



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

**Not Reportable
Case No: A135/2025**

In the matter between:

THEO HARTZENBERG

Applicant

and

THE STATE

Respondent

Coram: DA SILVA SALIE, J et MAPOMA, AJ

Heard on: 27 February 2026

Delivered on: 27 February 2026

Summary:

Criminal law – sexual offences – appellant convicted of statutory rape of a 15 year old minor, sexual exploitation of the minor for sexual services in exchange for reward and engaging sexual services with an adult – distinction between exploitation of a child and engaging sexual services of the 18 year old adult – construction of the statutory elements of the appellant being anally penetrated – definition of sexual penetration does not require that the appellant had to penetrate – anal penetration by the

complainant as sought by the appellant suffice in terms of the Act – postponement to call two defence witnesses to testify before the appellant correctly refused – the evidence of the minor complainant accepted as satisfactory and reliable notwithstanding shortcomings and investigation irregularities – conviction in respect of statutory rape and sexual exploitation of a minor confirmed – appeal dismissed in respect of counts 2 and 7 - conviction in respect of engagement of an adult for sexual services set aside– effective sentence of 8 years’ imprisonment confirmed

ORDER

1. The appeal against the conviction on Count 25 is upheld, and the conviction is set aside.
2. The appeal against the convictions on Count 2 (alternative) and Count 7 is dismissed.
3. The sentence on Count 25 is set aside, antedated to 2 December 2024.
4. The sentence imposed in respect of counts 2 and 7 are confirmed.
5. The effective sentence remains eight (8) years’ imprisonment.
6. The appellant’s bail is withdrawn and he is to report to the Clerk of the Criminal Court, Wynberg, at 10h00 on Monday, 2 March 2026 for his transportation and incarceration to the Correctional Facility to commence his sentence as imposed.
7. The Chief Registrar of this Court is directed to furnish a copy of this judgment on date hereof to the Clerk of the Criminal Court, Wynberg, for the Clerk to act as contemplated in the above paragraph.

JUDGMENT

DA SILVA SALIE, J:

Introduction

[1] This is an appeal against conviction and sentence. The appellant was legally represented throughout the proceedings in the court a quo. He pleaded not guilty to all charges and elected not to provide a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 (“the CPA”). After the State closed its case, the appellant brought an application for discharge in terms of section 174. The magistrate granted a discharge on most counts because the complainants on those counts were not called or the evidence was insufficient. The application was refused in respect of the remaining counts, and the appellant thereafter closed his case without testifying.

[2] The charges arose from alleged sexual offences in the Muizenberg beachfront area between March and May 2021. The remaining convictions relate to one minor complainant, EC (15 years old at the time), and one adult complainant, JF (18 years old at the time).

[3] The appellant was 36 years old, an admitted attorney of the High Court, and resided at the Empire Building Apartments situated directly opposite the Muizenberg beachfront. He was commonly known in the area by the nickname “lawyer.” The complainants were amongst other children who frequented the beachfront locality daily.

[4] The locations identified by the complainants included the area below the municipal hall with its distinctive red-tiled roof, the beachfront hokkies, the colourful wooden bathing huts, and “die kolletjie” near the bridge—well-known public landmarks associated with the Muizenberg beachfront.

[5] The appellant was convicted on:

(a) Count 2 (alternative charge): Statutory rape, a contravention of the provisions of section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to 8 years’ imprisonment, of which 3 years was suspended for 5 years, on condition that he is not convicted of the same offence within the period of suspension. The sentence would run concurrently with Count 7.

(b) Count 7: Sexual exploitation of children, a contravention of the provisions of section 17(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to 8 years’ imprisonment; and,

(c) Count 25: Engaging sexual services of a person older than 18 years, a contravention of section 11(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007. He was sentenced to 3 months’ imprisonment, wholly suspended for 3 years on condition he is not convicted of same offence. The effective term imposed was 8 years’ imprisonment.

(d) He was also found unsuitable to work with children, and that in terms of section 120 (4) of the Children’s Act 38 of 2005, his name be added in the National Child Protection Register in Part B.

(e) The court also ordered in terms section 50A of the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007) that his name be included in the National Register for Sexual Offenders.

Factual Background

[6] The complainants were boys living on the streets in the Muizenberg beachfront precinct. They moved between the beachfront, the civic centre, the bridge, and the informal wooden structures (“hokkies”). They knew the appellant by his nickname “lawyer” and regularly saw him entering and exiting the Empire Building.

[7] EC testified that the appellant offered him money to penetrate him anally and that this occurred on more than one occasion in secluded areas near the beachfront. EC explained that he was living on the streets and accepted the money out of necessity.

[8] JF, an adult complainant, testified that he too had anal intercourse with the appellant once and afterwards received money. He also corroborated elements of EC’s testimony, notably the incident with faecal matter on EC’s trousers.

[9] The complainant TR, who was younger, testified that he acted as a lookout but was never induced into sexual activity. The appellant was acquitted on all counts involving TR.

[10] EC testified that after one act of penetration he found faecal matter on his trousers and informed the group. JF confirmed this account, stating that EC told them what had happened and that the boys laughed about it. The magistrate accepted this corroboration as material.

