REPORTABLE

CASE NO.: SA 26/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FADI AYOUB	**Appellant**
and	
MINISTER OF JUSTICE	**First Respondent**
MAGISTRATE OF WINDHOEK: ELINA NANDAGO	**Second Respondent**
PROSECUTOR-GENERAL	**Third Respondent**
MINISTER OF FOREIGN AFFAIRS	**Fourth Respondent**
HEAD OF THE WINDHOEK PRISON	**Fifth Respondent**

Coram: SHIVUTE CJ, MARITZ JA*et*MAINGA JA

Heard: 12 July 2012

Delivered: 22 August 2012

APPEAL JUDGMENT

SHIVUTE CJ (MARITZ JA *et* MAINGA JA concurring):

Background

[1] The appellant, a Lebanese national and also a holder of South African citizenship, was arrested on 10 January 1992 in Rouen, France for allegedly committing the crime of rape the night before the date of his arrest. After his initial appearance in court, he was provisionallydetained in custody until his subsequent appearance on 10 March 1992 when he was conditionally released on probation. He avoided probation on 15 February 1993 when he failed to appear in court. He says that he left France in 1993; has been resident in Namibia since 1999 and married a Namibian citizen on 5 December 2003. Together they have two children. The authorities in the French Republic have requested the Namibian authorities for the appellant's extradition. In the documents containing information on the request for the return of the appellant to France, it is stated amongst other things that after the appellant had failed to comply with probation on 15 February 1993 a warrant for his arrest was issued by the examining judge on 26 February 1993 and on 16 December 1993 an order for his arrest was also issued by the Indictments Chamber of the Court of Appeal in Rouen. Due to his absence from France, the warrant could not be executed and, on 10 January 1997, the appellant was tried in his absence, convicted and sentenced to 10 years 'criminal imprisonment' by the Criminal Court of the County of Seine Maritime.

[2] The documents further reveal that the complainant in the rape matter alleged that she had been raped several times by the appellant, a man she had known for

two months prior to the incident. After the alleged rape, the appellant allegedly locked the complainant in his apartment and left with all the keys. The complainant hailed a female passer-by from a window of the apartment, informed her that she had been raped and gave her a telephone number to alert the complainant's friends. The passer-by left a message on the answering machine of the telephone number given to her by the complainant and also alerted the Rouen police of the situation. According to the documents, the appellant admitted during his first appearance in court that he had sexual relations with the complainant but, notwithstanding her admitted resistance to his advances, maintained that the sexual intercourse was consensual. This statement was contradicted by the complainant who maintained that she had made it clear to the appellant that their relationship would remain platonic and that she had introduced her fiancé to the appellant. An observation is made in one of the documents that after the appellant and the complainant had become acquainted, a mock engagement ceremony between the complainant and her fiancé was staged in a restaurant where the appellant had worked; the appellant had taken part in the ceremony and could therefore not ignore the nature of the relationship between the complainant and her fiancé.

[3] The first respondent in the appeal is the Minister of Justice, the Minister responsible for the administration of the Extradition Act,1996(Act No. 11 of 1996). The second respondent is a magistrate for the district of Windhoek, to whom an authority to proceed with the matter had been issued by the first respondent. The third respondent is the Prosecutor-General, the institution clothed with the authority to

prosecute in the name of the Republic of Namibia in criminal proceedings pursuant to Article 88(2) of the Namibian Constitution. The fourth respondent is the Minister of Foreign Affairs cited 'due to direct and substantial interest he has in the outcome of the application'. The fifth respondent is the head of the Windhoek Central Prison where the appellant is being detained.

[4] Upon receiving of the request for the appellant's extradition to France and acting in terms of s 10(1)of the Extradition Act, 1996(the Act), thefirst respondent(the Minister)issued to the second respondent(the magistrate)an authority to proceed with the matter in accordance with the provisions of s 12 of the Act. Satisfied that the warrant for the appellant's arrest was duly authenticated as contemplated in s 18(1) of the Act, the magistrate endorsed it and the appellant was subsequently arrested in Windhoek on 1 March 2012. He appeared before the magistrate where he applied for his release on bail pending the outcome of the extradition enquiry. Bail was refused. The appellant appealed to the High Court against the refusal of bailbut the appeal was dismissed.

[5] The enquiry in terms of s 12 of the Act was set down for hearing from 27 to 29 June 2012 but has since been postponed for reasons unrelated to the present appeal.

[6] In this matter the appellant appeals against the judgment and order of the High Court dismissing the urgent application brought by him for his immediate release from detention at Windhoek Central Prison and interdicting his arrest or detention in

connection with the pending extradition inquiry. The appellant challenged his detention on the basis that his detention was - and any extradition that may follow would be -contrary to the provisions of ss 5(1)*(e)*and (2)*(a)* of the Act on contended grounds that the offence for which extradition was being sought had become prescribed through lapse of time and,because the appellant's conviction had been obtained in his absence, his extradition was precluded by the Act.

[7] The application in the High Court was brought by way of a Notice of Motion with two parts, A and B. In terms of Part A, the appellant sought leave for the application to be heard as one of urgency and also sought an order granting a rule *nisi* calling upon the respondents to show cause why he should not be released from detention and why the respondents should not be restrained and interdicted from arresting and detaining the appellant or in any other manner restraining his liberty and movement. The appellant also urged the Court below to order that the rule *nisi*should operate immediately as an interim interdict pending the outcome of the review application in terms of Part B of the Notice of Motion at a hearing in due course.

[8] In Part B, the appellant sought an order reviewing and/or setting aside and/or correcting the decisions and actions taken by the Minister and the magistrate as set out in paras 1 to 4 of Part B of the Notice of Motion.

[9] In the High Court the appellant was represented by Mr Tjombe while Mr P A van Wyk represented the Respondents. It is necessary to summarise the submissions made by counsel in the High Court. Mr Tjombe's contentions were twofold: Firstly, that, in terms of s 5(1)*(e)*[1]of the Act, no person may be extradited for an offence allegedly committed after the lapse of 20 years from the date of the alleged commission of the crime or offence and, secondly that, in terms of s5(2)*(a)*of the Act,a person may not be extradited for an offence he or she had been convicted of in *absentia*. Since no prosecution had been instituted in Namibia, the matter had prescribed, so counsel argued.The appellant also denied that he had committed the crime he had been accused and convicted of in *absentia* and contended that he would not abscond from Namibia, which country has become his permanent home.

[10] Mr van Wyk's counter-argument on the first point was that the proceedings had already commenced in a court in Rouen in 1992 and that these proceedings had been confirmed in the High Court of Seine Maritime on the date of the hearing, namely 16 December 1993. Therefore, he submitted, the cause of action(being the crime committed which necessitated the request for extradition)had not prescribed due to lapse of time. On the second point, he submitted that the documents substantiating the request for extradition of the appellant by the French authorities,

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[1] 5(1)Notwithstanding section 2 or the terms of any extradition agreement which may be applicable, no person shall be returned to a requesting country, or be committed or kept in custody for the purposes of such return, if it appears to the Minister acting under section 6(3), 10 or 16 or the magistrate concerned acting under section 11 or 12, as the case may be-

…

(e) that the offence for which such return was requested has, according to the laws of Namibia or the requesting country, prescribed through lapse of time.

explicitly stated that the sentence passed in the appellant's absence would be revoked upon his arrest, the trial would commence afresh and the appellant would have the right to a legal representative, thus ensuring a fair hearing for the appellant.

