IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 152/153/**
HOLDEN AT NDOLA **154/2017**

(Criminal Jurisdiction)

BETWEEN:

AFUMBA MOMBOTWA **1ST APPELLANT**

PELEKELO LIKANDO **2ND APPELLANT**

SYLVESTOR KALIMA INAMBAO **3RD APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 4th September, 2018 and 10th September, 2018.

For the Appellants: **Mr Victor Kachaka of ICN Legal Practitioners and Mr Paul Chavula, Senior Legal Aid Counsel of the Legal Aid Board.**

For the Respondent: **Mrs R. N. Khuzwayo, Chief State Advocate of the National Prosecutions Authority.**

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Penias Tembo v the People (1980) Z.R. 218**
2. **The People v Antifellow Chigaba, SCZ Judgment No. 54 of 2017**

3. **The People v The Principal Resident Magistrate Ex Parte Faustine Kabwe and Aaron Chungu [2009] Z.R. 170**
4. **Miller v Minister of Pensions (1947) 2 ALL ER 372**
5. **Mwewa Murono v the People (2004) Z.R. 207**
6. **Saluwema v The People (1965) Z.R. 4**

Legislation and other works referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia, sections 22 and 45(b)**
2. **The Constitution of Zambia (as amended in 1996), Article 33 (2)**
3. **The Provincial and District Boundaries Act, Chapter 286 of the Laws of Zambia**
4. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia, sections 206 and 291(1)**
5. **The Supreme Court Act, Chapter 25 of the Laws of Zambia**
6. **The Barotseland Agreement, 1964**

The three appellants, Afumba Mombotwa, Pelekelo Likando and Sylvestor Kalima Inambao were charged with and convicted on one count of the offence of Treason-felony contrary to **section 45(b)** of the **Penal Code.** The particulars of offence alleged that the appellants, on dates unknown, but between 1st March, 2012 and 20th August, 2013 at Mongu, Sioma, Senanga, Livingstone and other places unknown in the Republic of Zambia, jointly and whilst acting together with other persons unknown, prepared or endeavoured to carry out by unlawful means, the usurpation of the executive power of the State in a matter of both a public and general nature. They were each sentenced to 10 years imprisonment with hard labour with effect from the date of arrest. A fourth person who had been jointly

charged with the appellants, Mr Masiye Masialeti, was acquitted at the close of the trial. The appeals are against conviction.

In the court below, the prosecution led evidence from ten witnesses while the three appellants gave sworn evidence in their respective behalves.

The evidence given by the witnesses for the prosecution, in this case, established that on 12th August, 2013, the 1st appellant took an oath of office as Administrator-General of the allegedly independent State of Barotseland and that the 2nd and 3rd appellants attended the swearing-in-ceremony. Following the swearing-in of the 1st appellant, celebrations by groups of people were reported in Mongu, Senanga and Kalabo districts of Western Province.

In August, 2013, Nambo Kabui (PW2), an airtime vendor, saw a group of 50 to 60 people in Mongu town, running along the road coming from Limulunga to Mongu. They were shouting with a loud hailer that Lozi-land had been cut off from Zambia. They also carried banners one of which proclaimed "*Barotseland – Happy and Joyous Independence*". The people were not armed or riotous but appeared happy.

On 15th August, 2013, Sofa Kabika (PW3), a police officer, who was alerted to activities in Senanga town and went there, saw people wearing red berets of the type worn during the Kuomboka ceremony. They too were shouting in Lozi, using a loud hailer, that *"Barotseland is independent from Zambia"*, *"we have got independence"*. There were several banners as well, some of which read "*Loziland is Ours*"; *"Great day for Barotse people"*; *"Government of Barotseland is welcome"*; and *"Viva Linyungandamba, viva Afumba Mombotwa"*. Again, the people were not armed or violent and normal business and Government operations continued. Police, however, apprehended some of those people and recovered the loud hailer and banners used during the celebrations.

