Chapter 3: Preliminary Inquiries (Committals)

Every criminal case that goes for trial in the High Court needs to have been preceded by a preliminary inquiry (committal) held in a Magistrate's Court. This committal is designed to bring the evidence together for the primary purpose of checking whether the prosecution has sufficient evidence for the case to go to trial.

This chapter provides a brief history of preliminary inquiries, followed by:

- Why these inquiries are an important part of the criminal justice system;
- The types of inquiry and their statutory bases;
- Sufficient grounds to commit for trial;
- Long form preliminary inquiries;
- Defence evidence;
- Decision to commit or discharge;
- Rules of evidence; and
- Appeals from a decision to commit.

History of Committals

The history and nature of committal proceedings are described in the judgment of Dawson J in *Grassby v The Queen*, in the following terms:[1]

> It has consistently been held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of an executive or ministerial function. See *Ammann v Wegener* (1972) 129 CLR 415, at pp 435–436; *Lamb v Moss* (1983) 76 FLR 296, at p 321; 49 ALR 533, at p 559; *Reg v Nicholl* (1862) 1 QSCR 42; *In re The Mercantile Bank; Ex parte Millidge* (1893) 19 VLR 527, at p 539; *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330, at pp 356–357; *Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145; *Ex parte Coffey; Re Evans* (1971) 1 NSWLR 434. The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1 & 2 Philip & Mary c 13; 2 & 3 Philip & Mary c 10), they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial.
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> With the establishment of an organised police force in England in 1829, the role of the justices underwent change. The most significant factor in

[1] (1989) 168 CLR 1; [1989] HCA 45.

> this change was in *The Indictable Offences Act 1848* (UK) (11 & 12 Vict c 42), 'Sir John Jervis' Act', which provided for witnesses appearing before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his counsel. Depositions of the evidence were to be taken down in writing and signed by the magistrate and the accused. The accused was no longer obliged to be examined. He was to be invited to make a statement and was to be cautioned with the now familiar words: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial'. *The Act went on to provide that 'if, in the opinion of such justice or justices such evidence is sufficient* to put the accused party upon his trial for an indictable offence, or if the evidence given raise(s) a strong or probable presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant, commit him to the common gaol or house of correction ... or admit him to bail …'.[2] (Emphasis added.)

The full case is worth reading because it places committals in historical context and thus assists to better understand committals in the contemporary common law world.

In *Regina v Kelly*, Awich J stated that:

> A fundamental principle in the English common law system on which the system in Solomon Islands is based, is that in trial on a charge of felony, generally the more serious offences, the accused must be made to know the serious charge against him and the facts upon which the charge is based, well before his trial. That affords him ample time to prepare his case to oppose the serious charge. That advance knowledge is conveyed to him in proceedings known as preliminary inquiry. It might take the form of calling evidence in magistrates court and having accused cross examine witnesses or simply reading the charges and deposition and giving copies to accused. The magistrate is required to protect the accused by discharging him if the Magistrate does not find sufficient evidence upon which to commit accused to the High Court on the serious charge for trial there. That of course is subject to application of the DPP under section 217 of the CPC [Criminal Procedure Code]. That process protects accused from baseless serious charges.[3]

A number of Australian authorities also deal with the purpose and importance of the committal process. In *Barton v Queen* the High Court of Australia considered the issue of when a trial could or should be stayed on the basis that it would be an abuse of process to commence without committal proceedings.[4] In the joint judgment of Gibbs and Mason JJ the Court stated:

> Lord Devlin in the Criminal Prosecution In England was able to describe committal proceedings as 'an essential safeguard against wanton or

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2 Ibid [10]–[11] (Judgment of Dawson J).
3 [1996] SBHC 31.
4 147 CLR 75; [1980] HCA 48.

> misconceived prosecutions' (p 92) … This comment reflects the nature of committal proceedings and the protection which they give to the accused, viz the need for the Crown witnesses to give their evidence on oath, the opportunity to cross-examine, to present a case and the possibility that the Magistrate will not commit.[5]

The judgment of Stephen J noted the effects of denying committal proceedings:

> [I]n evaluating the extent of this detriment, three factors play their part. First, failure to commit never guarantees, although it no doubt makes it very likely, that no trial will follow … Secondly, although the outcome of committal proceedings is of importance, their primary function is not that of a contest between parties; the relative infrequency with which the accused tenders evidence demonstrates this. Thirdly … the evidence which the Crown proposes to tender at the trial may, when application is made for a stay of the trial, be then seen to be such as to make it most unlikely that on any committal proceedings the Crown would fail to make out a prima facie case against the appellants. …
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> These factors may, and in the present case do, mean that loss by the accused of the chance of discharge by the committing Magistrate is by no means the most serious detriment which absence of committal proceedings imposes upon an accused. …
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> An accused also loses the opportunity of gaining relatively precise knowledge of the case against him and, as well, of hearing the Crown witnesses give evidence on oath and of testing that evidence by cross-examination. A Court, in exercise of its power to ensure a fair trial, can do much to reduce the deleterious effect of the first two of these losses by ensuring that the accused is furnished with particulars of the charge and proofs of evidence. But the loss of the opportunity to cross-examine Crown witnesses before the trial will be irredeemable. How serious this will be to the accused will depend upon the nature of the offence charged and of the Crown's evidence. It is likely to be the most serious detriment which absence of prior committal proceedings imposes upon the accused …[6]