Findings by the High Court

[11] The High Court dismissed the application with costs, reasoning that the appellant's contentions that the extradition enquiry in terms of s 12 was in violation of ss 5(1)*(e)* and 5(2)*(a)*of the Act was based on an erroneous interpretation of those sections. The Court below found that the phrase '*if it appears to the Minister'*employed by s 5(1)*(e)*and 5(2)*(a)*of the Act is the basis for the Minister's discretionary power vested in her by the sections. These words have to be considered when interpreting the section and the Act as a whole.

[12] The learned Judge reasoned further that one of the consequences for the aforementioned interpretation was that the Minister must first exercise her discretion before a Court could intervene, upon the production of evidence showing that such discretion was exercised in a manner rendering it impugnable. This, the High Court found, had not been the situation in the case before it.

[13] Regarding the issue of whether the crime for which the appellant's extradition had been requested had prescribed due to lapse of time in terms of Namibian law, the Court below decided that it was not necessary to consider and make any findings on counsel's submissions on the point.

[14] The last issue considered by the High Court was whether the appellant had made out a case for the temporary interdict sought. The Judge agreed with counsel for the appellant's submission that the requirements for the grant of a temporary interdict as enunciated in *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality*1969(2)SA 256(C)at 267A-F were applicable.[2]

[15] In applying these requirements, the learned Judge accepted that the appellant had established a *prima facie* right which was open to doubt. He, however, held that the harm the appellant suffered or could suffer was not irreparable: the appellant had other forms of relief at his disposal and there was a real risk that he would flee from Namibia as he had from France. Thus, the Court below concluded that the appellant had failed to satisfy the requirements of a temporary interdict applied for.

[16] The High Court emphasized that Namibia had an international duty and moral obligation not to become a safe haven for fugitives from justice. Thus, so it concluded, the balance of convenience clearly favoured the respondents.

Counsel's submissions on appeal

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[2] In summary these requisites are that the applicant for such temporary relief must show -
(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
(b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) that the balance of convenience favours the granting of interim relief; and
(d) that the applicant has no other satisfactory remedy.

[17] In this Court Mr Heathcote,assisted by Mr Narib, argued the appeal on behalf of the appellant. Mr PA van Wyk appeared together with Mr Akweenda for the first, third, fourth and fifth respondents while Mr Khama argued the appeal on behalf of the second respondent. In summary, counsel for the appellant set out certain principles that he argues were applicable to the consideration of the appeal. He asserted the uncontested fact that Article 7 of the Constitution plays a pivotal role in extradition proceedings as decided by this Court in *S vAlexander*2010 NR 328 (SC). Counsel submitted that the core of the application in the High Court was the challenge of the decision of the Minister to authorise the matter to proceed to the enquiry. According to counsel, the Minister's decision *'in effect'*to authorise the detention of the appellant was subject to the following legal principles:

(a) International law does not recognize a general duty on the part of states to deliver or surrender an accused or a convicted person to other states.[3]

(b) The duty to extradite can be created by treaty or legislation(such as the Act).

(c) Any extradition is *'by its very nature, an invasive process, a draconian measure'.*[4]As such it must be done subject to the rule of law, and any legislation authorising same must be interpreted in *'favorem libertatis'*.

[3] See: *South African Constitutional Law: The Bill of Rights*, Cheale, Davis and Haysom at p 322.
[4] See: Id. at p 323.

(d) Any act of the Minister authorising the committal of a person sought by a foreign state, is subject to the provisions of the Namibian Constitution and the Act.

(e) Namibia being a constitutional state, an act of the Minister which has the effect of depriving the appellant of his liberty, are justiciable by the Namibian High Court, and in doing so, that court was obliged to have proper regard to the fact that the appellant's right to liberty could only be infringed if it had been done in a substantially and procedurally correct manner.

[18] Against the backdrop of these principles, counsel argued that s 2 of the Act - authorising the extradition of persons(other than Namibian citizens)in Namibia if they are *'accused of having committed an extraditable offence'* or if they *'are alleged to be unlawfully at large after having been convicted'*- is the crucial provision, but that subsection (1)thereof makes it clear that the Minister's power to authorise the return of the wanted person to the requesting country must be exercised subject to the provisions of the Act. It is thus clear, so counsel contended, that the provisions of ss 5(1)*(e)*and 5(2)*(a)*of the Act are applicable to the decision of the Minister to issue authority to proceed. Counsel continued to submit that ss 5(1)*(e)*and 5(2)*(a)*only find application when the magistrate acts, as far as appellant was concerned, under s 12 of the Act. They do not find application when the magistrateendorses the warrant for the appellant's arrest in terms of s 10.

[19] Counsel for the appellant initially and forcefully argued that the Minister could not issue an authority to proceed because it was apparent from the documents accompanying the request for the appellant's return to France that the alleged rape which had been committed more than twenty years ago would have prescribed under Namibian law through lapse of time. Reliance on prescription as a basis for challenging the decision of the Minister to issue anauthority to proceed has been abandoned in reply. In my view, correctly so, given the fact that criminal proceedings were instituted against the appellant in the French courts on the day of his arrest and the prosecution thereof was only delayed because the appellant absconded and became a fugitive from justice. The only remaining basis for the appellant's challenge is the contention that the authority to proceed should not have been issued, because it was apparent from the documents accompanying the extradition request that the appellant had been convicted in his absence and that the extradition would be in violation of s 5(2)*(a)*of the Act.

[20] Counsel developed the argument by stating that there was no ambiguity in the provisions of s5*(2)(a)* of the Act, and that it should for this reason be given its ordinary grammatical meaning. He went on to argue that the restriction on extradition contained in s 5(2*)(a)*of the Act was unqualified, unlike the restrictions contained in ss 5(1)*(a)*, 5(1)*(b)*,and 5(1)*(d)*which can be removed on some positive action by the requesting country. For example, s 5(1)(*d*)restricts the extradition of a person if he or she would face the death penalty as a sentence, but the requesting country can guarantee that such penalty would not be imposed or executed if it had already been

imposed. Counsel continued to argue that it was common cause between the parties that on 10 January 1997and in his absence, the French authorities tried, convicted and sentenced the appellant to 10 years imprisonment.