On 20th August, 2013 Police led by Senior Superintendent Leon Mweemba Ngulube (PW7), commenced investigations during which Mr Masialeti's house at Sioma Secondary School, where he was employed as a teacher, was raided and searched. They saw people scamper away from the house into the nearby bush and found a hurriedly abandoned breakfast indicating that at least four people had been in the house. Video footage and audio recordings were

recovered from the house showing the 1st appellant taking the oath of office in the presence of the 2nd and 3rd appellants. The oath was in these terms:

> **I, Afumba Mombotwa, do hereby swear that I will endeavour, to the best of my ability to protect, defend and uphold the constitution of the Kingdom of Barotseland as an inviolable Law of the Land, and I promise to protect the independence, sovereignty and territorial integrity of the Kingdom of Barotseland, and I shall serve the people of Barotseland without discrimination and give the respect to the sovereign de jure, Ngocana King. So help me God.**

Following the oath of office, the 1st appellant made a speech in which he stated that the effect of the declaration he had made was that-

1. **There was to be no extra territorial operation by Zambia in Barotseland;**
2. **Zambia was to have no extra territorial rights over Barotseland; and**
3. **By the act of declaration, Zambia had no general power to pass legislation taking effect outside its territory. For example, to punish crimes committed outside its realm.**

Other items found in the house included a document titled Barotseland Emancipation and Restoration Order – National Constitution Guide 2012 which for ease of reference we shall term as the Barotseland constitution; a document dated 10th December, 2012 containing the provisional cabinet of the Barotseland government; a

letter dated 11th December, 2012 allegedly written by the 1st appellant in his capacity as Administrator-General to one Rt. Hon. Oliver K. Ndumba authorising the latter to find people to help *"re-establish"* the Barotseland Defence Force; the Barotseland Defence Force Code of Conduct, 2013; a document on Finance and National Planning; a compact disc (cd) containing the (proposed) national anthem and a written translation of it. Also found were bank notes (paper money) designs (called mupu) as well as the national flag. There was also another letter dated 10th January, 2013 with the letterhead titled "Linyungandambo" under the hand of the 1st appellant, who signed as Chairperson, to the Catholic Commission for Peace and Justice imploring the latter to spiritually intervene and pray for the Zambia Police that the police realise that Barotseland was a country separate from Zambia.

The investigations further led police to Sichili, also in Western Province, where they recovered a, laptop from a person called Mashwelo. The laptop had soft copies of the materials found at Masialeti's house in Sioma. From Mashwelo, police learnt about another laptop owned by Wamundila Mukelabai (PW6) who was

Mashwelo's co-owner of a Company called Landfresh Initiatives limited. Similar content as in Mashwelo's laptop was found there as well.

Police sent out alerts by wireless radio messaging regarding the three appellants. On 5th December, 2014 the three appellants were apprehended at a police check-point in Mwandi district manned by Sergeant Valentine Mugwagwa (PW8) and other police officers and were taken to Mongu where eventually they were charged with the subject offence. Subsequently, they were tried in the High Court at Kabwe. At the close of the case for the prosecution the learned trial judge found each appellant with a case to answer and put him on his defence.

In his defence, the 1st appellant did not deny that he took the oath of office or made the speech in the terms stated above. His defence was simply that he had not committed any offence in Zambia which, according to his testimony, did not include Barotseland and sought to justify this position. He acknowledged the existence of an organisation called Linyungandambo which he said was formed in 2010. He alluded to dissatisfaction by the people (of Barotseland) on

the relationship between Zambia and Barotseland which led to meetings in which members of the Linyungandambo participated. These meetings culminated in what he called the Convention of the Barotse National Council (BNC) held between 26th and 27th March, 2012 at Limulunga. The purpose of the Convention, according to the 1st appellant, was to determine the *"destiny of Barotseland"* and that the Convention resolved that *"Barotseland was to determine for herself as a sovereign nation"*. The 1st appellant stated that after several months, people started calling him asking when the resolutions would be implemented. He visited several district *"Kutas"* and confirmed the people's view that the BNC Convention resolutions were not trivial matters. It was on that basis that he and his co-appellants committed themselves *"to the service of the people of Barotseland by taking a vow before God in Livingstone at the 3rd appellant's house"*. He stated that he took the oath as Administrator-General of a political organisation that would serve alongside the Litunga, King of Barotseland and to pay allegiance to the Litunga. Their intention was to put in place an entity that would lead to the achievement of their mission.

