

Off-duty Police officer punches youth who stole cigarettes

Summary of the Incident

1. On 9 July 2019 Officer A was at his residential address in North Auckland when he disturbed a 14-year-old male (Mr X) stealing a packet of cigarettes from his property. Mr X and a friend who was waiting nearby, Mr Y, made their way towards a local park.
2. Officer A got into his private motor vehicle and went in search of Mr X and Mr Y and located them walking through the park. He got out of his vehicle, called on them to stop and walked over to them.
3. Officer A first took hold of Mr Y by the collar. When he saw that Mr X was holding something in his hand, he punched Mr X twice to the face causing him to fall to the ground. Mr Y ran off and Officer A put Mr X in an arm bar and led him to the roadway. Mr X also alleged Officer A kicked and punched him while he was on the ground.
4. Police were called to attend and noted swelling to Mr X's eye. Officer A admitted punching Mr X. Mr X was taken to the Police station for interview and his parents attended. At the station Mr X's eye injury worsened and his condition deteriorated. He was taken to a local medical centre and then to Starship Children's Hospital with a suspected fractured eye socket.
5. Police commenced a criminal investigation into Officer A's actions when he apprehended Mr X. Following that investigation, Officer A was charged with injuring Mr X with intent to injure him under section 189(2) of the Crimes Act 1961.¹ Following two jury trials in 2020 and 2021 where the jury could not reach a verdict, the charge was dismissed when the Crown elected not to proceed further.

¹ This section is set out in paragraph 57.

The Authority's Findings

Issue: Was Officer A justified in using force against Mr X?

Officer A had no legal justification to punch Mr X.

The Authority is unable to determine whether Officer A kicked Mr X.

Analysis of the Issue

6. We interviewed Officer A and the officers who attended the incident. We also reviewed the Police investigation leading to the prosecution of Officer A and the evidence given at both trials. The release of this report has been delayed by the need to await the outcome of the prosecution.
7. Officer A was off-duty and on a period of leave from work. In the weeks leading up to the incident on 9 July 2019, he noticed items going missing from his property. He was concerned someone had been watching the house, coming onto the property and stealing cigarettes from a table on the deck at the front of the house.
8. At about 5pm on Tuesday 9 July 2019, Officer A went out onto the deck to have a cigarette and then went inside to make a drink. He left a packet of cigarettes and three or four lighters on the table outside.
9. Officer A heard footsteps running onto the deck, "*stuff sort of shuffling and stuff being grabbed*," then footsteps running away again. He said he went out to the deck and saw his cigarettes and lighters were gone. Officer A went out onto the footpath and saw two males, Mr X and Mr Y, walking about 100 metres further up the road. He believed he saw Mr Y smoking a cigarette and assumed it was him who had stolen his cigarettes.
10. Officer A did not see anyone else on the street, so he was "*pretty certain*" it was one of or both who had taken his cigarettes. He said he felt the need to confront them as he believed it likely they were the same people who had stolen his cigarettes previously.
11. Officer A went back inside the house and fetched his car keys but when he came out again Mr X and Mr Y had gone. He said he did not believe he could find them on foot, so he got in his car and drove to the local park looking for them.
12. Officer A saw Mr X and Mr Y in the park. He called out to them, got out of his car, and approached them. As he did so, Mr X and Mr Y started walking towards him.
13. Mr X says he took the cigarettes out of his bag to return them to Officer A and said "*sorry, sorry, sorry*" as Officer A approached them. Mr Y says he saw Mr X with the cigarettes on the flat of his hand and heard him say "*here are your cigarettes Sir.*"

