Act, both of which are imprisonable offences.

FINDING ON ISSUE 1

Officer A was justified in arresting Mr Z.

ISSUE 2: WERE OFFICER A'S USES OF FORCE JUSTIFIED AND PROPORTIONATE?

Use of the baton and pepper spray

Mr Z's version of events

18. Mr Z said he first came across the Volkswagen with the keys still in the door and did not know who it belonged to. He got into the driver's seat and Ms Y got into the passenger seat. He had just started the car when Police arrived.
19. Mr Z said he knew he was going to be arrested as there was a warrant for his arrest, he was not meant to be driving, and he was in a stolen car. Mr Z said that he opened the car door to speak with Officer A, as the window would not wind down. Mr Z said Officer A spoke to him through the open driver's door and was asking for his details when Ms Y got out of the passenger side which "*seemed to escalate things*".
20. Mr Z shut the car door as it was cold. He said that Officer B came over and pulled out her pepper spray. Officer A "*smashed*" the driver's side window with his baton and pepper sprayed him with his pepper spray.

The officers' versions of events

21. Officer A said that, after he advised Mr Z he was under arrest, Mr Z "*blew up*", became very angry and started swearing aggressively. Officer A tried to handcuff Mr Z but he pulled his hand away and then went to grab Officer A's wrist. Officer A dropped his handcuffs and stepped back.

Mr Z continued to swear, then twisted in his seat and put a leg out of the Volkswagen. Officer A assessed Mr Z as assaultive, in that he believed Mr Z intended to cause harm.³

22. Officer A stepped back approximately three to four metres and pulled out his pepper spray as he thought Mr Z was going to *“come out fighting”*. Officer A said Officer B was behind him and had pulled out her Taser. She said it looked like *“[Mr Z] was either going to comply or fight with us”*. However, Mr Z pulled his leg back into the car and shut the door. Officer A got his baton out and used it to break the driver’s window. He then pepper sprayed Mr Z. He could not recall whether he warned Mr Z before doing so, but said it is normal for him to do so.
23. Officer A recalled Mr Z *“shying away”* from the pepper spray. Most of it hit the side of his face and had no effect. At this point Mr Z was trying to start the Volkswagen and Officer A believed Mr Z was actively resisting, as he was trying to escape. Officer A acknowledged, in hindsight, he should have stepped back from the car and waited for back-up, and this was an error on his part.
24. Officer B said when Officer A told Mr Z he was under arrest he went from *“talking casually to us”* to becoming *“quite aggressive”*. He refused to get out of the Volkswagen, denied knowing anything about the car, and swore at the officers. She believed he was actively resistant at this point. He resisted being handcuffed and shut the car door. She said Officer A tried to talk Mr Z round for possibly *“30 seconds or so”* and tried to *“grab”* Mr Z, but *“he was a big man and couldn’t be dragged out the car”*.
25. Officer B said Officer A used his baton to break the window. Officer A stated that Mr Z took another car key from between his legs and tried to start the Volkswagen, but he had not managed to do so at the time Officer A used his pepper spray. Officer B also pulled out her pepper spray. She believed this was when Officer A sprayed Mr Z. She said it *“was quite a lot”*, but Mr Z turned so the pepper spray hit the side of his face. At the time Officer B believed the use of pepper spray was justified, as Mr Z was actively resistant. She said Mr Z was *“definitely non-compliant”*, but not assaultive.
26. Officer B did not believe she was at risk of being assaulted as Mr Z had refused to get out of the Volkswagen. However, she believed if he had got out of the car there was *“a high chance he’d be assaultive to get away, push or punch [Officer A]”*.

Use of Taser

27. There is Taser Camera footage of Officer A’s deployment of his Taser. However, at normal speed it is not the best quality due to the frenetic nature of the incident.⁴

³ Police policy states that ‘assaultive’ means someone who displays intent to cause harm, through body language or physical action.

⁴ Authority staff have viewed frame-by-frame footage.