The Importance of Committals

The importance of a committal is referred to by Dawson J in the Australian High Court case of *Grassby v R*:

> The importance of the committal in the criminal process should not, however, be underrated. It enables the person charged to hear the evidence against him and to cross-examine the prosecution witnesses. It enables him to put forward his defence if he wishes to do so. It serves to marshal the evidence in deposition form. And, not withstanding that it is not binding, a decision of a magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is

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5 Ibid,[40] (Judgment of Gibbs and Mason JJ).

6 Ibid [8]–[10] (Judgment on Stephen J).

> ***insufficient evidence***, should not be pursued. Indeed, the significance of the magistrate's decision is clearly reflected in the requirement now contained in s 41(6) of the *Justices Act* that the magistrate should discharge a defendant if he is of the opinion that, having regard to all the evidence, a jury will not be likely to convict. Furthermore, the value of committal proceedings to a person charged may be such as to warrant a trial being stayed or postponed where an ex officio indictment has been presented without committal proceedings, in order to prevent an abusive process in the trial court and to ensure a fair trial: *Barton v The Queen*.[7] (Emphasis added.)

The committal can be of significant assistance to both the prosecution and the defence in that it can reveal further evidence, or result in a discharge of the accused. The following are some of the insights that can be gained through long form preliminary inquiries; some are also relevant for short form inquiries:

1. Prosecution witnesses can be tested in a way that may reveal new evidence. Such evidence may either strengthen or weaken the prosecution case. As in every case, witnesses who provide evidence on oath can add to the information they have provided in statement form. This can result in evidence substantially different to that given in written form.
2. Further detail can be provided by witnesses that will allow both the defence and prosecution to better prepare their cases for trial. For example, dates, times and places may be better described in oral testimony under examination.
3. The committal can reveal further lines of investigation which result in either the prosecution or the defence calling further witnesses at trial.
4. Expert witnesses can be tested in a way that assists them to clarify their evidence and in some cases significantly qualify their opinions. For example, an expert in ballistics when confronted with alternate scenarios under cross-examination may decide that the opinion they have provided needs to be changed from only one possibility to a series of reasonable alternatives. In a case where an accused is being held in custody largely because of the opinion provided by a prosecution expert, the qualification of such opinion may result in the granting of bail.
5. The committal process can reveal that expert witnesses will need to be called at trial.
6. A witness who has given evidence on oath at committal may provide a different version at trial. Such prior inconsistent statements can be of benefit to the tribunal of fact in determining the weight it should give to the evidence.
7. The prosecution case may be undermined to the extent that the magistrate discharges the accused.

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7 (1989) 168 CLR 1; [1989] HCA 45.

8. The prosecution case can be undermined to the extent that a *nolle prosequi* (no bill) application is successful.[8]
9. The committal process can assist both the prosecution and defence to determine whether certain evidence is admissible at trial.
10. An accused person has the opportunity to fully understand the strength of the prosecution case. If the accused then decides to plead guilty, a sentence discount is obtained. A plea of guilty also has benefit for the efficient administration of justice and cost savings for the state if a trial is avoided.
11. Both prosecution and defence witnesses have the opportunity to carefully consider the reliability and truthfulness of their evidence.
12. The evidence revealed at committal may establish a proper factual basis for sentencing purposes. If this occurs, the objective seriousness of the charge may be reduced or a lesser charge may be substituted, with sentence benefits for the accused.
13. The accused is provided with the opportunity to call rebuttal evidence at an early stage in the trial process.
14. The evidence can be tested in a way that does not prejudice the accused. For example, if a witness gives an answer that is detrimental to the defence the question can be avoided at trial.

It is usual for defence practitioners to determine whether to have a committal hearing.[9] This decision will be based on the complexity of the case. The greater the complexity of the case, the greater the need for a committal hearing. However, the defence practitioner should not ask for a committal hearing (long form preliminary inquiry) where the defence case does not have a forensic advantage. Where the prosecution has an advantage, a long form preliminary inquiry would be a waste of human and financial resources, and may simply strengthen the prosecution case.

The Statutory Regime

All offences carrying a maximum penalty of more than 14 years usually progress to trial in the High Court by way of a Long Form Preliminary Inquiry or a Short Form Preliminary Inquiry. The relevant sections of the *Criminal Procedure Code* that set the sentence limits that magistrates can pass are sections 7 and 27.