Investigative Irregularities Raised

[11] The appellant criticised aspects of the investigation, including the manner in which statements were taken, inconsistencies about who accompanied the police during his arrest, and discrepancies in dates. These issues were fully ventilated before the magistrate, who found that whilst the investigation was not beyond reproach, the irregularities did not materially affect the reliability of the evidence on the counts resulting in conviction.

Identification

[12] The appellant challenged the identification evidence. In *Abdullah v The State* (Case no 134/21) [2022] ZASCA 33 (31 March 2022), the Supreme Court of Appeal reiterated that identification must be approached with caution, particularly where there is any risk of dock identification.

[13] This Division in *S v Willemse and Others* (SS93/2019) [2020] ZAWCHC 105 (15 September 2020) at para 78 and *Abdullah* (supra) at para 13, (unreported) emphasised that recognition, where the witness knows the accused beforehand, substantially reduces the risk of error compared with first-time observation. In this case, the complainants knew the appellant from the area, knew his residence, and knew him by his established nickname. Their identification rested on recognition and not on fleeting encounters or courtroom pointing-out.

Right to Silence and court a quo's refusal to postpone

[14] The court refused to postpone the matter when at the commencement of the defence case, the appellant sought to call two witnesses to testify before him on orientation of the Muizenberg beachfront. After the court's finding that no exceptional circumstances exist to grant such leave, the appellant elected not to testify and closed his case. In my view the discretion was properly exercised and there was no irregularity. In the result I am further satisfied that this did not amount to an unfair trial.

[15] The appellant chose not to testify. While no adverse inference may be drawn solely from silence, where the State's evidence raises matters that call for an answer, and the accused elects not to give one, the State's case remains uncontested. (*S v Boesak* 2001 (1) SACR 1 (CC)).

Analysis of Convictions

Counts 2 (Alternative) and 7 — Upheld

[16] The magistrate considered the evidence of EC with the necessary caution for child witnesses. His evidence regarding the sexual acts, the locations, the payments, and the nature of the appellant's conduct was coherent and consistent in material respects.

[17] Contradictions common among children living in conditions of instability did not relate to the core allegations. The corroboration provided by JF strengthened the reliability of EC's evidence. The contradictions were not material and though there were shortcomings, it cannot be said that the magistrate's acceptance of such evidence as satisfactory and reliable was misplaced.

[18] The evidence proved beyond reasonable doubt that EC, a minor under 16, penetrated the appellant at the appellant's instance and for money (Count 2), and that the appellant induced EC to perform a sexual act for reward (Count 7). There is no basis to interfere with these convictions.

Count 25 — Conviction Unsustainable

[19] The evidence of JF established that intercourse with the appellant did occur and that he received money afterwards. However, section 11(1) criminalises engaging the sexual services of an adult for reward, requiring proof of procurement, solicitation, or engaging of services in a commercialised sense.

[20] JF's evidence does not establish that he was engaged as a sex worker or that his sexual services were procured for reward. The payment was spontaneous and unaccompanied by any arrangement or understanding that he was being hired. The essential element of "engaging the services" was not proved. The conviction on Count 25 therefore cannot stand.

Sexual Penetration — Gender Neutrality and configuration in terms of the 2007 amendment

[21] The definition of "sexual penetration" in section 1 of the Act is deliberately broad and gender-neutral. It includes:

[21.1] Any penetration whatsoever of the anus or genital organs by the genital organs of another person. The statutory wording does not require that the appellant be the penetrating party. The minor's penis penetrated the appellant's anus. The appellant intentionally caused that penetration to occur. The penetration therefore falls squarely within the statutory definition. The physical configuration of the act is legally irrelevant. The legislative purpose of the Act was to move away from the historic, gendered conception of rape that depended on male penile penetration of a female complainant. The appellant's argument that he "could not rape because he was penetrated" would therefore fail as a matter of statutory construction.

Sentence

[22] The remaining convictions relate solely to EC, who was 15 at the time. EC lived on the streets, without parental care or supervision, and was financially and socially vulnerable. His circumstances rendered him susceptible to exploitation.

[23] The appellant, a 36-year-old attorney residing opposite the beachfront, exploited EC by offering small sums of money for acts of anal penetration. The conduct was predatory and targeted a child in precarious circumstances. The moral blameworthiness is high.

[24] The magistrate imposed 8 years on Count 2 (alternative of which 3 years were suspended for 5 years), 8 years on Count 7, with 3 years of Count 2 to run concurrently with Count 7. However, notwithstanding Count 25 now set aside, this sentencing structure remains appropriate. The effective sentence of 8 years' imprisonment is justified.

[25] The sentence is proportionate and accords with the purposes of punishment in *S v Zinn*. There is no basis for interference.

Order

[26] In the result I make the following order:

1. The appeal against the conviction on Count 25 is upheld, and the conviction is set aside.
2. The appeal against the convictions on Count 2 (alternative) and Count 7 is dismissed.
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G. DA SILVA SALIE
JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

I AGREE:

Z. L. MAPOMA
ACTING JUDGE OF THE
HIGH COURT
WESTERN CAPE DIVISION

Appearances

For Applicant: Adv. GK Mhlanga
Instructed by: Musetsho Law Inc.

For Respondent: Adv. A Ferreira
Instructed by: The National Prosecuting Authority