28. The first deployment of the Taser is through the broken driver's window and lasts for five seconds. Mr Z clearly reacts to being tasered, however, neuro-muscular incapacitation (NMI) does not appear to occur because Officer A is too close to Mr Z.⁵
29. Officer A then presses the 'arc' button, which has the effect of re-energising the probes that are already attached to Mr Z. This lasts for 1.2 seconds.
30. Officer A discharges the second cartridge and then Mr Z drives forward. Again, the deployment has limited effect due to Officer A and Mr Z being too close to each other. It only lasts for 0.6 seconds, probably because the wires attached to the probes break as Mr Z drives away.

Mr Z's version of events

31. In Mr Z's statement to Police he said that, after Officer A pepper sprayed him, he tasered him. Mr Z said he was yelling "*I give up, I give up*".
32. Officer A tasered him a second time which caused his foot to hit the accelerator. The Volkswagen went up and over the curb, and down into a field. As he was "*freaking out*", Mr Z carried on driving. The wires from the Taser were "*streaming off*" behind the car and he thought "*the pain was never going to stop*". He was also "*blinded*" by the pepper spray. When he got to the bottom of the field, he drove over another bollard to get away.

The officers' versions of events

33. Officer A told the Authority he was aware there was a line of bollards in front of the Volkswagen which he thought would prevent Mr Z from driving forward. Officer A believed that if Mr Z was able to start the car, Mr Z would need to reverse in a "*j turn*" to get out of the reserve and he would get "*run over*" in the course of Mr Z's escape.
34. Based on Mr Z's earlier behaviour, Officer A considered he was assaultive at this point. He was also concerned Mr Z could cause death or grievous bodily harm in the course of his escape in the car. Officer A described Mr Z as a "*big guy*" and said that, due to his and Mr Z's comparative sizes, he believed he had "*zero hope*" of pulling Mr Z out of the car.
35. Officer B, who was behind Officer A, told Police her recollection of the order of events from this point was "*blurred*" as it happened quite quickly. She recalled Mr Z throwing the door open at one point. She was concerned it would become "*hands on*" and, if it did, Mr Z would become assaultive. However, he closed the door and tried to start the car instead. If Mr Z reversed the car, Officer A was in "*a bit of a bad position*" and could get hurt as he might have got "*caught in the door*" or knocked and run over. Officer B described Mr Z's language and body language as "*very aggressive*".
36. Officer B said if Mr Z tried to reverse, he would hit their car. She did not think he would go forwards through the bollards.

⁵ Neuro-muscular incapacitation (NMI) is when the nervous system and muscles are temporarily not able to permit movement. To cause NMI two Taser probes must hit the body and be a sufficient distance apart.

37. Officer A drew his Taser. He told Mr Z he had a Taser, to get his hand off the car key, and step out of the car. The light and red dots from the Taser were shining on Mr Z's chest. Officer A acknowledged to the Authority that the Taser footage, which is unclear, only records him saying *"step out of the car"* repeatedly.
38. Mr Z did not get out of the car, so Officer A deployed his Taser. Officer A's Tactical Options Report (TOR) recorded that Mr Z *"twisted in his seat and kicked the driver's door open"* as the Taser cycled.⁶ As Officer A was within approximately two metres of Mr Z, the Taser had an effect but did not cause NMI.
39. Officer B recalled Mr Z *"freaking out a little bit and screaming"*. He stopped trying to start the car, but then pulled the probes out and started it. She said that Mr Z began to *"scream in pain and told Police he would stop"*.
40. As the first Taser cycle finished, Officer A saw Mr Z reach to pull the Taser probes out. He made no attempt to get out of the car. Officer A was concerned Mr Z would *"put his hands on the wheel"* and *"spin"* it, so he deployed the Taser again.
41. Officer A said there was a *"brief second"* before the Volkswagen shot forward, mounted the kerb and drove between the bollards. He believed this was a deliberate manoeuvre on Mr Z's part, as opposed to an involuntary reaction caused by the Taser. Officer A ran after the car, thinking it may get stuck as the grass was wet. However, Mr Z drove through a second set of bollards to get away.
42. The probes that were connected after the second tasing were still attached to Mr Z, and Officer A reactivated the taser a third time as Mr Z was driving off.
43. Officer B told the Authority she did not believe Mr Z had started the car until after he was tasered the first time. She believed he was *"trying to do everything to get away"* but did not feel that she was personally in danger or that he was assaultive towards them. She was unsure whether Mr Z was intent on using the car as a weapon but acknowledged they could have been hurt as a consequence of him reversing to get away. She was nervous for Officer A, but not concerned for her own personal safety.
44. As Mr Z started driving across the park, Officer B ran behind Officer A. She said she did not want to leave him with Mr Z in case he got out of the car. Officer A told her to return to the Police car and Ms Y, and she did so.
45. In hindsight, Officer B believed they should have delayed arresting Mr Z and waited for backup. She told Police she recalled querying the use of the Taser on the way back to the station, as she was not long out of Police college. She did not think Mr Z was threatening them but had concerns that if he had reversed at speed Officer A may have got hurt. She queried whether this was justification for use of the Taser.