Section 7 of the *Criminal Procedure Code* allows for a Principal Magistrate to impose a sentence of imprisonment not exceeding five years, and a First or Second Class Magistrate to impose a sentence not exceeding one year.

The limitation on sentencing is modified by section 27 of the *Magistrate's Court Act* that allows, *inter alia*, for the Principal Magistrates to accumulate sentences to a maximum of ten years, and the Chief Justice or a judge of the High Court to extend the jurisdiction of a magistrate.

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8 See Chapter 13, 'Pleas of Guilty and Sentencing'.

9 Note that a committal hearing is a Long Form Preliminary Inquiry, as distinct from a Short Form preliminary Inquiry.

The *Penal Code* should be referred to find the maximum penalty for an offence and therefore to assist in determining whether a magistrate needs to proceed by way of committal. Some of the charges always dealt with by the High Court include murder, manslaughter and rape.

Section 37 of the *Magistrate's Court Act* allows a magistrate to refer a case to the High Court. It states:

> **A cause may be reported for transfer**
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> **37.** A Magistrate's Court may of its own motion, or on the application of any person concerned, report to the High Court the pendency of any cause or matter which in the opinion of the Magistrate exercising jurisdiction in such Magistrate's Court ought to be transferred from it to any other Magistrate's Court or to the High Court. The High Court shall direct in what mode and where the cause or matter shall be heard and determined.

A committal needs to occur in the event that a magistrate does not have jurisdiction to bring a case to finality, or where it is not transferred to the High Court. There are two forms of committal proceedings: a long form preliminary inquiry and a short form preliminary inquiry.

Short Form Preliminary Inquiry

The mechanism for determining whether to hold a long and short form preliminary inquiry is contained in section 211 of the *Criminal Procedure Code*. This section provides for short form preliminary inquiries in the following terms:

> **Court to hold inquiry in long or short form**
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> **211.** Whenever charge has been brought against any person in respect of an offence not triable by a Magistrate's Court, or as to which the Magistrate is of the opinion that it ought to be tried by the High Court or where an application in that behalf has been made by a public prosecutor, either the Magistrate shall hold an inquiry according to the provisions of section 212 or the Magistrate may, if he considers it appropriate so to do having regard to the circumstances of the case and if application is not made to the contrary by the accused person or his advocate or by a public prosecutor, commit the person so charged directly for trial to the High Court in Accordance with the provisions of this section, that is to say –
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> (a) the Magistrate shall read over and explain to the accused person the charge in respect of which the inquiry is being held, and shall explain to the accused that he will have an opportunity later on in the inquiry of making statement if he so desires, and shall further explain to the accused the purpose of the proceedings, namely to determine whether there is a sufficient case to put him on his trial by the High Court;

> (b) the Magistrate shall then require the accused person to plead to the charge against him and record his plea thereto, if any;
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> (c) notwithstanding that the accused person pleads 'guilty' or 'not guilty' or abstains from pleading to such charge, the Magistrate shall thereupon require the prosecutor to tender to the court the statement of any witness whom it is intended to call in proof of the said charge at the trial of the accused person together with any exhibits which it is intended to produce at the said trial and shall read, or cause to be read, every such statement to the accused person if the accused person is not represented by an advocate, but not otherwise unless requested to do so by the accused's advocate; and
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> (d) if, having considered the contents of such statement, the Magistrate is of the opinion that the facts alleged therein would, if proved in evidence, *constitute sufficient grounds* for committing the accused person for trial, he shall proceed as provided in sections 215 and 216. (Emphasis added.)

The section allows for those matters that are going to be dealt with in the High Court to be considered by a magistrate who simply reads and considers the statements of witnesses and the exhibits upon which the prosecutions relies, and then determines if they 'constitute sufficient grounds for committing the accused person for trial': section 211(d). This approach is often called a paper committal and does not involve the calling of any witnesses. Although the section does not refer to them, records of interview and medical reports are also considered by the magistrate during this process.

Under section 211(d), the magistrate will also need to determine what 'constitute[s] sufficient grounds for committing the accused person for trial' at the end of the prosecution case in both long and short form preliminary inquiries. The test of 'sufficient grounds' has its origin in *The Indictable Offences Act* 1848 (UK) (11 & 12 Vict c 42). Since that time, the question of sufficient grounds has been given detailed consideration in case law.

Sufficient Grounds to Commit for Trial

At the end of the prosecution case in a committal, whether in short or long form, it will be necessary for the magistrate to determine whether there is 'sufficient' evidence for the accused to be committed for trial.

The defence can make a no case to answer submission at this stage. This is a well established common law practice and is specifically referred to in section 197 of the *Criminal Procedure Code*. Section 197 states:

> **197.** If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused.

In deciding whether there is sufficient evidence, the magistrate will, of course, need to consider whether the prosecution has brought sufficient evidence to show that all the necessary elements of the offence have been made out. For example, a charge of assault includes the element that the accused committed the act of assault. If this is not made out, the magistrate must discharge the accused.

