

## **BAIADA POULTRY PTY LTD v THE QUEEN (M126/2011)**

Court appealed from: Court of Appeal of the Supreme Court of Victoria  
[2011] VSCA 23

Date of judgment: 18 February 2011

Date special leave granted: 2 September 2011

On 29 May 2009, the appellant ('Baiada') was convicted in the County Court of Victoria of one count of breaching s 21(1) of the *Occupational Health and Safety Act 2004 (Vic)* ('the Act') by failing to provide plant and systems of work for employees that were safe and without risks to health. Baiada carried on a business of processing broiler chickens at a plant in Laverton North. The conviction arose from the death of Mario Azzopardi, who was the director and driver of Azzopardi Haulage, a company which was engaged by Baiada to transport crates of chickens from a farm in Moorooduc to its processing plant. Azzopardi was struck by a crate which was being moved by a forklift operated by an unlicensed driver who was an employee of DMP Poultech Pty Ltd ("DMP"). DMP was engaged by Baiada to provide chicken catchers, who caught the chickens at the farm and put them in crates, which were loaded on to Azzopardi's truck by forklift. The fatal accident occurred when a crate was being moved on the back of the truck, by means of the forklift, in order to redistribute the load.

The Crown case was that, although Baiada engaged DMP and Azzopardi Haulage as independent contractors, Baiada retained 'control' over the loading activities and thus, under s 21(3)(b) of the Act, owed duties as an 'employer' to the employees of DMP and Azzopardi Haulage in relation to those activities.

In its appeal to the Court of Appeal (Neave JJA and Kyrou AJA, Nettle AJ dissenting) Baiada complained, inter alia, about the trial judge's directions to the jury with respect to Baiada's contention that it was entitled to rely on the expertise of its independent contractors to take appropriate steps to safeguard the health and safety of their employees. The Court found that the trial judge's direction was inadequate. What was needed was a clear direction that, if the jury were satisfied that control had been established, they were bound to go on and consider whether they were satisfied beyond reasonable doubt that Baiada's engagement of DMP and Azzopardi Haulage was not sufficient to discharge Baiada's obligation to do what was reasonably practicable to provide and maintain a safe work site. The jury should have been directed in clear terms that, unless the Crown had satisfied them of that beyond reasonable doubt, they were bound to acquit.

Neave JA and Kyrou AJA held there was no substantial miscarriage of justice as a result of the misdirection, and they applied the proviso to s 568(1) of the *Crimes Act 1958 (Vic)* to dismiss the appeal. Nettle JA (dissenting) considered the inadequacy of the judge's direction denied Baiada the benefit of the jury's consideration of one of its two principal defences, and therefore, the proviso should not be applied.

The ground of appeal is:

The Court of Appeal erred in the application of the proviso to s 568(1) of the *Crimes Act 1958 (Vic)* and in particular

- (a) in holding that the Court had a discretion as to whether to apply the proviso; and
- (b) in applying the proviso in circumstances where, by virtue of the trial judge's directions, the appellant was denied the jury's consideration of one of its principal defences.