The 1st appellant initially denied having played any role in the making of materials or participating in actions preparatory to the realisation of Barotseland's statehood, besides taking the oath of office as Administrator-General. Under cross-examination, however, the 1st appellant relented and conceded, in effect, to his participation in several preparatory activities such as the creation of a transitional Government in which the 2nd appellant was allocated responsibility for the agriculture portfolio. The 3rd appellant was also to work under the same portfolio. He stated that the video of his oath taking was to be placed on digital versatile discs (dvds) and cds at a studio called Sakata. Security cards were designed. He admitted hearing about the celebrations and that they took place after he was sworn-in. He, however, referred to his *modus operandi* as being non-violent but to follow legal redress to attain the objective of Barotseland statehood as advised by an organisation called Unrepresented Nations and People's Organisation (UNPO). He stated further, that in this vein, attempts had been made to institute a law suit at the International Court of Justice (ICJ) and that the matter had also been taken to the African Union (AU). He did not say what the outcomes of these efforts were.

The 2nd appellant confirmed that he attended the oath taking by the 1st appellant and that over ten people were in attendance. He also confirmed that the oath taking recording was taken to Sakata studio (for reproduction). He received a phone call while on his way back to Mongu (from the swearing-in) that members of the Linyungandambo who had been dancing in Kaoma were being arrested. He also heard of the same in Mongu and that people in Kalabo celebrated after seeing the swearing-in video. He denied being responsible for the items recovered by police in the investigations which were produced as exhibits in court but stated that they were done by other people abroad and locally. He confirmed that he was appointed (as Secretary of State for Agriculture) after the swearing-in at Livingstone. He too did not recognise the jurisdiction exercised over him (in being arraigned before the courts of this country) "*on account of my country Barotseland*". He said that he was a member of the Linyungandambo which term he interpreted to mean "*shake your neighbour*" because the Barotse people "*had been asleep for a long time*". He attended meetings including the BNC Convention which, according to him, resolved to revert Barotseland to its former status

before the Barotseland Agreement of 1964 and that a 30 day period was set to put in place the Government of Barotseland.

The 3rd appellant's defence also pointed in a similar direction as his co-appellants. He stated that the 1st appellant took oath (as Administrator-General of Barotseland) in his (3rd appellant's) house in Livingstone which, according to him was part of Barotseland. He also attended the BNC meeting whose purpose was to chart a way forward for Barotseland using legal and peaceful means at the ICJ. He too belonged to the Linyungandambo. All that was being done was within Barotseland and had nothing to do with Zambia. He pleaded ignorance of the materials recovered by police in the investigations. He also stated that the 1st appellant was sworn in to enable him take the issue to court. He heard that people celebrated after the swearing-in of the 1st appellant. That summed up the evidence adduced in the High Court.

Written submissions were filed on behalf of the prosecution and the defence and the learned trial judge took them into account in his judgment. In the judgment, the learned trial judge noted the existence of the 1964 Barotseland Agreement regarding the position

of Barotseland within independent Northern Rhodesia and that this agreement was signed on 18th May, 1964 between then Prime Minister of Northern Rhodesia - Kenneth David Kaunda, the Litunga of Barotseland at the time – Sir Mwanawina Lewanika III and the Secretary of State for Commonwealth Relations and the Colonies – Duncan Sandys. The learned judge took judicial notice of the historical fact that Zambia became independent on 24th October, 1964; that section 1 of the Zambia Independence Act 1964 declared the territories which comprised Northern Rhodesia to cease to be a Protectorate and together became the independent Republic of Zambia. Further, that prior to independence in 1964 Barotseland was an integral part of Northern Rhodesia in the British Administration of the territory. The learned judge also referred to a ruling on a communication by the Ngambela of Western Province and Others to the African Commission on Human and Peoples' Rights in which the case pertaining to alleged breach of the Barotseland Agreement was held to be inadmissible. The learned judge also conducted an online search on the ICJ website and yielded no result of any case pertaining to the Barotseland Agreement. The judge,

therefore, concluded that there were no proceedings at (any) international forum that impacted on the case.