However, the question of what will constitute sufficient evidence is not always so clear cut. In *Barton*, Wilson J describes the value of the committal in terms of drawing together the evidence and making it available for later trial even if the witness is unavailable.[10] He also refers to the standard of satisfaction necessary for a magistrate to commit to trial as being that of a prima facie case, which is the same as the section 211(d) concept of 'sufficient grounds'. Wilson J states:

> The committal proceeding is a procedure designed to facilitate the administration of criminal justice. It serves this purpose in two ways: in the first place, it marshals the evidence that is tendered on behalf of the informant in deposition form, a form which enables it to be perpetuated and be available for use at the trial in the event of the witness being dead or otherwise unavailable; in the second place, it requires the magistrate to be satisfied that the evidence establishes a prima facie case before the accused person is committed to stand trial: *Reg v Epping and Harlow Justice; Ex parte Massaro* (1973) 1 QB 433.[11]

The case of *Reg v Epping and Harlow Justice; Ex parte Massaro* can be regarded as good law in the Solomon Islands and it requires a prima facie case to be made out.

The case of *May v O'Sullivan* considered the question of when evidence will be sufficient for a prima facie case to be made out. The High Court of Australia found:

> When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is <u>not</u> whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact.[12] (Emphasis added.)

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10 (1980) 147 CLR 75; [1980] HCA 48.

11 Ibid, [3](d) (Judgment of Wilson J).

12 (1955) 92 CLR 654); [1955] HCA 38. See also Zanetti v Hill (1962) 108 CLR 433; [1962] HCA 62.

A no case to answer submission is determined on the evidence which is favourable to the Crown and 'by disregarding any evidence which militated in favour of the accused': *R v Haas*.[13] The prosecution evidence is accepted at its highest. As stated in *R v Bilick*:

> The question to be answered by the trial judge [or the magistrate] is whether there is evidence with respect to every element of the offence charged which, if accepted, ***could*** prove that element beyond reasonable doubt.[14] (Emphasis added.)

The word 'could' is very relevant because it qualifies the standard of proof required at the preliminary stage. Such level of evidence is distinguished from a finding beyond reasonable doubt, as is required for a determination of guilt. The word 'could' may be replaced by 'capable', as was used in the Court of Appeal case of *Regina v Somae*.[15] The law in respect of no case to answer and prima facie case, as described above, has been adopted by the Court of Appeal in the Solomon Islands.

In *Regina v Somae* the Court of Appeal applied the test for a no case to answer:

> It is important to note that the evidence that is to be considered for the purposes of a no case submission must be capable of proof *beyond reasonable doubt* of the accused's guilt. It is not enough if it is merely capable of proving the possibility of guilt. It must be capable, if accepted, of proving guilt beyond a reasonable doubt. As the High Court of Australia said in *Doney,*[16]… 'To put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty'. It follows that it must be such as to permit proof of guilt without inappropriate speculation. Whether it is right to take the evidence at its highest or most favourable to the Crown is, of course, ultimately a matter for the tribunal of fact. But, in order to establish a case to answer, there must be *some* evidence capable of establishing, whether directly or inferentially, every element of the offence charged beyond reasonable doubt. To take an example that might have applied in the present case if the respondent had made no admissions, the Crown would have established that it was possible that he had shot the deceased, but there was no evidence capable of establishing beyond reasonable doubt that he had done so. Accordingly, there would have been, on this hypothesis, no case to answer.
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> For the purposes of considering whether there was a case to answer, the learned trial judge was required to ignore the respondent's assertions that he was under attack and had acted in self defence. Doing so, the prosecution was left with the following evidence: first, the deceased had attacked the respondent viciously without provocation and was going towards his house with the expressed intention to attack him again;

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13 (1986) 22 A Crim R 299, 302.
14 (1984) 11 A Crim R 452, 467.
15 [2005] SBCA 11.
16 *Doney v R* (1990) 171 CLR 207; [1990] HCA 51.