[21] I turn to consider the submissions made by counsel for the first, third, fourth and fifth respondents. The approach adopted by Mr van Wyk was that the issues raised by the appellant about the legality of his detention, including arguments based on ss 5 and 10 of the Act should be ventilated at the enquiry in due course or during the review. In the submission of counsel, the appellant was lawfully arrested and has not been treated unfairly. During the second phase of the extradition, there are remedies that would be available to the appellant and to which he could have recourse. Rather than challenging the decision of the Minister to issue the authority to proceed, the appellant should challenge the decision of the magistrate to endorse the warrant of arrest. Counsel indicated that the respondents he represents fully supported the judgment of the High Court. Counsel continued to argue that it was premature for the appellant to challenge the evidence tendered by the French authorities *'at this stage'* since the magistrate may adjourn the hearing and request further particulars in terms of s12(4)of the Act. Furthermore, the person designated by the Prosecutor-General to appear at the enquiry pursuant to s12(3)of the Act may present evidence refuting the issue raised by the appellant concerning the conviction in his absence and the magistrate may request further particulars in this regard. By the time the Minister makes orders in respect of the appellant’s extradition, all facts and legal arguments would have been fully ventilated, either at the enquiry or during

argument on Part B of the application. In the light of this approach, counsel for these respondents raised issues of *lis alibi pendens* and *res judicata*. In the view I take of the matter, issues of *lis pendens* or *res judicata* do not arise at all and it is therefore not necessary to deal with those issues in this judgment.

[22] Counsel appearing for the magistrate has indicated that the magistrate would abide the decision of the Court. Counsel nevertheless sought leave of Court to present submissions to assist the Court to come to a decision. Such leave having been granted, counsel accordingly commenced his submissions by dealing with the scheme of the Act and pointing out that the scheme of the Act was designed in a manner that demarcates between judicial functions that are exercised by the magistrate and executive functions that are exercised by the Minister. Counsel submitted that this approach is followed in many Commonwealth countries and relied for this proposition *inter alia* on five Canadian cases - some of which will be considered later on in this judgment.

[23] He continued to argue that the provisions of the Act do not authorise the magistrate to second-guess or review the decisions made by the Minister leading to the issuing of an authority to proceed in terms of s10(1)of the Act. If the external warrant is duly authenticated, the magistrate must endorse it in terms of s10(2)of the Act.

[24] Once the warrant has been endorsed and executed, then s12(1)requires that the person affected be *'brought before that magistrate who shall hold an enquiry with a view to make a finding as to the return of such person to the country concerned'*. In terms of s12(5)of the Act, the magistrate was required to make a finding that the return of the person was not prohibited under Part II of the Act *'after hearing the evidence tendered at such enquiry'*. Not only does the Act require the consideration and finding as to Part II to be made after hearing the evidence tendered by all parties at the enquiry and after the second respondent had possibly elected to request further particulars from the requesting country with regard to legal and factual issues permitted by s12(4)of the Act, Articles 12 and 18 of the Constitution and the common law also require informed and fair decision-making. Counsel concluded by stating that inasmuch as the enquiry for determining whether or not the appellant should be returned to the requesting state has not yet commenced, the issue whether the appellant had been convicted in his absence was not yet ripe for decision. Further points of argument raised by the three counsel will be referred to, where necessary, in the succeeding paragraphs of the judgment. For the moment I turn to consider the statutory scheme of the Act.

Statutory Scheme of the Extradition Act

[25] This Court in *S v Alexander* adopted the following dictumof the Constitutional Court of South Africa in *Harksen v President of the Republic of South Africa and Others*2000(2)SA 825(CC)at para 4about the nature of extradition process:

'An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign state to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between States. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws. Each state is free to prescribe when and how an extradition request will be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many countries have extradition laws that provide domestic procedures to be followed before there is approval to extradite.'

[26] In Namibia, the Act establishes a legislative scheme that sets out the domestic procedures to be followed before a person may lawfully be extradited. Section 2(1)of the Act provides that:

'Subject to provisions of this Act, any person in Namibia, other than a Namibian citizen, who-

(a) is accused of having committed an extraditable offence within the jurisdiction of a country contemplated in section 4(1);

(b) or who is alleged to be unlawfully at large after having been convicted of such an offence in such a country,

may, upon a request made by such country in terms of section 7, be arrested and returned to that country in accordance with the provisions of this Act or, where applicable, the terms of an extradition agreement existing between Namibia and such country, whether or not such offence was committed before or after the commencement of this Act or before or after the date upon which the relevant extradition agreement came into operation.'

'Extraditable offence' for the purposes of the Act is defined in s3(1)as meaning:

> 'act, including an act of omission, committed within the jurisdiction of a country contemplated in section 4(1)which constitutes under the laws of that country an offence punishable with imprisonment for a period of 12 months or more and which, if it had occurred in Namibia, would have constituted under the laws of Namibia an offence punishable with imprisonment for a period of 12 months or more.'

[27] Section 4(1)provides that a person may be extradited to any country that has entered into an extradition agreement with Namibia and any other country, including a Commonwealth country, which has been specified by the President in the Government Gazette. It is common cause that the French Republic is a country so specified. Section 7 deals with requests for the return of alleged foreign offenders. Subsection *(b)* of that section states that a request shall be made to the Minister by a diplomatic or consular representative of the requesting country accredited to Namibia. Section 8 deals with the particulars and documents in support of the request for the return of persons and subsec(1)*(c)* thereof provides that:

> '(1) Notwithstanding the terms of any extradition agreement which may be applicable, a request made under section 7 shall be accompanied-
>
> *(a)* ...
> (b)...

> (c) by a statement or statements containing information which set out *prima facie* evidence of the commission of the offence contemplated in para (b)by the person whose return is requested;'

It is to be noted that the requesting country is required to advance evidence to establish a case for extradition but on a lower threshold of *prima facie* evidence.

[28] Section 9 of the Act states that if the Minister considers any information provided to be inadequate to decide on the request, he or she may require the requesting country to furnish the necessary further particulars within such time as the Minister may determine. Section 10(1)and(2)provide as follows:

> '(1) Upon receiving a request made under section 7 the Minister shall, if he or she is satisfied that an order for the return of the person requested can lawfully be made in accordance with this Act, forward the request together with the relevant documents contemplated in sections 8 and 9 to a magistrate and issue to that magistrate an authority in writing to proceed with the matter in accordance with section 12.
>
> (2) Upon receiving the documents and authorization referred to in subsection(1)or section 6(3), as the case may be, the magistrate shall, if he or she is satisfied that the external warrant accompanying the request is authenticated as contemplated in section 18(1), endorse that warrant, and whereupon that warrant may be executed in the manner contemplated in

> subsection(3)as if it were issued in the court of that magistrate under the laws of Namibia relating to criminal procedure.'

[29] Section 12 deals with enquiry proceedings for committal. Subsection(2)thereof provides that:

> '… the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is held in the case of a person charged with having committed an offence in Namibia and shall, for the purposes of holding such enquiry, having the same power, including the power of committing any person for further examination and of admitting to bail any person detained, as he or she would have at a preliminary examination so held.'

Section 12(4)says that if the magistrate is of the opinion that the evidence tendered by the requesting country is insufficient to enable him or her to make a finding regarding the return of the person, the magistrate may adjourn the hearing and request that the country concerned provide further particulars in evidence.

