

COURT OF APPEAL

**MORRISON JA
BODDICE J
BURNS J**

**CA No 223 of 2015
DC No 107 of 2008**

THE QUEEN

v

MCH

Appellant

BRISBANE

TUESDAY, 15 MARCH 2016

JUDGMENT

MORRISON JA: On 24 July 2008, the appellant was convicted on his own plea of guilty of three counts of incest involving his niece. The niece was 17 years old at the time of the alleged offences. The indictment charged the offences under s 222(1) of the *Criminal Code*. The appellant was sentenced to two years' imprisonment on each count, to be suspended after serving six months, with an operational period of two years.

On 31 July 2015, the appellant received legal advice that the convictions should be challenged and applied for an extension of time to appeal. On 22 October 2015, this Court extended the time to appeal against the conviction.

At the time of the alleged offence, s 222(1) of the *Code* relevantly provided:

“This section does not apply to carnal knowledge between persons who are entitled to be lawfully married.”

The relationship between an uncle and a niece was not then within the defined categories of “prohibited relationship” under s 23B(2) of the *Marriage Act* 1961. As a consequence, for the reasons given by this Court in *R v Rose* [2010] 1 Qd R 87, the appellant and the niece were, at the time of the alleged offences, “persons entitled to be lawfully married”.

It follows that the appellant could not have been charged under s 222 of the *Code*. The respondent properly concedes that the appellant could not have been lawfully convicted of the offences of incest, therefore, the convictions cannot stand and it would be a miscarriage of justice to let them remain; see *R v Wade* [2012] 2 Qd R 31.

The appellant filed a notice of abandonment on 1st March 2016. For the reasons above, that notice should be set aside. The Court proposes the following orders, and it will make the following orders:

1. The notice of abandonment dated 1 March 2016 is set aside.
2. The appeal is allowed.
3. The verdicts of guilty entered on 24 July 2008 are set aside.
4. On each count, a verdict of acquittal is entered.

They are the orders of the Court. Nothing arising out of anything I’ve said?

MR ALLEN: No, your Honour.

MORRISON JA: Thank you very much, adjourn the court.