> secondly, two shots had been fired by the respondent from the appellant's premises, striking the deceased in the hand and the leg; and, thirdly, the respondent was angry. Even if it was necessary to ignore the first and second matters, this material was silent as to the circumstances in which the deceased had been shot. There was certainly evidence that the respondent had killed the deceased, that he had intended to inflict grievous bodily harm and that doing so was intentional and not accidental: these elements were established (for the purposes of the no case submission) by the respondent's admissions and the medical evidence**.** However, in a case of murder, the prosecution must also establish beyond reasonable doubt that the act of the accused was not done in self defence. It is quite wrong to speak of this as a 'defence', just as it is wrong to speak of accident as a 'defence', although it is conventional to do so. In each case it is incumbent on the prosecution to prove both that the act causing death was intentional and that it was not committed in self-defence. As we have already noted, the possibility of accident was excluded by the admissions of the respondent. However, upon the limited evidentiary material available for the purposes of considering whether there was a case to answer, there was no evidence at all either directly or inferentially capable of negativing the reasonable possibility that the respondent acted in self defence.
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> We observe that there was no evidence contradicting the respondent's account of events (with the exception of whether David had possession of a knife, and that might well have been the respondent's mistake since David himself said that the deceased had been attacked by someone – not the respondent – with a knife). The Crown submission in this Court appears to assume that disregarding the respondent's assertions about acting in self defence means that it should be inferred that he had not done so. This is an obvious logical fallacy. In short, the state of the evidence was such that the respondent might have acted in self defence or he might not have so acted, with no evidence of the fact, one way or another, or capable of resolving the issue. In order to be satisfied as to this element, the tribunal of fact would inevitably have needed to speculate about what had happened. It follows that, applying *Tome*,[17] no error of law is demonstrated and Brown J was obliged to hold there was no case to answer.[18] (Emphasis in original.)

In *R v Tome* the Court held:

> As is made clear by cases such as *Doney*, inconsistencies in evidence (whether within the testimony of a witness or between witnesses) are not relevant at the no case stage. The court must take the prosecution evidence at its highest and that means accepting the evidence most favourable to the prosecution when determining whether an accused has a case to answer. The test is not whether the prosecution has proved its case beyond reasonable doubt but rather whether there is evidence capable of supporting a conclusion beyond reasonable doubt that the accused is guilty.[19]

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17 *R v Tome* [2004] SBCA 13.
18 [2005] SBCA 11.
19 [2004] SBCA 13.

When considering the appropriate test in *Rojumana v Regina*, a judge of the High Court found that:

> It is clear from s 211(d) of the CPC [*Criminal Procedure Code*], a Committal Magistrate is not required to consider the question on whether there was sufficient evidence upon which a court could be satisfied beyond reasonable doubt that Mr Rojumana and Mr Maetia were persons employed in the Public Service when committal is done on witness statements. The Committal Magistrate was only required to be satisfied that the facts alleged in witness statements, if proved on evidence, constituted sufficient case to commit Mr Rojumana and Mr Maetia for trial. The Committal Magistrate was satisfied to that extent in this case. [20]

The learned judge seems to have gone against the line of authority and may have misconceived the words 'could prove beyond reasonable doubt'. Sufficient evidence (facts) that 'would' allow for the committal of an accused must make out the elements of the offence. If the prosecution evidence were then taken at its highest, without consideration of the defence case, the evidence 'could prove the case beyond reasonable doubt'. This is the test for a prima facie case. The learned judge does not provide a test that can be applied using well-established legal principles.

Counsel for the accused can make submissions at a short form preliminary inquiry on the basis that the statements do not disclose a case to answer. An accused charged with an offence that can only be heard in the High Court who wishes to plead guilty should also be committed to trial pursuant to section 211. The plea of guilty can be entered in the Magistrate's Court, which is useful in showing that a plea of guilty was entered at the first available opportunity. However, the accused will still be arraigned in the High Court and asked how he or she pleads.

Right to Long Form Preliminary Inquiry

There is sometimes disagreement between parties and a magistrate about how a committal should be conducted and whether it should be long or short form. Section 211 provides an accused person with the right to full committal proceedings. The Court will have a short form preliminary inquiry where no application to the contrary is made by the accused person or a public prosecutor.

Section 211 states that a Magistrate may 'having regards to the circumstances of the case ***and*** if application is not made to the contrary … commit the person so charged directly for trial to the High Court' by way of a short form preliminary inquiry.[21] The words quoted from the section have their ordinary and natural meaning. One of the fundamental principles of statutory interpretation is that words should be given their ordinary meaning. In Halsbury's Laws of England the following is stated:

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[20] [2008] SBHC 23.

[21] Emphasis added.

> If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning.[22]

Bennion stresses the point, stating that 'the plain meaning must be given, *but only where there is nothing to modify, alter or qualify it*'.[23]

It is clear that referral to the High Court by way of short form preliminary inquiry can only be made by a magistrate if it is not opposed by the accused person or his advocate or by a public prosecutor. The relevant word 'and', emphasised above, in section 211 is used conjunctively.

Indeed, section 211 places an emphasis on having long form preliminary inquiries: 'the Magistrate shall hold inquiry according to the provisions of section 212 or [section 211]'. The alternative use of section 211 short form committal is only available if not opposed by one of the parties. It is not a matter of convenience for a magistrate and there is only a limited discretion that requires the support of the parties.