[30] As this Court pointed out in *S v Koch*2006(2)NR 519 (SC) at para 83, although an enquiry for the extradition of a person has characteristics similar to a criminal trial it is neither a criminal nor civil matter. Extradition proceedings are *sui generis*. In *S vAlexander*it was said that extradition from Namibia has two stages. For my own part, broadly the Act sets out three distinct phases. The first is the administrative phase where the Minister is required to consider the request for the return of a person wanted on an extraditable offence and if he or she is satisfied that an order for the

return of the person requested can lawfully be made in accordance with the Act, to issue an authority to proceed with the enquiry. In considering whether the request should be referred to an enquiry, the Minister,of necessity, will consider the law of the requesting country and other considerations including political considerations and the need for Namibia to comply with its international obligations in the field of extradition in accordance with our law. The second phase is a judicial phase where the magistrate holds an enquiry contemplated in s 12 of the Act and considers the jurisdictional facts set out in s12(5)after all evidence has been presented at the enquiry. If the magistrate is satisfied that the jurisdictional facts set out in s12(5)have been established, he or she must issue an order committing the person sought to prison pending the Minister's decision under s 16 of the Act. Upon the issuing of the order of committal, the magistrate is also required to forward to the Minister a copy of the record of the proceedings and such report as he or she may deem necessary in accordance with s 12(6). The second phase is judicial in nature and at this stage as was said by the Supreme Court of Canada in *Idziak v Canada (Minister of Justice)* [1992] 3 SCR 631,the person sought is entitled to the *'full panoply of procedural safeguards'*. Included in the second phase is any appeal to the High Court[5] and ultimately to the Supreme Court[6]by the person concerned or the government of the requesting country against the order of the magistrate. The third and final phase is the executive phase which occurs if a committal order has been issued at the end of the judicial phase. In the executive phase, the Minister makes a final determination whether or not the person should be returned to the requesting country. The

[5]See section 14(1)of the Act.
[6]*S v Alexander*.

Minister's decision-making in this regard is political in its nature.It is evident thatthe Minister has a front-end and a back-end function in the extradition process: he or she must ensure that the request for extradition complies with the Act and then decide whether or not to refer the matter to the judicial phase. Once the judicial phase of the extradition process has been completed and the magistrate has issued a committal order, the Minister's back-end function comes into play: he or she must determine whether or not to issue an order for the return of the person sought.

Is the Minister's decision to issue an authority to proceed subject to challenge prior to the commencement of the s 12 enquiry?

[31] The issue for determination in this appeal is whether the exercise of the Minister's discretion to issue an authority to proceed pursuant to s 10(1)of the Act is subject to judicial review. If the answer is in the affirmative, a further issue that arises is whether the Minister is required to have regard to restrictions for extradition specified in s 5 of the Act and, if so, whether the restriction in s5(2)*(a)* precluded the Minister from authorising the magistrate to proceed with the extradition enquiry.

[32] It is to be noted from the provisions of s 10(1) and (2) quoted earlier in the judgment that the issuance of an authority to proceed initiates the judicial phase of the extradition process. It can also be said that the issuance of an authority to proceed is a precursor to the endorsement of the external warrant. It is also apparent from s 10(1)thatin deciding whether or not to issue an authority to proceed, the Minister is required to satisfy him or herself that an order for the return of the wanted

person can be lawfully made. Mr Heathcote argues forcefully that ina constitutional state, such as ours, an act of the Minister which has the effect of depriving a person of his liberty, is justiciable by the Namibian High Court, and in doing so, that Court was obliged to have regard to the fact that the appellant's right to liberty can only be infringed if it had been done both substantially and procedurally in accordance with the law. As earlier noted, Mr van Wyk and Mr Khama on the other hand contend that the proper forum to raise such issues will be at the s 12 enquiry. Mr Khama was emphatic that the proposition that the Minister's decision to issue an authority to proceed cannot be challenged except at the s 12 enquiry is widely followed in most Commonwealth jurisdictions.In support of this proposition reference was made to, among others, a series of Canadian cases involving a man named Arthur Froom. It would be convenient to consider these cases at the outset.

[33] Although certain provisions of the Canadian Extradition Act, S.C 1999, c.18 are similar to the provisions of our Act, a closer reading of some of the authorities cited by Mr Khama to buttress his point reveals that not only are there significant differences in our law and the Canadian law on the point but that they also do not support the proposition he is seeking to advance in unqualified terms. In *Froom v Canada (Minister of Justice)2004 FCA, [2005] 2 FCR 195*, the Canadian Federal Court of Appeal was concerned with an appeal and cross-appeal against the decision of the Federal Court declining to review the decision of the Minister of Justice to issue an authority to proceed under s 15 of the Canadian Extradition Act. In para 3 of the judgment, Sharlow JAwriting for the Court observed that the new Canadian

Extradition Act, like its statutory predecessors, had given the provincial superior and appellate courts jurisdiction over all judicial functions under the Extradition Act. Only a judge of a provincial superior court may act as an extradition judge and only a provincial appellate court may hear an application for judicial review of the Minister of Justice to surrender a person sought to be extradited. In para 15 the learned Judge of Appeal stated:

> '[15] In this case, the Judge concluded that she should exercise her jurisdiction to deal with Mr. Froom's application for judicial review, but only to the extent that there were strong grounds for arguing that the Minister acted arbitrarily or in bad faith, or that the Minister was motivated by an improper motive or irrelevant considerations. She reached that conclusion largely because of two considerations, stated at paragraph 58 of her reasons. The first consideration was her conclusion that Parliament could not have intended, even when streamlining and modernizing the extradition process, that the decision to issue an authority to proceed would not be reviewable, because if that were the intent, it would violate the rule of law.'

[34] In paras 17, 18 and 19 of the judgment it is stated:

> '[17] I agree with the Judge that, in principle, the Federal Court should always decline jurisdiction to deal with an application for judicial review of an authority to proceed if the grounds for the application disclose arguments that are squarely within the jurisdiction of the extradition judge, because in such cases an adequate alternative remedy would be available from the extradition judge. The same is true of any matter that is within the jurisdiction of the Minister at the surrender stage, or the provincial appellate court on judicial review of the surrender decision, or any matter that, under the applicable

extradition treaty or the Extradition Act, must be deferred to the foreign court if the person sought for extradition is surrendered.

[18] I also agree that an extradition judge does not have the jurisdiction to conduct a judicial review of the authority to proceed, or to decide anew whether the Minister was correct to conclude that the statutory conditions for the issuance of an authority to proceed are met.

[19] However, I am unable to agree with the Judge that it necessarily follows that an extradition judge lacks the jurisdiction to provide an adequate remedy *if the issuance of the authority to proceed is tainted by a significant impropriety on the part of the Minister in the issuance of the authority to proceed.* On the contrary, it is my view that an extradition judge who is presented with evidence that the decision of the Minister to issue an authority to proceed was made arbitrarily or in bad faith, or was motivated by improper motives or irrelevant considerations, has the requisite jurisdiction to grant an appropriate remedy under the Canadian Charter of Rights and Freedoms [being Part I of the Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11(U.K.) [R.S.C., 1985, Appendix II, No. 44]] or under the inherent jurisdiction of the superior courts to control their own process and prevent its abuse.'(Emphasis added and reference to other authorities omitted.)