The trial judge then set out from the premises that the appellants were at all material times citizens of Zambia who were advocating for a separate State known as Barotseland which would encompass the Western Province of the Republic of Zambia. He noted, however, that the appellants asserted that Barotseland was an independent State from the Republic of Zambia and as such they were non-Zambians and in that context could not be charged by another country. The learned judge considered the elements of the offence of Treason-felony under section **45(b)** of the **Penal Code** which states:

> **45. A person is guilty of treason-felony and shall be liable to imprisonment for twenty years who-**
>
> ...
>
> **(b) prepares or endeavours to carry out by unlawful means any enterprise which usurps the executive power of the State in any matter of both a public and a general nature.**

He took into account Article 1 of the applicable **1996 Constitution of Zambia** which, amongst other things, entrenched the indivisibility

of the State. He considered Article 3.2 of the Barotseland constitution which stated:

> (i) **Where under any proclamation or law in force in the Barotseland territory, any power, jurisdiction or authority is at the commencement of this order exercised by the President, similar or analogous power, jurisdiction or authority shall be exercised by the Administrator-General during transition.**

The judge then made a finding, taking into account the **Provincial and District Boundaries Act** which provides for the division of the Republic of Zambia into provinces and districts which include Western and Southern Provinces, that Mongu, Limulunga, Senanga, Sioma, Kalabo and Livingstone (where the various occurrences took place) were at all material times integral parts of the unitary State of Zambia as enshrined in the Constitution of Zambia. He also agreed with the submission by the prosecution that by taking the oath, which was broadcast to the general public, the 1st appellant assumed the authority vested in him under the Barotseland constitution as Administrator-General of Barotseland, a part of the Republic of Zambia, thereby taking the place of a Government officer which amounted to carrying out an enterprise which usurped the executive power of the State by unlawful means contrary to **Article 33(2)** of the **1996 Constitution of Zambia** which provided that-

33. (2) **The executive powers of the Republic of Zambia shall vest in the President and, subject to the other provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him.**

As for the 2nd and 3rd appellants, the learned trial judge found that they were equal participants in the commission of the offence by virtue of **section 22** of the **Penal Code** which states:

22. **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.**

The learned judge was of the view that the demeanour of the appellants and the evidence they gave showed that they were unrepentant for the Barotseland cause. He also rejected the alternative defence of mistake of fact on the basis that it did not arise in this matter because the appellants' beliefs that Barotseland was a nation or State separate from Zambia cannot be said to have been reasonably or honestly held. The learned judge convicted the three appellants of the offence of Treason-felony as charged and sentenced each one of them to 10 years imprisonment, as it were.

The appellants were not satisfied with the judgment and sentences and now appeal to this court on six grounds couched as follows:-

GROUND ONE

The learned trial judge misdirected himself both in law and fact when he erroneously found the appellants with a case to answer and placed them on defence when there was no evidence to support the charge against them at the close of the prosecution's case.

GROUND TWO

The learned trial judge erred and misdirected himself both in law (and fact) when he convicted the appellants for the offence of Treason-Felony in absence of proof beyond reasonable doubt that they had prepared or endeavoured to carry out by unlawful means an enterprise which usurps the executive powers of the State in any matter of both a public and a general nature.

GROUND THREE

The learned trial judge erred and misdirected himself both in law and fact when he convicted the appellants for the subject offence when in fact the alleged preparatory activities were not undertaken by the appellants but by other people unknown.

GROUND FOUR

The learned trial judge erred and misdirected himself both in law and fact when he held that the 1st appellant took the position of a Government officer and 'declared himself' the Administrator-General of a part of the Republic of Zambia when there was no evidence identifying such an office of Administrator-General allegedly taken in the Zamblan Government.

GROUND FIVE

The learned trial judge erred in law and fact by failing to take into account clear evidence from Appellant 1, Appellant 2 and Prosecution

Witnesses 2 and 3 showing that Barotseland and Western Province of the Republic of Zambia are not one and the same leading to a misdirection of fact and law.