Long Form Preliminary Inquiries

An accused person can elect to have a long form preliminary inquiry when facing a charge that will eventually be heard in the High Court. Such inquiries occur pursuant to section 212 of the *Criminal Procedure Code* which states:

> **212.** (1) A Magistrate conducting an inquiry in accordance with the provisions of this section shall, at the commencement of such. inquiry, read over and explain to the accused person the charge in respect of which the inquiry is being held, and shall explain to the accused that he will have an opportunity later on in inquiry of making a statement if he so desires, and shall further explain to the accused the purpose of the proceedings, namely to determine whether there is sufficient evidence to put him on his trial by the High Court, and shall then, in his presence, take down in writing, or cause to be so taken down, the statements on oath of those who know the facts and circumstances of the case.
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> Statements of witnesses so taken down in writing shall be termed depositions.
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> (2) The accused person may put questions to each witness produced against him, and the answer of the witness thereto shall form part of such witness's deposition.
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> (3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness.

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22 Halsbury's Laws, *Statutes*, Vol 44(1) (Reissue), at para 1487. Cited in Frances Bennion, *Bennion on Statutory Interpretation* (5th ed, 2008), Lexis Nexis, Oxford at p 549.

23 Bennion, above n 26, 549. Emphasis in original.

(4) As the statement of each witness taken down under this section is completed, it shall be read over him in the presence of the accused and shall, if necessary, be corrected.

(5) If any witness denies the correctness of any part of the statement when the same is read over to him, the Magistrate may, instead of correcting the evidence, make a memoranda thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(6) If the statement is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the statement shall be interpreted to him in a language which he understands.

(7) The deposition of each witness shall then be signed by him or attested by his mark and by the Magistrate holding the inquiry.

If an accused person elects for a long form preliminary inquiry the procedure set down in section 212 must be followed. This allows the accused or his or her legal representative to question witnesses, subsections (2) and (3) make this clear. The emphasis in the section is on the mandatory 'shall' in terms of supplying the depositions and allowing questioning. The word 'may' gives an option to the accused as to whether or not to ask questions.

It is only after following the requirements in section 211 and 212 that a magistrate considers whether there is sufficient evidence to commit the accused for trial. This is made clear in section 215(1) where the following words are used:

> If after the consideration of the statement of witnesses tendered to it in accordance with the provisions of paragraph *(c)* of section 211 or the examination of the witnesses called on behalf of the prosecution in accordance with the provisions of section 212, as the case may be ….

Defence Evidence and Statements at Preliminary Inquiry

Sections 215 and 216 provide, *inter alia*, the opportunity for the defence to provide evidence and statements to the Court. Section 215 states:

Provisions as to taking statement or evidence of accused person

215. (1) If after the consideration of the statement of witnesses tendered to it in accordance with the provisions of paragraph *(c)* of section 211 or the examination of the witnesses called on behalf of the prosecution in accordance with the provisions of section 212, as the case may be, the court considers that such statements disclose, or on the evidence as it stands them are sufficient grounds far committing the accused for trial, the Magistrate shall satisfy himself that the accused understands the charge and shall ask the accused whether he wishes to make a statement in his

defence or not and, if he wishes to make a statement, whether he wishes to make it on oath, or not. The Magistrate shall also explain to the accused that he is not bound to make a statement and that his statement, if he makes one, will be part of the evidence at the trial.

(2) Everything which the accused person says, either by way of statement or evidence, shall be recorded in full and shall be shown or read over to him, and he shall be at liberty to explain or add to anything contained in the record thereof.

(3) When the whole is made conformable to what he declares is the truth, the record thereof shall be attested by the Magistrate, who shall certify that such statement or evidence was taken in his presence and hearing and contains accurately the whole statement made, or evidence given, as the case may be, by the accused person. The accused person shall sign or attest by his mark such record. If he refuses, the court shall add a note of his refusal, and the record may be used as if he had signed or attested it.

There is no requirement for an accused to say anything at the committal stage.

Section 216 allows an accused person to call witnesses in the following terms:

Evidence and Address in Defence

216. (1) Immediately after complying with the requirements of section 215 relating to the statement or evidence of the accused person, and whether the accused person has or has not made a statement or given evidence; the Magistrate shall ask him whether he desires to call witnesses on his own behalf.

(2) The Magistrate shall take the evidence of any witnesses called by the accused person in like manner as in the case of the witnesses for the prosecution, and every such witness, not being merely a witness to the character of the accused person, shall be bound by recognisance to appear and give evidence at the trial of such accused person.

(3) If the accused person states that he has witnesses to call, but that they are not present in court, and the Magistrate is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the Magistrate may adjourn the inquiry and issue process, or take other steps, to compel the attendance of such witnesses, and on their attendance shall take their depositions and bind them by recognisance in the same manner as witnesses under subsection (2).

(4) In any preliminary inquiry under this part the accused person or his advocate shall be at liberty to address the court –

(a) after the reading over of the statements of witnesses in accordance with the provisions of paragraph (c) of section 211 or the examination of witnesses called on behalf of the prosecution in accordance with the provisions of section 212 as the case may be;

(b) if no witnesses for the defence are to be called, immediately after the statement or evidence of the accused person;

(c) if the accused person elects:

(i) to give evidence or to make a statement and witnesses for the defence are to be called, or

(ii) not give evidence or to make a statement, but to call witness,

immediately after the evidence of such witness.