[35] The Judge furthermore observed in para 20 as follows:

'[20] In fact, a review of the record of this case, the dozens of cases cited by both counsel, and the written and oral submissions of counsel, discloses not a single example of a potential challenge to the validity of an authority to proceed that could not be adequately remedied by an extradition judge or by a provincial appellate court, given the jurisprudence that has developed since the order under appeal was issued. The scope of remedies available to extradition judges, and provincial appellate courts sitting on appeal from extradition warrants or on judicial review from the Minister's surrender decisions, is not as

> narrow as it appeared to be when the Judge was dealing with Mr. Froom's application for judicial review.'

[36] *Froom v Canada (Minister of Justice)*2002 FCT 367, [2002] 4 FC 345, a decision of the Trial Division of the Federal Court of Canada, concerned a motion to strike the application for judicial review of an authority to proceed issued by the Minister of Justice. Subsection 15(1)of the Canadian Extradition Act permits the Minister of Justice, after being satisfied that the conditions set out in para 3(1)*(a)*and subsec 3(3)have been met, to issue an authority to proceed. In his notice of application, Froom sought an order quashing the authority to proceed, as well as declarations that the authority to proceed was invalid and of no legal effect. Froom alleged in particular that the Minister had failed to satisfy herself in accordance with subsec 15(1)of the Extradition Act that the conditions set out in para 3(1)(a) and subsec 3(3)had been met, that the Minister's function to issue the authority to proceed had been improperly delegated and that the Minister failed to adequately describe the offences against him. The issues before the Court were:(1)whether the issuance of an authority to proceed was subject to judicial review; and(2)if the Court had jurisdiction to review the Minister's decision, whether an adequate alternative remedy was available to the applicant. Lafrenière P *inter alia* held that the Minister's decision to issue an authority to proceed did not result in any deprivation of fundamental justice. Froomhad retained the right to challenge both its validity and sufficiency within the extradition process. *In the absence of any allegation of violation of constitutionally protected rights, or of any conduct that could be construed as evidence of mala fides*

or flagrant impropriety on the Minister's part, the authority to proceed was not a decision amenable to judicial review.(My emphasis.)

[37] Moreover, so the Court reasoned, extradition hearing process with its right to appeal, the right to make submissions to the Minister, and the right to judicially review the Minister's surrender order, constitutes a more than adequate alternative remedy. Parliament intended that the extradition proceedings be dealt with by the provincial superior courts expeditiously so that Canada may promptly meet its international obligations. The extradition procedure contemplated by the Extradition Act was not only an adequate alternative forum, but was the only forum available to the applicant to deal with the issues raised herein. The matter went on appeal by way of motion and is reported as *Froom v Canada (Minister of Justice)*2002 FCT 1278, [2003] 3 FC 268 in para 15 of the judgment, Gibson J observes as follows:

> 'It is to be noted that subsection 57(1)of the Extradition Act ousts the jurisdiction of this Court to judicially review a decision of the Minister under section 40 of the Act and vests that jurisdiction in the court of appeal of the appropriate province. No equivalent ousting of the jurisdiction of this Court, if there be such jurisdiction, is reflected in the Act in relation to a decision by the Minister to issue an authority to proceed under subsection 15(1)of the Act. A defect or defects in the authority-to-proceed process is not among the circumstances set out in sections 42 to 47 of the Act under which the Minister is obliged to, or has a discretion to, refuse to make a surrender order.'

In para 25 of the judgment, Gibson J quotes the dictum of Justice Décary in *Gestion Complexe Cousineau (1989) Inc. v Canada (Minister of Public Works and*

*Government Services)*1995 CanLII 3600(FCA), [1995] 2 F.C. 694(C.A.)where it was stated *inter alia*:

> 'When it amended paragraph 18(1)(a)of the Federal Court Act in 1990 to henceforward permit judicial review of decisions made in the exercise of a royal prerogative, Parliament unquestionably made a considerable concession to the judicial power and inflicted a significant setback on the Crown as the executive power, if one may characterize making the government still further subject to the judiciary as a setback. What appears from this important amendment is that Parliament did not simply make the 'federal government' in the traditional sense subject to the judiciary, but intended that henceforth very little would be beyond the scope of judicial review. *That being so, I must say I have some difficulty giving to s. 18(1)(a) an interpretation which places Ministers beyond the scope of review when they exercise the most everyday administrative powers of the Crown, though these are also codified by legislation and regulation*.'(My emphasis.)

In para 26 of the judgment, Gibson J makes the observation that although the statutory authority given to the Minister of Justice to issue an authority to proceed under the Extradition Act cannot be said to be an*'every day administrative power'*, it was nevertheless an administrative power codified by legislation. In para 34 Gibson J concludes as follows:

> 'Based upon the foregoing line of analysis, I am satisfied that, while Prothonotary Lafrenière makes a compelling argument that this Court does not have the jurisdiction to judicially review the issuance of an authority to proceed, an equally compelling argument can be made that this Court has such

> jurisdiction by virtue of the Federal Court Act and, in the absence of the ousting of that jurisdiction, this Court should fully consider exercising it.'

[38] It would appear therefore from the aforegoing analysis of the Canadian authorities relied upon by Mr Khama that in Canada, the decision of the Minister of Justice to issue an authority to proceed may be reviewable *inter alia* on the basis of allegations of violation of constitutionally protected rights, or of any conduct that could be construed as evidence of *mala fides* or flagrant impropriety on the Minister's part. It would also appear that in principle, the Federal Court of Canada declines jurisdiction to deal with an application for judicial review of an authority to proceed if the grounds for the application disclose arguments that are squarely within the jurisdiction of the extradition judge, because in such cases an adequate alternative remedy would be available from the extradition judge. It is apparent from the decisions surveyed that in Canada, an extradition judge is part of the superior courts who is clothed with jurisdiction to enforce fundamental rights and freedoms enshrined in the Canadian Charter of Rights and Freedoms. The extradition judge also possesses inherent powers of superior courts to prevent abuse of the court process and in an appropriate case may review the Minister of Justice's decision to issue an authority to proceed. In contrast, and it is a striking contrast, in Namibia magistrates' courts which deal with extradition enquiries are not part of the superior courts[7]; are not "competent" courts to enforce fundamental rights and freedoms enshrined in the Namibian Constitution within the contemplation of Art. 25(2)[8]of the Constitution; are creatures of statute

[7] Cf. Art 83 of the Constitution.
[8] Compare: *S v Myburgh* 2008 (2) NR 592 (SC) at 618G-J; S v *Heidenreich* 1995 NR 234 (HC) at 238E-H.

thatdo not have jurisdiction beyond that conferred on them by their constituting statute and the regulations made thereunder[9], and therefore, are also not “competent” administrative tribunals within the contemplation of Art 18 of the Constitutionnor do they have the power to regulate their own procedures under Art 78(4) of the Constitution. These are significant differences.