⁶ Uses of force, including deployment of a Taser, must be reported in a Tactical Options Report.

Were the uses of the baton, pepper spray and Taser justified?

46. Officer A assessed Mr Z's behaviour as being actively assaultive and assaultive when attempts were made to arrest him. Officer A used his baton to break the driver's side window, used his pepper spray, and discharged his Taser. He told the Authority that his legal justification for using force was sections 39 and 40 of the Crimes Act 1961 ('the Act'). Officer A also claimed that he was justified in the use of the Taser in accordance with section 48 of the Act (self-defence or the defence of others), but we do not believe that section is relevant here because when Officer A discharged the Taser, Mr Z was attempting to escape, and there is no evidence that he was intending to harm Officer A. We have therefore assessed the use of the Taser under section 39 of the Crimes Act.

Section 39 of the Crimes Act 1961

47. Section 39 of the Act 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.
48. To rely on section 39 of the Act, Officer A's actions must be assessed on the following questions:
- 48.1 Did Officer A use force to overcome force which he believed was being used to resist arrest?
- 48.2 Was Officer A's belief that Mr Z was using force to resist arrest reasonable?
- 48.3 If Officer A's belief was reasonable, was his use of force reasonable (i.e., proportionate to the force being used to resist)?
- 48.4 If the use of force was reasonable, could Mr Z's arrest have been effected in a less violent manner?

Did Officer A use force to overcome force which he believed was being used to resist arrest?

49. After Officer A tried to handcuff Mr Z, who pulled the driver's door closed. Officer A used his baton to break the driver's window and then pepper sprayed Mr Z. Officer A assessed Mr Z's behaviour when he was trying to effect his arrest as actively resistant and assaultive.
50. When the pepper spray was not effective, and Officer A concluded that Mr X would drive away, so he discharged his Taser.
51. We accept that Officer A used force to overcome what he believed to have been active resistance by Mr Z to resist arrest.

Was Officer A's belief that Mr Z was using force to resist arrest reasonable?

52. Officer A knew that Mr Z was inside a stolen vehicle. Mr Z grabbed Officer A's wrist and was verbally aggressive, he closed the car door, and attempted to drive away. We believe Mr Z was actively resistant at this point.

53. For these reasons we accept that Officer A's belief that Mr Z was using force to resist arrest was reasonable when Officer A used his baton, pepper-spray and Taser.

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

54. Officer A gradually (but quickly because of the fast-moving situation) elevated his level of force in his attempt to arrest Mr A. He started by verbally communicating with Mr Z, and then attempted to handcuff him. Officer A then used his baton to smash the driver's window when Mr Z closed the door, followed by the use of pepper spray and the Taser when Mr Z continued to resist. We note that Officer A's third discharge of the Taser was as Mr Z was driving away and we consider this was risky given he was now mobile, but understandable in our view. Overall, we accept that Officer A's use of force was reasonable in the circumstances.