(5) If the accused person or his advocate addresses the court in accordance with the provisions in paragraph *(a)* or *(c)* of subsection (4) the prosecution shall have the right of reply.

(6) Where the accused person reserves his defence, or at the conclusion of any statement in answer to the charge or evidence in defence, as the case may be, the Magistrate shall ask him whether he intends to call witnesses at the trial, other than any whose evidence has been taken under the provisions of this section, and, if so, whether he desires to give their names and addresses so that they may be summoned. The Magistrate shall thereupon record the names and addresses of any such witnesses whom he may mention.

Under section 216(6) the Court can ask defence counsel or an accused person if they intend to call any witnesses at trial and if so whether it is desired that their names and addresses be provided so they can be summonsed. Defence practitioners should be aware that disclosure of such witnesses is optional.

When it May be Advisable to Call Defence Evidence at Committal

There are certain circumstances under which depositions made at preliminary inquiry can be admissible at trial. If a witness will shortly be departing the Solomon Islands or is terminally ill it may be advantageous to call them at the preliminary inquiry in order to ensure that their evidence will be available at trial. Note that section 225 contains a specific provision for taking the deposition of a person to ill to attend court. Section 118(1)(5) of the *Evidence Act 2009* is relevant in this regard. It states:

> **118.** (1) A hearsay statement is admissible in any proceeding if –
>
> …
>
> (5) For the purposes of this section, a person is unavailable as a witness in a proceeding if the person –
>
> (a) is dead; or
>
> (b) is outside Solomon Islands and it is not reasonably practicable for him or her to be a witness; or
>
> (c) is unfit to be a witness because of age or physical or mental condition; or
>
> (d) cannot with reasonable diligence be identified or found; or
>
> (e) is not compellable to give evidence.

Evidence that has been tested at a preliminary inquiry has greater cogency than simply a written statement, because it has been or could have been tested.

Decision to Commit or Discharge

Following the application of sections 215 and 216 of the *Criminal Procedure Code* the magistrate will either commit the accused person for trial under section 219 or discharge the accused person under section 217. Section 217 states:

> **Discharge of accused person**
>
> **217.** If, after consideration of the statement of witnesses tendered in accordance with the provisions of paragraph *(c)* of section 211 or, in case of an inquiry conducted in accordance with the provisions of sections 212, at the close of the case for the prosecution, as the case may be, or after hearing any evidence for the defence, the Magistrate considers that the case against the accused person is not sufficient to put him on his trial, the Magistrate shall forthwith order him to be discharged as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts:
>
> Provided that nothing contained in this section shall prevent the court from proceeding, either forthwith, or after such adjournment of the inquiry as may seem expedient in the interests of justice, to investigate any other charge upon which the accused person may have been summoned or otherwise brought before it, or any offence which, in the course of the charge so dismissed as aforesaid, it may appear that the accused person has committed.

The requirement that the magistrate consider whether the case against the accused '***is not sufficient*** to put him on his trial' requires the magistrate to

consider any evidence brought by the accused. The magistrate is required to consider more than the prosecution evidence. However, if the elements of the offence are still found on the evidence it remains 'capable of proof beyond reasonable doubt' and the magistrate must commit to trial. The magistrate may decline to commit the accused for trial, for example, if he or she accepts evidence that the accused was not present when the offence was committed. The reason is simply that an element of the offence has not been made out, namely, the involvement of the accused.

Section 218 applies to the discharge of an accused, and the potential for the Director of Public Prosecutions to seek the intervention of a judge of the High Court following discharge by a magistrate. It states:

> **Power to apply to High Court for committal in certain cases where accused person discharged**
>
> **218.** (1) In any case where a Magistrate's Court shall discharge an accused person on a preliminary inquiry the court shall, if required to do so by the Director of Public Prosecutions, transmit forthwith to him the record of the proceedings, including the statements of any witnesses read over in accordance with the provisions of paragraph (c) of section 211 or certified copies or translations thereof, and if the Director of Public Prosecutions on considering the case shall be of the opinion that the accused person ought not to have been discharged, it shall be lawful for him to apply to a Judge for a warrant for the arrest and committal for trial of the accused person; and if the Judge shall be of the opinion that the case, as presented before the Magistrate's Court, was sufficient to put the accused person on his trial, it shall be lawful for him to issue a warrant for the arrest of the accused person and for his committal to prison for trial, there to be kept until discharged in due course of law or admitted to bail, and any person so proceeded against shall be further prosecuted in the same manner as if he had been committed for trial by the Magistrate's Court which discharged him, and for the purposes of the other provisions of this Code the said Magistrate's Court shall be deemed to have committed him for trial.
>
> (2) An application under the preceding subsection may not be made after the expiry of six months from the date of discharge.
>
> (3) For the purpose of taking recognisances under section 221, the Magistrate's Court shall have in relation to any person required to be bound over under the section aforesaid all the powers vested in the court for compelling the attendance of witnesses.
>
> (4) The person in charge of a prison shall inform any person committed to such prison under the provisions of subsection (1) of his rights under sections 223 and 224, and notwithstanding the other provisions of this Code, the Magistrate's Court shall not be required so to inform him.

