

DISSENTING OPINION BY DUFFY, J.
IN WHICH ACOBA, J., JOINS

I respectfully dissent. While the majority agrees that the ex parte communication meeting between the trial judge, the prosecutor, co-defendant Nakano, and Nakano's counsel was improper, and violated Canons 2(A) and 3(B)(7) of the Revised Code of Judicial Conduct, it concludes that the improper conduct was harmless beyond a reasonable doubt. I disagree. The improper ex parte communication meeting occurred immediately after the prosecution called Nakano as a witness, and Nakano invoked his Fifth Amendment right to remain silent. The trial judge called a recess, and held a meeting in chambers with the prosecutor, Nakano, and Nakano's counsel. Defendant Birano and his counsel were excluded from this meeting and no contemporaneous record of what happened in this meeting was made. Following this improper meeting, Nakano recanted his prior invocation of his Fifth Amendment right to remain silent, and testified against Birano. I respectfully submit that a reasonable person using common sense would conclude that something happened in the improper ex parte communication meeting which caused Nakano to change his mind about testifying against Birano, and that, if a mistrial was not ordered, basic fairness would require that Birano be allowed to cross-examine Nakano regarding what happened at the improper meeting. In any event, the trial judge compounded its ex parte communication error by

(1) denying Birano's motion for a mistrial based upon the improper meeting, and (2) granting the prosecutor's motion in limine to prevent Birano's counsel from cross-examining Nakano about the meeting and his reasons for changing his mind about testifying against Birano. We are thus left with the following challenges to Birano's right to a fair and impartial trial:

(1) an improper ex parte communication between the trial judge, the prosecutor, co-defendant Nakano, and Nakano's counsel in a meeting held in the trial judge's chambers during trial, a meeting in which defendant Birano and his counsel were excluded, in violation of Canons 2(A) and 3(B)(7) of the Revised Code of Judicial Conduct; (2) a violation of Birano's right to be present at "every stage of the trial," in violation of Hawai'i Rules of Penal Procedure Rule 43(a); and (3) a violation of the Confrontation Clause of the Sixth Amendment when Birano's counsel was prohibited from cross-examining Nakano about the improper meeting and Nakano's reasons for changing his mind about testifying against Birano. Based upon this record, I am unable to conclude that the errors which began with the trial judge's improper ex parte communication meeting and cascaded thereafter are harmless beyond a reasonable doubt.

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