[39] In our extradition law, once an authority to proceed has been issued, and upon receipt of the documents in support of the request, the magistrate must satisfy him or herself in terms of s10(2)of the Act that the external warrant accompanying the request has been authenticated as contemplated in s 18(1). Once he or she is so satisfied, he or she is obliged in peremptory terms to endorse the warrant 'whereupon that warrant may be executed in the manner contemplated in subsec(3)as if it were issued in the court of that magistrate under the laws of Namibia relating to criminal procedure'. The next step in the process is the execution of the warrant. Mr Heathcote conceded the proposition put to him by a member of the Court that the endorsement of the duly authenticated external warrant is a ‘pure’ administrative act that was not subject to review and I did not hear the remaining counsel to argue to the contrary.

[40] Counsel for the appellant is entirely right in his submission that the issues which were raised in the High Court could not have been determined by the magistrateprior to the commencement of the s 12 enquiry.In fact, some of them (such as the review and correction or setting aside of the Minister’s decision) cannot be

[9] See: Article 83(1) which provides that: 'Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.'

decided by the magistrate at all. If the respondents are correct in their contention that the restrictions on extradition in Part II of the Act which should have informed the Minister's decision can only be enquired into once the hearing before the magistrate had started or, worse, only be decided *'after hearing the evidence tendered at such enquiry'*[10], it would mean that the person sought will have to remain in custody until then - unless he or she is released earlier on bail - even in the circumstances where the detention is in violation of the person's constitutional right to personal liberty. Such an interpretation of the Act is not supported by the language used and would be against the letter and spirit of the provisions of Article 7 of the Namibian Constitution, which,as this Court concluded in *S v Alexander*, contains a substantive right to personal liberty.The issuing and execution of a warrant of arrest makes a severe inroad on the liberty of an individual and is only constitutionally permissible if it is both substantively and procedurally in accordance with the law.Ifan authority to proceed which, in turn, has triggered the endorsement of the external warrant and ultimately the arrest of the person whose extradition is being sought, was not considered and issued in accordance with the law,it violates the person's constitutional right to personal liberty and he or she should be entitled to challenge the validity of the Minister's decision and conduct in a competent court. Such a person need not wait until the commencement of the extradition enquiry or until all evidence tendered at the enquiry has been heard before he or she may raise the issues that adversely affect his liberty.

[10] If regard is had to the letter of s12(5) of the Act.

[41] The approach of the High Court as summarised earlier and advanced in paras 9, 10 and 11 of the judgment cannot be accepted as correct. Although s 5(1)*(e)*is no longer in issue on appeal, it has become necessary to deal briefly with the reasoning of the Court below because that Court applied its reasoning and conclusions thereon to the argument based on s 5(2)*(a)*.The Court found in para 9 of its judgment that it had not been shown that the Minister had exercised her discretion under s 5(1)*(e)* and that the expression *'if it appears to the Minister'* in ss 5(1)*(a)*and 5(2)*(a)* meant that the Minister must first exercise her discretion before a Court could intervene if called upon to do so. In para 10 of the judgment, the Court below applied the aforegoing reasoning and conclusions to the argument based on s 5(2)*(a)*, holding that they applied with equal force to the argument based on s5(2)*(a)*.In para 11 the learned Judge criticised the erstwhile counsel for the appellant for allegedly proffering an untenable interpretation of ss 5*(*1)*(e)*and 5(2)*(a)*of the Act and concluded by emphasising that at that stage the Court was not in a position to determine how the Minister had exercised her discretion when she decided to issue an authority to proceed.

[42] The power to review acts of administrative bodies and administrative officials in appropriate cases is an integral part of the rule of law and the Court's constitutional power to review their validity should be jealously guarded. The Court was called upon to decide in effect whether the deprivation of the appellant's liberty was done according to law as Article 7 of the Namibian Constitution demands. The case that the respondents were required to meet has been clearly set out in the appellant's

founding affidavit and, in respect of the contention based on s5(2)(a), it has been summarised in paras30 and 31 of the affidavit where it was stated:

> '30. I am advised by my legal practitioners, which advice I verily believe, and submit that under section 5(2)*(a)* of the Extradition Act, a person is prohibited from being extradited if such person was convicted in his or her absence for the extraditable offence. There is no doubt that the offence for which the extradition is sought is in fact the alleged offence of rape and for which I was tried, convicted and sentenced in absentia.
>
> 31. Once again, had the first respondent and second respondent properlyapplied their minds to these facts, so clearly detailed in Annexures 'A' and 'I' attached hereto, they would not have made the decisions complained of. The decisions fall to be set aside for that reason too as it is in violation of section 5(2)*(a)* of the Extradition Act.'

[43] The onus was on the respondents to show that the appellant's continuous detention was lawful. As was stated by the South African Appellate Division in *Minister of Law and Order v Hurley and Another*1986(3)SA 568(AD)at 589E-F:

> 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'

It was not for the appellant to place before Court evidence how the Minister had exercised her discretion under s5(1)*(e)*or 5(2)*(a)*. The issue having squarely been

raised, the onus was on the Minister to present such evidence.The Court below therefore erred in not finding that the onus was on the Minister to place before Court evidence as to the factors that had influenced the exercise of her discretion under s10(1)of the Act. Moreover, the finding by the Court below that the expression *'if it appears to the Minister'* in ss 5(1)*(e)*and 5(2)*(a)*must appear to the Minister *'and not a Judge, counsel or any other person'* loses sight of the Courts' constitutional duty to uphold the fundamental right to administrative justice through the mechanism of judicial review and the need to protect the right to liberty emphasised in the important case of *Katofa v Administrator-General for SWA and Another*1985(4)211 (SWA)at 217which this Court approved in *S v Alexander*.

[44] The thrust of the appellant's applicationwas the contention that, given the contents of the documents accompanying the request for extradition, the Minister was precluded from issuing an authority to proceed by s 5(2)*(a)* of the Act which reads as follows:

> '(2) Notwithstanding section 2 or any extradition agreement which may be applicable, no person who is alleged to be unlawfully at large after conviction of an extraditable offence shall be returned to a requesting country, or be committed or kept in custody for the purposes of such return, if it appears to the Minister acting under section 6(3), 10 or 16 or the magistrate concerned acting under section 11 or 12, as the case may be-
>
> (a) that the conviction was obtained in such person's absence.'

[45] The first observation to make about the above provision is that it is not only prohibited to return the alleged foreign offender or to commit him or her in custody, but it is also forbidden to 'keep' the person in custody in the circumstances where it appears to the Minister (or, where applicable the magistrate) that the conviction was obtained in the absence of the person. On the facts of this matter, s5(1)*(a)*only finds application in relation to the magistrate when the magistrate acts under s 12. Section 11 concerns provisional warrants of arrest on grounds of urgency and finds no application on the facts of the appellant's case. Thus the issues that were raised in the High Court, namely that the appellant should not have been arrested in the first place because it appeared that the conviction hadbeen obtained in his absence and that the offence had become prescribed could not have been determined by the magistrate until after evidence had been heard in the s 12 enquiry.