Section 218(1) limits the power of the Director of Public Prosecutions to override the finding of a magistrate to discharge an accused by requiring a judge of the High Court to review the case before 'issue[ing] a warrant for the arrest of the accused person and for his committal to prison for trial'. It also limits the time to six months during which the Director can apply for a review: section 218 (2).

Section 219 relevantly states:

> **Commitment for trial**
>
> **219.** (1) If the Magistrate's Court considers the case against the accused person sufficient to put him on his trial, the court shall commit him for trial to the High Court and shall, until the trial, either admit him to bail or send him to prison for safekeeping. The warrant of such first-named court shall be sufficient authority to the officer in charge of any prison appointed for the custody of prisoners committed for trial.

Rules of Evidence and Cross-examination of Witnesses at Preliminary Inquiry

The rules of evidence do not apply at a preliminary inquiry in the same way as they do at the trial proper. For example, a magistrate would be unlikely to exclude evidence in the exercise of discretion, and they may consider that those are matters for the trial judge.

A magistrate should, however, apply the rules of evidence as they pertain to the application of legal, as opposed to discretionary, tests. Hearsay for example should not be allowed. Generally, however, a magistrate is more likely to 'let it in' at a preliminary inquiry if a contentious issue is raised as to admissibility. The rule in *Browne v Dunne* does not apply at committal proceedings.[24]

Appeals of Magistrates Decision to Commit or Discharge

An accused person can appeal a decision to commit pursuant to section 283 of the *Criminal Procedure Code* which states:

> **Appeal to High Court**
>
> **283.** (1) Save as hereinafter provided, any person who is dissatisfied with any judgment, sentence or order of a Magistrate's Court in any criminal cause or matter to which he is a party may appeal to the High Court against such judgment, sentence or order:
>
> Provided that no appeal shall lie against an order of acquittal except by, or with the sanction in writing of, the Director of Public Prosecutions.

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[24] (1893) 6 R 67, HL. This rule states that the testimony of a witness may not be contradicted by evidence that has not been put to that witness.

(2) When a person convicted on trial by a Magistrate's Court is not represented by an advocate he shall be inform by the Magistrate of his right of appeal at the time when sentence is passed.

(3) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(4) For the purposes of this Part the extent of a sentence shall be deemed to be a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor.

Alternatively, leave can be sought to apply for an order of certiorari to quash a decision of a magistrate to commit an accused for trial.[25]

Additional Witnesses at Trial

The prosecution may not have been able to call a witness at the committal stage. Section 264 of the *Criminal Procedure Code* makes provision for this eventuality, it states:

Additional witnesses for prosecution

264. No witness who has not given evidence at the preliminary inquiry shall be called by the prosecution at any trial, unless the accused person has received reasonable notice in writing of the intention to call such witness.

The notice must state the witness's name and address and the substance of the evidence which he intends to give. The court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness:

Provided that when, under the provisions of section 180, the plan of a surveyor or the report of a medical officer or other witness has been put in during the proceedings at the preliminary inquiry, and the surveyor, medical officer or other witness himself is called at the High Court trial, notice of the evidence of such surveyor, medical officer or other witness shall not be required to be given to the accused person.

Charges in the High Court Following Committal

Section 233 governs what charges an accused person can be indicted upon following their committal for trial. The section states:

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[25] See *Moti v Public Prosecutor* [1999] VUCA 5; *Makarava v Director of Public Prosecutions* [1998] FJHC 131.

Filling of an information

233. (1) If, after the receipt of the authenticated copy of the statements and depositions as aforesaid, the Director of Public Prosecutions is of the opinion that the case is one which should be tried upon information before the High Court, an information shall be drawn up in accordance with the provisions of this Code, and when signed by the Director of Public Prosecutions shall be filed in the registry of the High Court.

(2) In any such information the Director of Public Prosecutions may charge the accused person with any offence which, in his opinion, is disclosed by the statements and depositions either in addition to, or in substitution for, the offence upon which the accused person has been committed for trial. (Emphasis added.)

The Director of Public Prosecutions can therefore indict an accused on more than the charges they were committed on. For example, a count of rape may be substituted, after a committal, for a count of defilement, or a charge of manslaughter following a committal for murder.

Following the decision to commit, absent any appeals, comes the trial. The next chapter examines hearing procedures that are relevant for hearings in the Magistrate's Court and the High Court.