If the use of force was reasonable, could Mr Z's arrest have been effected in a less violent manner?

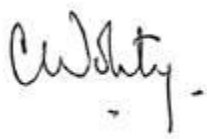
55. We have concluded that Officer A's use of force was reasonable, but note that Officer A acknowledged, in hindsight, he should have stepped back from the car and waited for back-up. Whilst we agree this is an option Officer A could have taken, we accept that the force he used was proportionate in the circumstances.

FINDINGS ON ISSUE 2

Officer A's use of his baton to break the driver's window was justified.

Officer A's use of pepper spray was justified.

Officer A's deployment of his Taser was justified, although the third discharge when Mr Z was driving away was risky, but understandable in the circumstances.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

3 February 2022

IPCA: 19-0382

Appendix – Laws and Policies

LAW

Power to arrest

56. Section 31 of the Crimes Act provides that an officer is justified in arresting any person without warrant in accordance with the provisions of section 315, or with any other enactment conferring them with a power to so arrest.
57. Section 32 provides where an officer has power to arrest any person without a warrant who has committed an offence, they are justified in doing so if they believe, on reasonable and probable grounds, that person to have committed that offence, whether or not the offence has in fact been committed, and whether or not the arrested person committed it.
58. Section 315 of the Crimes Act 1961 provides that an officer can arrest any person without warrant if the officer has good cause to suspect that person has committed an offence punishable by imprisonment.

Use of force

59. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use reasonable force in the execution of their duties such as arrests 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.”*
60. Section 40(1) of the Crimes Act 1961 provides for Police officers to use reasonable force to *“prevent the escape of that other person if he takes flight in order to avoid arrest”*, unless the escape can be prevented *“by reasonable means in a less violent manner”*.
61. Section 48 of the Crimes Act states: *“Everyone is justified in using, in defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.”* This provides legal justification for any person, including Police officers, to use reasonable force in defence of themselves or another. ‘Legal justification’ in this sense means that this person is not guilty of an offence or liable to any civil proceeding in connection with their use of force.
62. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

Use of force

63. The Police '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), pepper spray, batons, Police dogs, Tasers, and firearms.
64. Police policy provides a framework 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 as the TENR (Threat, Exposure, Necessity and Response) assessment.
65. Police officers must also constantly assess an incident based on information they know about the situation and the behaviour of 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).
66. 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 activity); actively resisting (pull, pushes or runs away); assaultive (showing an intent to cause harm, expressed verbally or through body language or physical action); or presenting a threat or 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.
67. The policy states that 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 pepper spray

68. The 'Oleoresin Capsicum (OC) Spray' policy states that pepper 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. A warning must be given before pepper spray is deployed.

Use of Taser

70. The 'Taser' policy states that a Taser may only be used to arrest an offender if the officer believes the offender poses an imminent risk of physical injury and the arrest cannot be effected less forcefully. A Taser must only be used on a person whose behaviour *"has the potential to escalate to within or beyond the assaultive range."*
71. To encourage de-escalation and to warn others nearby, officers should give a verbal warning in conjunction with the deployment of a Taser unless it is impractical or unsafe to do so. The warning relevant to the presentation of a Taser is *"Taser"*. The warning relevant to a discharge or contact stun is *"Taser, Taser, Taser"*.
72. A 'discharge' is an *"an application by firing two probes over a distance from a cartridge attached to the Taser, or subsequent applications of electrical current via the probes, which are in contact with the subject after firing, in conjunction with a verbal warning"*.
73. Whenever a Taser is shown or used, the operator must notify a supervisor as soon as practicable.

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, report writers 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.



Mana Whanonga Pirihimana Motuhake

PO Box 25221, Wellington 6140

Freephone 0800 503 728

www.ipca.govt.nz