[46] The second observation to be madeabout s5(2)*(a)*is that, in deciding whether to issue an authority to proceed in terms of s 10(1), the Minister must be satisfied *'that an order for the return of the person requested can lawfully be made in accordance with this Act'*.It follows therefore that she is also required to consider the provisions of Part II of the Act. Part II deals with restrictions on return of persons to requesting countries in specified instances. It is under Part II of the Act that s 5 resorts. The Court below appears to have overlooked this provision when it held that the Minister had not exercised her discretion before the matter was heard in the High Court.Clearly, the Minister must have exercised her discretion to refer the matter to the enquiry before she issuedthe authority to proceed with the enquiry. It might be

that the learned Judge had in mind the exercise of discretion in accordance with s 16(issuing of an order for the return of the foreign offender)which, being part of the third stage of extradition proceedings, has not yet arisen. Counsel for the second respondent also appears to have overlooked the fact that express reference is made in s 5(2)*(a)* tos 10 when he forcefully argued that Part II of the Act finds no application except at the s 12 enquiry. Counsel cannot be correct in this contention, in view of the fact that the section expressly applies the restrictions to 'the Minister acting under s 6(3),10 or 16. . .'(the underling is mine). As already noted, s 10 deals with authority to proceed. The reasoning and conclusions of the High Court appear to ignore the fact that the Minister is not only required to consider restrictions on return set out in s 5 when exercising his or her discretion in terms of s 16(issuing of a written order for the return of the requested person)but also when she acts in accordance with the provisions of s 10(issuing an authority to proceed). This finding significantly strengthens the appellant's contention that the Minister is required to apply her mind, at the stage when considering whether or not to issue an authority to proceed, to the provisions of s 5(2)*(a)*that prohibits the return of persons who are alleged to be 'unlawfully at large' after conviction of an extraditable offence if it appears to the Minister that the conviction had been obtained in such person's absence.As earlier mentioned, when the Minister exercises her discretion whether to issue an authority to proceed, she is required to take into account foreign law. The scheme of the Act is also such that the Minister is required to undertake some limited interpretation of the domestic law in drafting the authority to proceed. I conclude therefore that the appellant is entitled to challenge the decision of the Minister at this stage and does

not have to wait for the enquiry proceedings to commence before he could do so. But this is not the end of the matter. The next stage of the appeal is to decide whether there were sufficient facts and considerations before the Minister on which a reasonable person in her position, acting carefully, will be satisfied that an order for the return of appellant can lawfully be made in accordance with theAct. It is to this issue that I turn next.

Was the Minister reasonably entitled to rely on the information in documents requesting the extradition of appellant?

[47] The third respondent, the Prosecutor-General, has deposed to an answering affidavit. She says in it that she had been authorised to do so also on behalf of the Minister. The Minister deposed to a confirmatory affidavit wherein she *inter alia* confirmed the contents of the affidavit by the Prosecutor-General*'as they relate to me and to the steps I have taken in this matter'*. The Minister added:

> 'I am advised that at this stage, applicant seeks only interim relief and that the review application will be heard in due course. I will file a substantive answering affidavit in the course of the review application'.

[48] In heraffidavit, the Prosecutor-General states that the request for extradition by the French authorities complied with the Act and gives a summary of the allegations made by the French authorities. As regards the sentence meted out against the appellant in France, the Prosecutor-Generalrefers to provisions of the French Penal Code for the proposition that *'if the accused condemned under conditions provided*

for in article 379-3 [in his absence],hands himself in or if he is arrested before the sentence is erased by prescription, the judgment of the criminal court is null and void in all its dispositions and the case is examined again by the criminal court in accordance with the dispositions of articles 269 to 379-1'. Mr Heathcote argued that this statement was not supported by the documents forming part of the request for the return of the appellant. In any event, so counsel contended, this is an aspect of foreign law, which requires to be proven with expert evidence: The Prosecutor-General did not act for France nor was she an expert on French law. I agree that in the documents forming part of the request, there was no specific reference to the articles in the French Penal Code on which the Prosecutor-General purports to rely. However, the substance of the proposition advanced by the Prosecutor-General can be found in documents attached to the appellant's founding affidavit to which I shall advert in due course. Furthermore, the Prosecutor-General did not qualify herself as an expert in French law nor did she purport to be acting for France. Mr Heathcote'scriticism in that regard is entirely justified.

[49] With regard to the contention that had the Minister applied her mind to the fact that the appellant had been convicted in *absentia,* she would not have had authorised the matter to proceed to the enquiry, the Prosecutor-General responded as follows:

> 'Add Paragraph 29 and 30 thereof:
> I stand by what I said above on French Penal Code 379. The proceedings complained of by applicant, was due to him absconding and not complying with the conditions of release(probation).

> Add paragraph 31 thereof:
> I deny that the first and second respondentsdid not apply their mind to the facts alleged herein and in particular those contained in annexures ‘A’ and ‘I’. I have already addressed the allegations herein and stand by what I said above.'

Although the Minister did not specifically state in her confirmatory affidavit that she had considered the contents of Annexures 'A' and 'I' to the appellant’s founding affidavit, the denial of the allegation that she had not done so by the Prosecutor-General(assupported by the Minister in her confirmatory affidavit)in effectconfirms that the Minister had relied on the contents of those Annexures. In the light of the factthat the onus was on the respondents to demonstrate that the continued detention of the appellant would be lawful, it was incumbent upon the Minister to set out the steps she had taken so that the courtconsidering the application and the court of appeal, should the matter go that far, are appraised of all the facts and placed in a position to judge the nature of the considerations taken into account in arriving at the decision and the extent to which the decision complies with the law. To be fair to the Minister, it appears that she formed the view that she was not required to file a substantive answering affidavit in the light of the fact that the appellant had only sought interim relief at that stage. The Minister appears to have understood that issues regarding prescription and conviction in *absentia*only related to Part B of the Notice of Motion. Such a stance is clearly wrong, because the Minister’s decision to refer the request for extradition to an enquiry for committal had been squarely raised in a separate

substantive application. She was required to deal with the allegations made and the contentions advanced by the appellant in his founding affidavit.

[50] As noted earlier, it would appear from the affidavit of the Prosecutor-General(and confirmed by the Minister) that the Minister’sdecision to issue an authority to proceed was informed by the contents of the documents forming part of the request obviously submitted to the Minister by the requesting country and which the Minister in turn forwarded to the magistrate.As alluded to above, the appellant attached Annexure 'A' and Annexure 'I'to his founding affidavit. Annexure 'A' is a memorandum written to the Namibian authorities and summarises the facts for the request for extradition. The memorandum and the other documents make it plain that appellant was convicted in his absence, and that he had a guaranteed right to have his sentence nullified. The memorandum states:

> 'Following this order, and no arrest being made, he was judged in absentia by the High Court of Seine Maritime on the 10th January 1997 and sentenced to 10 years imprisonment.'

In turn the 'MEMORANDUM for the requisite Namibia authorities'reads:

> 'If a person is arrested, in the framework of an in absentia process, the sentence is cancelled by right, the case is judged again and the accused person benefits from the assistance of a lawyer.'

A document titled 'Request for Extradition of AYOUB Fadi'and under the heading 'Prescription and procedural guarantees'reads:

> 'In the case of process in absentia, then by default from 1st October 2004, if the person is arrested, the sentence is automatically cancelled and the case is judged again, with the accused person benefitting from assistance of a lawyer. The person remains detained by virtue of the order for arrest until his appearance in front of the High Court, but a decision to set him free may happen at any time upon his request'.