GROUND SIX

The learned trial judge misdirected himself in law and fact by making a finding that A1, A2 and A3 usurped the executive power of the State when there was no evidence to support usurpation. (Sic)

Heads of argument were filed on behalf of the appellants which spoke to the grounds of appeal. Heads of argument, in response, were likewise filed on behalf of the respondent to which a reply was filed on behalf of the appellants. We must mention here that no grounds of appeal and heads of argument had been filed by or on behalf of the appellants by the date of the appeal hearing. Mr Kachaka gave reasons, to explain the failure, which we accepted and the grounds of appeal and the heads of argument were thereafter filed in the manner in which we had instructed including those in response by the prosecution.

The view we formed after reading the grounds of appeal as well as the appellants' heads of argument is that there is a significant amount of overlap and repetitiveness. For reasons of orderliness and necessary brevity, we propose to consider and resolve the issue[s]

raised in each ground as we go along except for grounds two, three and six which were responded to as one by the learned Chief State Advocate for the state save where we find that the issue has already been dealt with in a previous ground.

We would like to state at this juncture that our mandate in this appeal is to determine the question whether the offence which the appellants were charged with under the **Penal Code** was established. It will not be within the purview of this judgment to entertain considerations whether or not the appellants are entitled to their claim for a separate existence from Zambia under the nation of Barotseland.

Mr Kachaka and Mr Chavula in arguing the first ground of appeal submitted that the evidence had not disclosed the essential ingredients of the offence of Treason-felony against them which counsel listed as being- "1. prepares or endeavours; 2. unlawful means usurps the executive power of the State; 3. any matter of both a public and general nature".

Learned counsel presented their arguments in respect of the listed ingredients to the following effect: the appellants did not

participate in the celebrations seen by PW2 and PW3 in Mongu and Senanga (not Sioma as submitted by learned Counsel) which he touted as preparatory activities; the exhibits produced in the case, and particularly the oath recording, do not establish the ingredient of unlawful usurpation of executive power; there was no evidence from the prosecution that the appellants supplanted the provincial or district administration of the Zambia[n] Government which, in our view, would have addressed the last ingredient in the learned Counsel's list; in any case, that the appellants did not belong to Zambia but were citizens of Barotseland.

Counsel referred to **section 291(1) of the Criminal Procedure Code (CPC)** and the cases of **Penias Tembo v The People**[1] and **The People v Antifellow Chigaba**[2] and submitted that this was a proper case to stop at the close of the evidence for the prosecution because the evidence to support the charge had not been established and that no evidence led by the appellants afterwards can remedy the deficiency in the prosecution evidence.

The respondent's response to the submissions in the first ground of appeal was that the learned trial judge did not err in law

or fact when he found the appellants with a case to answer because the prosecution's evidence at the close of their case established a link between the offence and the appellants. Learned Chief State Advocate was of the view that the ingredients of the offence to be proved are the following- 1. the appellants acting together and jointly with others unknown; 2. prepared or endeavoured to carry out; 3. by unlawful means; 4. any enterprise; 5. which usurps the executive power of the State in any matter of both a public and general nature.

It was submitted that the evidential burden (at this stage of the proceedings) was one of a prima facie nature. It was pointed out, in the light of the foregoing, that the appellants all belonged to an organization called Linyungandambo whose mission was to spearhead the interests of Barotseland as a separate territory; the 1st appellant was sworn-in in the presence of the 2nd and 3rd appellants and gave an inaugural speech as Administrator-General of Barotseland which straddles parts of the Southern, Central, North-western and Western Provinces of the Republic of Zambia and declared that henceforth Barotseland was an independent territory and that the Government of Zambia had no power over the said

territory; the oath and the speech which were broadcast via video and the internet caused jubilation in several towns of Western Province; afterwards, several items preparatory to Statehood were recovered from Masialeti's house in Sioma from where a number of people were seen fleeing.