14. Officer A said he first grabbed Mr Y by the scruff of his collar and said: "*Why have you been coming to my house?*" and "*Where is my property?*" As Officer A was saying this, he said Mr X was behind him and he could not see what he was doing.
15. Officer A says he then heard Mr X say: "*I did it*" or "*I've got the cigarettes.*" When he turned, he saw Mr X's hand coming out of his bag or pocket and there was something in his hand. Officer A said he couldn't see what it was, and he believed it may have been a weapon of some sort, so he let go of Mr Y and then punched Mr X twice to the face: "*I struck him and then struck him again so he went to the ground.*" Mr X said Officer A swore and shouted: "*You think it's cool to steal off me? You know my cigarettes have been going missing for weeks.*"
16. Mr X also said Officer A kicked him when he was on the ground. He said: "*I was on the ground...he was just punching and kicking me the whole time.*" Mr X believed the incident went on for "*a few minutes*" and that Officer A only stopped when a member of the public, Ms Z, called out to Officer A to stop hitting Mr X. Officer A denied kicking or punching Mr X when he was on the ground.
17. Officer A then searched Mr X's bag to "*make sure he had no weapons*" and looked for Mr X's driver's licence as he did not know Mr X's age. Officer A said as soon as he found out Mr X was only 14, "*my heart just sank...*" He then lifted Mr X off the ground, put him in an 'arm bar' and escorted him out of the park where he saw Ms Z and asked her to call the Police.²
18. Ms Z said she had heard shouting and swearing coming from the park. She did not see Officer A punch Mr X but saw Mr X lying on the ground with Officer A standing over him. She said she shouted out to Officer A to ensure he knew he was being watched. She watched Officer A walk Mr X out of the park with his hands behind his back. Ms Z described Mr X as "*submissive*" and not struggling. She said Officer A appeared "*quite agitated....*"
19. Officer A told Ms Z to call the Police which she did. She could see that Mr X's left eye was swollen and there was blood on his face. While she was on the phone to Police, Mr X said he was 14 years old.
20. Shortly after, two Police officers (B and C) arrived, and Officer A explained to them the thefts from his property over a period of four to six weeks. When Police asked what happened to Mr X's face, Officer A admitted punching him twice.

What are the possible justifications for Officer A's use of force in these circumstances?

21. Officer A has provided different justifications for his use of force against Mr X. When interviewed, Officer A told the Authority that he used the force "*to subdue [Mr X] so I could apprehend him.*" However, when providing a response to the Authority's draft report on this matter (after we interviewed him and before his trials) Officer A said he was acting in self-defence as he considered Mr X and Mr Y posed a threat to his safety.

² An 'arm bar' is an approved manual restraint technique which custody officers can use to control a person's movements, or to gain control over a person who may try to escape.

22. The following provisions of the Crimes Act 1961 provide legal justification for using force in certain circumstances:
23. 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.
24. Section 48 provides that any person is justified in using “*reasonable*” force in defence of themselves or another.
25. We will consider each in turn.

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

26. 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.*”
27. 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).

Was Officer A justified in detaining or arresting Mr X?

28. A preliminary question in determining whether Officer A’s use of force was justified under section 39 is whether Officer A was, in fact, justified in detaining or arresting Mr X.
29. As stated in Police policy: “The powers and responsibilities of constables apply 24 hours a day and nothing prevents an off-duty constable from taking lawful, appropriate and justified action in situations where they believe intervention or assistance is necessary in the circumstances.”
30. Accordingly, the fact that Officer A was off duty does not prevent him from taking steps to detain or arrest someone.
31. While Officer A told us he intended to “*apprehend*” Mr X, he did not clarify whether he intended to place Mr X under arrest, or temporarily detain him on some other basis. A “detention” may be a more fleeting restriction on a citizen’s ability to move around freely, and it may move on to become an arrest. However, whether a detention or an arrest, that restriction on a citizen’s freedom must otherwise be justified under the law.

32. If Officer A's intent was not to arrest Mr X, but hold him for some other reason, the situations in which he can lawfully do this are limited. Of potential relevance in this situation would be an officer's power under section 33 of the Policing Act 2008 to detain a person for the purpose of obtaining the detainee's identifying particulars in order to issue the detainee with a summons. However, there is no evidence to suggest that Officer A considered issuing Mr X with a summons or that this was his purpose in 'apprehending' Mr X. Therefore, we do not consider that Officer A was justified in detaining Mr X under section 33.
33. We do not consider that there are any other legal justifications for temporarily detaining Mr X available to Officer A.
34. If Officer A's intention was to place Mr X under arrest, section 32 of the Crimes Act 1961 allows an officer to arrest a person without a warrant where the officer has reasonable grounds to believe that person has committed an offence. However, where that person is under 18 years of age, section 214 of the Oranga Tamariki Act 1989 also applies.
35. Section 214 contains additional safeguards for children and young persons, and provides that a child or young person cannot be arrested without a warrant unless the officer is satisfied on reasonable grounds that it is necessary to arrest that child or young person without a warrant for the purpose of:
- ensuring the appearance of the child or young person before the court, or
 - preventing the child or young person from committing further offences, or
 - preventing the loss of evidence or interference with witnesses.
36. The officer must also be satisfied that proceeding by way of summons would not achieve these purposes.
37. In this situation, we accept that Officer A was not aware before attempting to arrest Mr X that Mr X was 14 years old. We accept that Mr X's physical stature may have meant that it was not obvious that Mr X was a young person and, thus, under the protection of the Oranga Tamariki Act.
38. However, the courts have made it clear that, in justifying an arrest of a child or young person, Police have the onus of proving the requirements of section 214 have been met. While an officer is not obliged to check a person's age prior to arrest, the conditions set out in section 214 must still have been satisfied. Therefore, even if Officer A was not aware of his age, for the arrest to have been justified it must meet the conditions set out by section 214.
39. In this situation, Officer A did not give any consideration to whether it was necessary to arrest Mr X in order to ensure his appearance in court, prevent further offending, or prevent the loss of evidence. He also did not give any consideration to whether a summons would have achieved these purposes.
40. Accordingly, if Officer A did, in fact, intend to place Mr X under arrest, this was not justified as the conditions of section 214 of the Oranga Tamariki Act had not been satisfied, or even

considered. Therefore, section 39 of the Crimes Act does not justify any use of force by Officer A to restrain Mr X.

41. As a result, because we do not consider this to have been a lawful arrest, we are not required to consider the questions under the section 39 analysis.

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

42. Section 48 provides that any person is legally justified in using reasonable force in defence of themselves or another.
43. To rely on a defence under section 48, Officer A's actions must be assessed on both a subjective and an objective basis. This assessment involves three questions:
 - What were the circumstances as Officer A believed them to be? (a subjective test)
 - Did Officer A punch Mr X for the purpose of defending himself? (a subjective test)
 - If the punches were for the purpose of defending himself, were they a reasonable response in the circumstances as Officer A believed them to be? (an objective test)

What did Officer A believe the circumstances to be?

44. Officer A believed Mr X and Mr Y were responsible for stealing cigarettes from his house and he believed they were in possession of them when he approached them in the park.
45. Officer A told the Authority that he felt threatened by Mr X and Mr Y, particularly because he did not have his phone on him and did not know what their intentions were. Officer A says that when he heard Mr X say: '*I did it*', he turned to see Mr X with something in his hand. He said he did not know what the object was and believed it may have been a weapon. He said he perceived Mr X to be a risk, and he used sufficient force to subdue Mr X and remove that risk.
46. We do not accept that Officer A actually believed that Mr X posed a threat to his safety.
47. When Officer A approached Mr X and Mr Y in the park, he made it clear he believed them to be responsible for stealing the cigarettes and he wanted them back.
48. Mr X and Mr Y were walking toward Officer A as he was approaching and shouting at them. If Officer A had perceived Mr X and Mr Y to be a threat, we would not expect that he would continue to approach them and then grab Mr Y by the scruff of the neck.
49. We are satisfied that when Mr X said, "*I did it*" or "*I've got your cigarettes*", it was the cigarettes that he pulled from his pocket or bag, and he was in the process of handing them over, and Officer A knew that.
50. Even if Officer A did not recognise what was in Mr X's hand, the chance of it being a weapon was remote. Given that Officer A had demanded his property back and Mr X then said he had that property and held out his hand, we do not accept that Officer A believed that the object in Mr X's hand may have been a weapon.

Was Officer A's use of force against Mr X for the purpose of defending himself?

51. Officer A told the Authority he used the force “*to subdue him so I could apprehend him*” and he believed the force he used was “*sufficient enough to carry out what I needed to do to safely apprehend him.*” In other words, he punched Mr X for the purpose of apprehending Mr X, not for defending himself.
52. We do not accept that Officer A perceived himself to have been at risk of attack from Mr X or that he punched Mr X for the purpose of defending himself. Nor, given the evidence that Mr X was compliant, did Officer A have any justification to use force to overcome any resistance on the part of Mr X.
53. The Authority does not accept that Officer A had any legal justification to punch Mr X and agrees with Police’s decision to charge Officer A with injuring Mr X with intent to injure him.

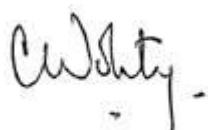
Was Mr X kicked?

54. When Officer B arrived at the scene, Mr X told her that Officer A had punched him in the face, pushed him to the ground and then kicked him “*multiple times.*” The doctor at Starship Hospital also recorded Mr X saying he had been kicked.
55. Officer A however denied kicking Mr X while he was on the ground. He said once “[Mr X] was subdued, he was no longer a risk to me.”
56. No-one witnessed Mr X being kicked and the medical evidence does not assist the Authority in making a conclusive finding on this issue.

FINDINGS

Officer A had no legal justification to punch Mr X.

The Authority is unable to determine whether Officer A kicked Mr X.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

15 September 2022

IPCA: 19-0112

Appendix – Laws and Policies

LAW

57. Section 189(2) of the Crimes Act 1961 states that everyone is liable to imprisonment for a term not exceeding five years who, with intent to injure anyone, or with reckless disregard for the safety of others, injures any person.
58. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

POLICY

Off-duty officer policy

59. The powers and responsibilities of constables apply 24 hours a day and nothing prevents an off-duty constable from taking lawful, appropriate, and justified action in situations where they believe intervention or assistance is necessary in the circumstances.
60. Sound judgement and discretion must be applied to determine whether it is appropriate to intervene or provide assistance in the particular circumstances. Where practicable call for assistance by reporting the incident to a Communications Centre and identify yourself as a constable to the call taker.
61. Officers should consider these factors before acting:
 - How serious is the offending? Is there a real danger of injury to any person or serious damage to property?
 - Are you equipped, or will you put your own safety or the safety of others at risk if you intervene?
 - Does action need to be taken immediately to resolve the situation or can it wait for on-duty constables to arrive?
 - Will your actions breach the law in any way?
 - Have you consumed alcohol, used medication or is there anything else that could hinder you from safely and effectively intervening or assisting? Constables should recognise the impact this may have on their decision making.
 - Are there any members of the public who can assist you until on-duty constables arrive?
62. Constables who use reportable force off-duty must submit a Tactical Options Report form to their supervisor before the end of the day in which they used force, or with the incident supervisor's approval, within 3 days/72 hours of the incident.”

Use of Force policy

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), OC 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 the 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. Wherever possible and appropriate, officers should use tactical communication throughout an incident, alone or with any other tactical options. Tactical communication is crucial to safely de-escalating an incident with uncooperative subjects. Tactical communication should be attempted in every incident where Police action is necessary in response to uncooperative subjects, including those that may require force to be used.
67. 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 inactivity); actively resisting (pulls, pushes or runs away); assaultive (showing an intent to cause harm, expressed verbally or through body language or physical action); or presenting a threat of 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.
68. 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.

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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