The document styled *'European Arrest Warrant'*reads in part:

> 'Indicate the judicial guarantees: sentenced in absentia, then by default from 1 October 2004.If the person is arrested, the sentence is automatically cancelled and the case is judged again, with the accused having the benefit of a lawyer.'

[51] It is to be noted that the extracts above make it plain that although the appellant had been convicted and sentenced in his absence, there are judicial guarantees by the French authorities that if the appellant is arrested for purposes of his return to France, the sentence will be automatically cancelled and the case will be judged afresh.In an exchange with the Bench, a question was put to Mr Heathcotewhether the Minister was entitled to draw upon her knowledge of French law on the point in deciding whether or not an order for the appellant’s return can be lawfully made. Mr Heathcote’s response was that if the Minister had relied on that, she should have said so in her affidavit. This response is telling: it is a far cry from

saying that the Minister was not entitled to rely on her knowledge of French law as set out in the documents referred to above. It is apparent from those documents that the appellant's conviction and sentence on the count of rape in *absentia* was subject to the legal principle that, if arrested for purposes of his return to France in connection with the crime, his sentence is automatically quashed and he will be given a hearing as well as the assistance of a lawyer.

[52] It cannot be overemphasised that our extradition law requires that a requesting country should provide *prima facie* evidence of the commission of an offence by the person whose return has been requested. It is trite law that *prima facie* evidence in our criminal law means evidence upon which a reasonable court, acting carefully, might(and notmust)convict. It seems that it is also on the basis of this lower threshold that the Minister must satisfy herself that an order for the return of the person requested can lawfully be made. It is alsoon the same basis that the magistrate should ultimately make a determination in terms of s12(5)of the Act. The issue should not be viewed as if the requirement is that there must be evidence before the magistrate conducting the enquiry establishing the commission of the offence by the person whose extradition is being sought beyond reasonable doubt. Even less, that discharging such a heavy burden should be placed before the Minister. The guilt or otherwise of the person concerned is an issue more appropriately established at the trial, should the person be extradited.Mr Heathcote was, however, quick to point out that the Minister could not have relied on the information that the conviction and sentence would be avoided and a trial *de novo*will ensue, because in our law there is

what he referred to as a *'mandatory prohibition'* against the return of a person to a country where he had been convicted in *absentia.*

[53] It seems to me that the true meaning of the prohibition must be ascertained with reference to the mischief Parliament sought to address by its promulgation. The mischief the provision prohibiting the return ofa person who had been convicted and sentencedin *absentia* is to preclude the extradition of a person convicted and punished without the benefit of fair trial – as is constitutionally guaranteed to all persons in Namibia[11] and recognised in s 158 of the Criminal Procedure Act, 1977(Act 51 of 1977)which provides that:

> 'Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.'

[54] Our law does not permit a trial in *absentia*except in the confined circumstances prescribed in s 159 of the Criminal Procedure Act, 1977, because a person tried in his or her absence would obviously not have the opportunity to call witnesses and cross-examine them and generally to defend him or herself. If found guilty and is sentenced in his absence, the person would not have had the opportunity of putting before court evidence in mitigation or challenging the witnesses that may be called in aggravation of sentence. In those circumstances, the trial in our law cannot be said to have been

[11]Article 12(1)*(d)* provides: 'All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.'

fair. This appears to me to be part of the mischief the provision seeks to address when the extradition of a person in Namibia is requested. On the facts of this appeal, it is clear that the Minister took due cognisance of the fact that the appellant's conviction and sentence were not final or irrevocable;that they are subject to the legal principle apparent from the documents considered by her, i.e. that upon the appellant's arrest sentence was revoked and thatif he is extradited, the case against the appellant will commence afresh. Although s5(2)*(a)*of the Act clearly states that the conviction should not be one obtained in the wanted person's absence, it refers to a conviction and sentence which is final in effect – not one which will lapse by operation of the requesting country's law upon the person's arrest. It follows that if in terms of French lawthe appellant will not be compelled upon extradition to serve the sentence occasioned by the conviction in his absence; that such conviction will be revoked;that a fresh trial (where he will be legally represented)willbe conducted in his presence, then there was sufficient cause for the Minister to be satisfied that an order for the return of the appellant can lawfully be made in accordance with the Act. In my opinion a reasonable decision maker in the position of the Minister acting within the context of the current extradition request would have been reasonably entitled, on the basis of that information, to exercise his or her discretion to issue an authority to proceed. It is also my considered view that,to the extent that the appellant's right to personal liberty had been affected by the decision of the Minister, it was done substantively and procedurally in accordance with the law. In the light of this conclusion, the appellant's argument that his continued detention is unlawful cannot succeed. The appeal ought therefore to fail.

[55] Counsel for the appellant contended that it is not clear whether only the sentence or both the conviction and sentence will be set aside in France if the appellant is returned to that country. I note that whilst the documents forming part of the request referto the sentence being cancelled, in the same breath they say *'the case'* will be adjudged afresh, which suggeststhat the entire case, inclusive of the conviction will be heard *de novo*.This, it seems to me, was sufficient to satisfy the Minister – at least on a *prima facie* – basis that it would be the case whilst, at the same time, recognising that the s 12 enquiry would be the right forum to further canvass answers to the question and for any remaining issues that there may be regarding the true position in French law to be ventilated. As previously noted, the Act makes provision for the Prosecutor-General or a person delegated by her to appear at the enquiry[12] and for the magistrate presiding over the enquiry to request information from the requesting country if he or she is of the opinion that the evidence tendered by the country concerned is insufficient[13]. An opportunity therefore exists for the evidence that may clarify the issue to be led. The enquiry for committal is the route the matter should take without delay. Extradition proceedings are inherently urgent matters. There is great need for the proceedings to be dealt with expeditiously to ensurethat Namibia meets its international obligations in the area of mutual legal assistance. Towards this objective, magistrates who preside over these proceedings

[12]Section 12(3)*(a)*.
[13]Section 12(4).

should avoid unnecessary postponements and ensure that matters are dealt with expeditiously. A comparative study of the Act also makes it plain that there is a need to streamline and modernise the Act to make it responsive to the growing demands for mutual legal assistance and to ensure expeditious fulfilment of Namibia's international obligations in the area of extradition. This is a matter that ought to engage the attention of the Legislature.

[56] For all these reasons, the following order is made:

> The appeal is dismissed with costs, such costs to include the costs of two instructed and one instructing counsel.

_____

SHIVUTE CJ

_____

MARITZ JA

_____

MAINGA JA

APPEARANCES

APPELLANT:	Mr R Heathcote (with him Mr G Narib)
	Instructed by Tjombe-Elago Law Firm Inc
FIRST, THIRD, FOURTH AND FIFTH	Mr P A Van Wyk, SC (with him Mr S Akweenda)
RESPONDENTS:	Instructed by Government Attorney
SECOND RESPONDENT:	Mr D Khama
	Instructed by Metcalfe Attorneys