It was submitted that an analysis of the foregoing evidence established that the appellants were part of a group of people engaged in the unlawful enterprise of subverting or undermining the authority of the Zambian State; that it was not lawful for the appellants to prepare a constitution, bank notes, an anthem, a provisional cabinet; an army for Barotseland when it is part of the unitary State of Zambia; and for the 1st appellant to take oath as Administrator-General for Barotseland when the Constitution mandates the Republican President of Zambia to administer the territory termed by the appellants as the Kingdom of Barotseland. It was submitted that this conduct fell within the provisions of **section 45(b)** of the **Penal Code**; that the appellants' presence in the oath taking video found together with the other instruments linked them to the offence; that the prosecution had, therefore, discharged the duty of establishing a

prima facie case against the appellants. It was also submitted that contrary to the arguments by learned counsel for the appellants, the substance of the oath established that the 1st appellant was not declaring his allegiance to the Litunga; it was a declaration of Barotseland as an independent territory whose constitution he was to hold, defend and protect.

We must mention here that the evidence of the prosecution was required to address ingredients of the offence charged and for this purpose we adopt those set out by the learned Chief State Advocate which we find to be more in accord with the offence under **section 45(b)** of the **Penal Code**. We agree with the learned Chief State Advocate that at the close of the evidence for the prosecution, the consideration whether there is sufficient evidence adduced to require the accused to make a defence is determined on *prima facie* basis. In the case of **The People v The Principal Resident Magistrate ex parte, Faustine Kabwe and Aaron Chungu**[3], we said that the phrase "*prima facie*" is a Latin expression bearing the dictionary meanings "on its first appearance; by first instance; at first sight; at first view;

on its face; the first flush; and from a fresh impression". We then went on to hold, among other things that

4. **There is no requirement under section 206 -and by extension, under section 291- of the Criminal Procedure Code that the Court must give reasons for acquitting an accused person; that it must merely appear to the Court. The converse, therefore, must also be true that where the Court finds an accused with a case to answer, it must merely appear to the Court that a case has been made out against the accused.** (Words in parenthesis added, underlining supplied for emphasis)

5. **A finding of a case to answer is based on the Court's feeling or impressions, and appearance of the evidence. Above all, the finding of prima facie case is not a final verdict.**

In the English case of **Miller v Minister of Pensions**[3] it was held that-

> **A prima facie case does not mean proving each and every ingredient of the offence charged, if there is evidence to prove one of the elements then there is a prima facie case."**

Further, in the case of **Mwewa Murono v The People**[4], we stated that section 206 of the **CPC** which relates to trials in the Subordinate Court should be read together with section 291(1) of the **CPC** which applies to trials in the High Court. We also held, among other things that-

> **The application of Sections 206 and 291 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia does not depend on the defence making a no case to answer submission. The Court has of its own motion to consider whether a prima facie case has been made out.**

As submitted by the learned Chief State Advocate for the respondent, the evidence had established that the 1st appellant had taken oath of office as Administrator-General for Barotseland. There was evidence of other activities which were preparatory to the realization of statehood for Barotseland such as the meetings prior to and including the BNC Convention in which the appellants participated. Material was discovered in Masialeti's house which related to Barotseland's attainment of statehood. The places at which the various occurrences took place are within the Western Province of Zambia which, including Livingstone, is a part of the Zambia landmass. Without explanation the oath taking and the materials, all happening within the boundaries of Zambia must surely have given an appearance or impression to the trial judge that something unlawful in relation to Zambia was being contemplated or was about to happen and, therefore, that there was substance in the charge alleged against the appellants. The lower court was accordingly entitled to determine that a *prima facie* case had been made out and properly put the appellants on their defence. We, therefore, find no merit in the first ground of appeal and dismiss it.

Grounds two, three and six, without losing sight of what we said about the repetitiveness of some of them, will be addressed together. In ground two the central argument was that there was no proof that the appellants carried out an unlawful enterprise which usurped the executive power of the State in the manner envisaged under **section 45(b)** of the **Penal Code**. It was submitted to the effect that the oath taken by the 1st appellant was incapable of being enforced, as we understood Counsel; that article 3.2 of the Barotseland constitution referred to by the learned trial judge was of no consequence because it was not the law in force in Zambia; and that the State had failed to link the appellants to the rest of the exhibits in the case, which as we understood the argument, should have supported the allegation that the appellants were engaged in an unlawful enterprise.

Ground three raised the issue of the appellants' involvement or rather lack of involvement in any activities preparatory to the attainment of Barotseland independence. The aspect relating to the appellants' participation in the celebrations was already mentioned in the submission in ground one above. It was, however, also submitted that it was not proved that the appellants made or

participated in making the materials exhibited in the case. We were implored to accept, based on the explanations made by the appellants in their defence and the principle in the case of **Saluwema v The People**[9] that they had no idea about (the making of) the exhibits. The principle referred to holds that-

> **If the accused's case is reasonably possible; although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof.**

It was submitted, in ground six, that the oath taken by the 1st appellant was lawful under the Kingdom of Barotseland laws; that the 1st appellant had every right to take the oath which had nothing to do with Zambia; that the oath did not affect any office in Zambia; that it had nothing to do with Zambia but everything to do with the kingdom of Barotseland whose complainant should have been the King and not the Government of Zambia.

The respondent's response to grounds two, three and six was to the effect that based on the same matters alluded to in the first ground, it was established that the appellants and others unknown endeavoured or undertook to usurp the executive powers of the State. It was argued that the appellants did not have to actually supplant

someone from the office under the offence in **section 45(b)** of the **Penal Code** which requires the prosecution to only show that the appellants had prepared or endeavoured to usurp executive power. That the facts establish that the appellants and others unknown prepared to subvert the executive power of the State; that if that were not the case, what then was the effect (purpose, in our view) of all that which the appellants did and all the instruments that were prepared? It was submitted to the effect that if the appellants' activities had not been checked in time, they would have inevitably led to the secession of Barotseland from the Republic of Zambia in an unlawful manner and thereby bring chaos to the nation.

It was especially submitted to the effect that the appellants were all present at the taking of the oath; that based on the intentions of the BNC to secede from Zambia which they were part of, the appellants cannot distance themselves from knowledge of the exhibits recovered in this case, particularly that in order to run a country - Barotseland, they would need a currency (the mupu) for there to be trade (in the modern times); the kingdom would not be easily identified unless it had a constitution, a national anthem and

a flag. Therefore, that it made no sense for the appellants to distance themselves from the exhibits which were found in the same place at the same time, to paraphrase the submission.

As to the making of the exhibits, it was conceded that the appellants may not have done everything bearing in mind their evidence that there were many people involved who were playing different roles. It was submitted, however, that the appellants had a common purpose with others unknown in the joint enterprise to secede Barotseland which led the trial court to invoke **section 22** of the **Penal Code**. It was submitted in concluding the arguments under these grounds that the evidence was overwhelming on the matters herein.

We have considered the submissions. Our view of **section 45(b)** of the **Penal Code** is that it criminalises conduct that is preparatory or any endeavours aimed at carrying out by unlawful means an enterprise which usurps the executive power of the State in any matter of both a public and a general enterprise. It is, therefore, misleading for Mr Kachaka to submit that there should be actual usurpation of the executive power beyond mere preparation. But

even if the foregoing conclusion was not correct it would still stand to reason that it is abundantly clear that the oath of office was assumed under the provisions of the Barotseland constitution which in effect usurped the executive power of the State. As observed by the learned trial judge, the executive power of the State in Zambia vests in the President. By Article 3.2 of the Barotseland constitution, that power was purported to vest in the Administrator-General over a part of Zambia which is already subject to the executive powers of the President of the Republic of Zambia. What should not be lost sight of is that the Barotseland constitution was, in the eyes of its benefactors, a legitimate and lawful instrument by which the nation of Barotseland was to be governed. This is evident from the elaborate preparations that were put in place and leading up to the swearing-in of the 1st appellant and the celebrations that followed. To quote the 1st appellant, the issue of establishing the statehood of Barotseland was not a trivial one.

Based on the foregoing considerations, the 1st appellant cannot be heard to say that the oath he took was of no consequence, and that it was a mere declaration of allegiance to the Litunga, because

the Barotseland constitution was not legitimate. It is sufficient that the appellants and their confederates believed in it. In fact, the fact that what was being done was unlawful in the eyes of Zambian law is what forms the basis of the offence charged.

It is our considered position that grounds two, three and six equally have no merit and we dismiss them.

Ground four argues that the trial judge should not have held that the 1st appellant assumed the position of a Government officer as Administrator-General without establishing that such a position existed in the Zambian Government, as we understood the ground. It was submitted that the only office known as the Administrator - General in Zambia is under the Ministry of Justice and there was no evidence called from that office that the powers of that office had been usurped. It was Counsel's view that it was not a criminal offence in this country for a person to take oath but do nothing in furtherance of it; that the 1st appellant merely dedicated himself to (serving) the people of Barotseland which cannot amount to the offence of Treason-felony.

The brief response on behalf of the respondent to this ground of appeal was to the effect that the oath taken by the 1st appellant and his inaugural speech tells it all. That the finding by the lower court that the appellant took the position of a Government officer when he took oath as Administrator-General of Barotseland was not a misdirection because it was based on the oath. Therefore, that the court below cannot be faulted for that conclusion. We were urged to dismiss this ground of appeal as well.

We have again considered the submissions in ground 4 of the appeal. We are of the position that the substance of the oath taken by the 1st appellant is clear. He swore to uphold the constitution of Barotseland in the capacity of Administrator-General which is an office, in fact the executive office, in government according to that constitution. The implication of the said oath is that the 1st appellant and his cabinet (which includes his co-appellants) were now vested with executive powers to run a part of Zambia and that the Zambian Government had no control over the area they term as the Nation of Barotseland and that Western Province of Zambia and some other parts of other provinces had seceded from the Republic of Zambia

when in fact not. There is clearly no merit in this ground and we dismiss it.

The issue raised in ground five related to the relationship between Barotseland and the Western Province of Zambia. What we gleaned from the submissions on this issue is that Barotseland and Western Province according to the appellants' counsel, are not one and the same and, therefore, that it was a misdirection on the part of the learned trial judge to make a finding that the oath taken in reference to Barotseland was an oath taken in reference to Western Province of Zambia.

The response was that it has amply been established that the areas claimed as belonging to Barotseland in fact belong to Zambia. Further, that it does not matter in which place the oath was taken or that the acts should be in public.

This again is a non-issue and we are surprised that it was even framed as a ground of appeal. It is inconceivable that counsel for the appellants as an officer of the court, and who swore to uphold the Constitution of Zambia when taking oath of office of advocate, could even front such arguments when he knows fully well that the areas

the appellants and their confederates claim as the Nation of Barotseland are wholly part of the Republic of Zambia as by law established. We are not aware of any State or Nation called Barotseland that exists separately from the Republic of Zambia. There is clearly no merit in this ground and we dismiss it.

The result is that all grounds of appeal fail.

The sentence of 10 years imprisonment has however, caught our attention. This is in view of the disposition of the appellants towards the offence generally. It has clearly been one of self-righteousness in what they have been involved in which still reflects even in the phrasing of their fifth ground of appeal. We do not lightly interfere with the sentence of a trial court unless such sentence is totally inadequate such that it comes to us with a sense of shock. While we appreciate that the trial court took into account that the offence was a serious one in arriving at the sentence of 10 years, our view is that, bearing in mind: (i) the self-righteous disposition of the appellants; (ii) the potential which such self-righteous disposition has to destabilise the Nation; and (iii) that parliament has prescribed a maximum sentence of 20 years imprisonment for such offence, the

sentence of 10 years imprisonment is totally so inadequate to punish the appellants' conduct that it comes to us with a sense of shock. Therefore, in accordance with the power vested in us under Section 15 (4) of the Supreme Court of Zambia Act, we have decided to interfere with it. We set aside the said sentence of 10 years imprisonment. We substitute a sentence of 15 years imprisonment with hard labour.

The final outcome is that this appeal is dismissed.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE