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THE BEST EVIDENCE IN CASES OF OFFENCES AGAINST WOMEN: VIEW AMONG PROSECUTORS AND ADVOCATES IN KERALA

AUTHORED BY - APARNA.S

Introduction

Over a decade many researchers have dealt with research papers showcasing sexual, physical, mental violence against women which is exploiting them in our nation. But it is rare for us to see papers that deal with the evidences that deals with cases of offences related to women. It also pulls us into dilemma of which evidence prevails in court over which and why so? Starting from filing of a case before a court by the petitioner to get the accused punished or by an accused to get a relief, in either of the cases the most important and unavoidable part we use is the evidence. This is been used before the court either to prove the guilt or innocence of the accused.

In India, the issue we face currently is that even though there is decrease in the crime rate but still there is an increase in the reporting of cases related to offences against women. The crack open between men and women are getting much wider and had formed certainly a monster leading to a no women society. The NCRB report says that nearly 86-95 rape cases alone are reported a day. It is evident that no country can flourish if it suppresses the potential of the women and deprives the contribution of its citizens as the utility of their resources along together contribute to the prosperity and affluence. But half of the population is contributed highly by women and girls. But when it comes to the conviction rate it is less compared to the filing case. When we look at this aspect it is been seen that the cases are been left behind as false cases, in which it is again categorized as the cases in which there is no sufficient evidence or untraced or no clue. But what makes these cases to be categorized like this is question of fact in itself. As there are various types of evidences that we use in Indian courts to prove a case. In a place of various evidence what makes it insufficient? Which is the best evidence then to prove a case to improve the conviction case? In this paper we deal with this aspect and to try to find the best evidence that is been used by the prosecutors and advocates in the court to prove the case.

Statement of Problem

In India, by the 2024 the crime rate is at 445.9 per 100,000 people marking a decrease compared to previous year with 422.2 in 2022, 445.9 in 2021 and 487.8 in 2020 but specific crimes like rape, kidnapping, abduction etc increased by 1.1%, 5.1%. At the same time there is an increase in the false cases of rape as well which the data shows around 74% but the most unknown part here is that out of this percentage more than half like around 987 cases are left as false case because of insufficient evidence or untraced or no clue, like wise in cases of assault with intent to outrage modesty it is 3848 cases.¹ This gives us an alarm of what makes the evidence insufficient? Which is the best evidence to prove the accused as guilty? As in case of offences against women especially in rape cases “The Rapists are all innocent until proven guilty. But not the victim. The victim is a liar until proven honest”².

Relevance of study

From the above data it is evident that there is confusion on which is the best evidence to make an accused liable for his wrongdoing. As in case of offences against women especially in rape cases “The Rapists are all innocent until proven guilty. But not the victim. The victim is a liar until proven honest”³. As for example in rape cases the victim often tends to take bath which will leads to lack of forensic evidence. At the same time in most cases there won't be witness in rape cases, even though the victim herself is been considered as the greatest witness. Also, at times there are instances wherein the evidence can be forged by the influence. In all these situations it is the prosecution side which falls short of the evidence pushing it to the category of insufficient evidence or untraced or no clue category. Therefore, it is relevant for us to study this paper in detail as it is necessary for the prosecutors or advocates to light up the path of justice by taking the best evidence to prove the case.

Literature Review

Crime against Women: Investigation techniques, Ms Shikha Goel & Dr. Vasanth Kumar (2024): The paper deal with the crime against women in detail. The study helps us based on the various investigation techniques used in investigation that is various evidence collected

¹ Piyush (2024) ‘Latest Crime Rate Report of India 2024 and Their Impacts... Read more at: <https://www.Studyiq.com/articles/crime-rate-in-india/>, *studyiq*, 9 February. Available at: <https://www.studyiq.com/articles/crime-rate-in-india/> (Accessed: 03 August 2024).

² Juris Centre (2023) *Analysis: On the offence of rape in India*, Juris Centre. Available at: <https://juriscentre.com/2023/10/13/analysis-on-the-offence-of-rape-in-india/> (Accessed: 03 August 2024).

³ Supra note.3

from the crime scene which helps in analyzing the advantage and the disadvantage of each evidence leading to identify the analyzing the best evidence⁴.

Forensic Science and Its Limitations in Rape & Murder cases in India, Charan, Lakshmi, Manikyam, sita (2023): The paper deals mainly with the part of forensic evidence and its limitations. The paper analyzes this for establishing a standard guideline, for the admissibility of the same before the court of law. This paper helps us in analysing the forensic evidence through various case laws⁵.

Research Objectives

- To understand the various offences against women under different penal laws in India.
- To analyze the various types of evidences used in cases of offences against women especially rape case.
- To suggest the certain measures that can secure convictions in cases of offences against women.

Research Questions

1. Does the standard of proof in cases of rape and related offenses need to change?
 - 1.1 What are the various offences against women under penal laws in India ?
 - 1.2 What all evidences are been used to prove in cases of offences against women, especially rape case?

Hypothesis

In cases of rape and related offences, the standard of proof or evidence like forensic evidence and victim testimony is sufficient for securing convictions compared to other forms of evidence, such as eyewitness accounts or character testimonies.

⁴ Gonu, Dr.V.K. and Ms. Shikha Goel (2021) *Crimes against Women: Investigation Techniques*, bprd.nic.in. Available at: <https://bprd.nic.in/uploads/pdf/202206091155220071426FinalProjectonInvestigationTechnique.pdf> (Accessed: 07 August 2024).

⁵ Charan, J Lakshmi; Manikyam, K Sita. Forensic Science and its Limitations in Rape and Murder Cases in India. *Journal of Forensic Science and Medicine* 9(1):p 91-97, Jan–Mar 2023. | DOI: 10.4103/jfsm.jfsm_98_21

Research Methodology

The sampling frame of this study comprises mainly of advocates, prosecutors, forensic expert, etc. The data for this study were gathered using survey questionnaires. Primary data has been collected from the above professionals who deal with this matter. Primary data has been collected from the respondents through structured questionnaires. The secondary data for the study was collected from the published journals, magazines and other periodicals, books on research works, etc. Internet services were also used to gain the latest information through various websites. For this the area we focused is Kerala. So, the study is from the respondents in Kerala.

Content

1. Does the standard of proof in cases of rape and related offenses need to be changed?

The standard of proof in its essence can be said as the quantum of evidence that should be presented before the court to prove whether a fact exist or not. There are two types of cases mainly that is civil as well as criminal. The standard of proof for each type differs. In cases of criminal cases the standard of proof that should be followed is beyond reasonable doubt while in case of civil it is the balance of probabilities. So, it is clear that the standard of proof is more in cases of criminal cases. Standard of proof should be more doesn't mean the quantity of the evidence that should be produced but the nature that should be produced. Since our offence is solely based on the offences against women then we will start with analyzing the offences related to women.

Offences related women under different penal laws:

1. Indian Penal Code

- Section 326-A [Section 124 (1)-BNS]: Voluntarily causing grievous hurt by use of acid etc.
- Section 326-B [Section 124 (2)-BNS]: Voluntarily throwing or attempting to throw acid.
- Section 354-A [Section 75-BNS]: Sexual harassment and punishment for sexual harassment.
- Section 354-B [Section 76-BNS]: Assault or use of criminal force to women with the intent to disrobe.

- Section 354-C [Section 77-BNS]: Voyeurism
- Section 354-D [Section 78-BNS]: Stalking.
- Section 366 [Section 87-BNS]: Kidnapping, abducting, or inducing woman to compel to marriage.
- Section 366-A [Section 75-BNS]: Procurement of minor girl.
- Section 304-B [Section 80-BNS]: Dowry death.
- Section 376 [Section 64-BNS]: Punishment for ‘rape’
- Section 376-A [Section 66-BNS]: Punishment for causing death or resulting in persistent vegetative state of victim.
- Section 376-AB [Section 65(2)-BNS]: Punishment for rape of woman under twelve years of age.
- Section 376-B [Section 67-BNS]: Sexual intercourse by husband upon his wife during separation
- Section 376-C [Section 68-BNS]: Sexual intercourse by a person in authority
- Section 376-D [Section 70(1)-BNS]: Gange rape
- Section 376(3) [Section 65(1)-BNS]: Punishment for gang rape on woman under sixteen years of age.
- Section 376-AB [Section 65(2)-BNS]: Punishment for gange rape on woman under twelve years of age.
- Section 376-E [Section 71-BNS]: Punishment for repeat offenders.
- Section 509 [Section 79-BNS]: Word, gesture or act intended to insult the modesty of a woman
- Section 228-A [Section 72-BNS]: Disclosure of identity of the victim of certain offences⁶.

2. POCSO Act, 2012.

3. Dowry (Prohibition) Act, 1961.

4. Immoral Trafficking (Prevention) Act, 1956.

5. Indecent Representation of Women (Prohibition) Act,1986.

From the above we understood the various offences against women under the different penal laws in India. But how these are proved? To this question we all have the answer of through evidence but which evidence is needed to produce is question? So, now we will analyze the

⁶ Indian penal Code, 1860.

various of evidence used before the court of law.

Various of evidence used before the court of law to prove rape cases (mainly forensic evidence, expert opinion, and witness testimony)

- **Forensic experts:**

“Section 45-Opinion of experts: when the court has to form an opinion upon a point of foreign law, or science or art, pr as to identity of handwriting [or finger impression], the opinions upon that point of persons specially skilled in such foreign law, science, or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts”⁷

“Section 46-Facts bearing upon opinions of experts: facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of expert, when such opinions are relevant.”⁸

The opinion of experts and reports of forensic physicians plays an important role in cases of rape cases as it is used as corroborative evidence used by the court to corroborate the facts and recreate the scene. They are independent expert. These independent experts collect samples from the scene which assist in proving or disproving an offence. This is given importance in cases where we lack in primary evidence especially in cases of sexual offences. The main aim of this is to analyze and rule out the informed consent of the victim in cases related to sexual assault that is whether the consent was given or not. As in rape cases consent place a crucial role. This is done by swabbing the body parts both external as well as internal parts of the victim’s body. This will be later examined through various methods like colposcopy and these collected samples assist in revealing the evidence which helps in eliminating the suspicion and gives us a clear picture of the nature of the scene.

Example like in certain case these experts’ collect urine and blood sample for the toxicology report to analyze whether the victim was been drugged or have used alcohol which establish the incapability of the victim because of the influence or inducement of the alcohol or drug which is a vital point to deal with the question of consent of the victim in sexual offence cases. In case of children the medical examination will be done by a pediatrician or such suitable forensic expert who examine the post pubertal by using various methods. Reliability is yet another question when it comes to this. Let us

⁷ Section 45, Indian evidence Act, 1872.

⁸ Section 46, Indian evidence Act, 1872.

look into this matter.

“In Nirbhaya gang rape and murder case, a 23-year-old girl was been brutally raped by six accused in a moving bus. She was admitted in hospital after 11 days of the struggle she succumbed to the injuries. The trial court awarded death sentence. The accused went to Supreme court questioning the validity of the bite-mark which was rejected by the court and upheld the death penalty by stating that forensic odontology has established itself as an important and indispensable science in medico-legal matters and expert evidence through various reports which courts have utilized in the administration of justice. In the case at hand, the report is wholly credible because of matching bite marks with the tooth structure of the accused persons, and there is no reason to view the same with any suspicion.”⁹ But at the same time the UK, Australia, Canada, do not consider bite mark as valid evidence. The President’s Council of Advisors on Science and Technology, USA report stated that there is no scientific research that bite-marks can be matched to one person to the exclusion of others and also stated that the bite marks of a person often change with time and such bite-mark analysis does not meet the scientific standards for foundational validity.¹⁰ In 1987, the Texas Court convicted Steven Mark Chaney for double murder based on bite-mark analysis, however, in 2019, the Texas Court of Criminal Appeals re-examined the evidence and acquitted the accused invalidating the bite-mark evidence¹¹. In the case of State of Georgia v Sheila Danton, the Superior Court of Georgia USA held that the “the future admissibility of such evidence (bite-mark) is dubious at best” and set aside the conviction of felony murder¹².

Many other cases are there where in the admissibility of forensic evidence has been challenged because of the experts mishandling or inconsistency in their reports given etc. The respondents (about 45%-survey report-annexure 2) even agree to this aspect as it can be fabricated in most case and difficult to establish it.

⁹ Mukesh & Anr v State of NCT of Delhi & Ors, (2017) 6 SCC 1.

¹⁰ Report to the President Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods; 2016. Available from: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (Accessed on 7 August 2024).

¹¹ Charan, J Lakshmi; Manikyam, K Sita. Forensic Science and its Limitations in Rape and Murder Cases in India. Journal of Forensic Science and Medicine 9(1):p 91-97, Jan–Mar 2023. | DOI: 10.4103/jfsm.jfsm_98_21

¹² State of Georgia vs. Sheila Denton, Indictment No. 04R-330 Decided by Superior Court of Ware County, State of Georgia, Judgment Dated 02.07.2020. Available from: https://forensicsources.org/wp-content/uploads/2020/04/2020_GA_Sheila-Denton-order-for-new-trial.pdf, https://www.fd.org/sites/default/files/covid19/appeals/gavdenton_emergency_motion_release.pdf, (accessed on 7 August 2024)

- **Forensic evidence:**

This is an important area which is also known as the medical jurisprudence. The evidence collected through this is a vital part as it is admissible in the court of law and helps the prosecution in resolving the case. Many victims who are subjected to sexual offences often prefer medical care than seeking help from the police or judiciary. This is a medical examination conducted for the medical opinion in the court of law. This includes collection of samples of hair, semen, saliva, blood, foreign material from crime scene, any other physical evidence.

In a case, a 20-year-old woman was raped by her boyfriend. They were in relation and then got broke, later one day he broke into and forced her. She tried to escape but was taken to a wooden area. Later he went by taking off her credit cards and other valuables. The victim got treatment and the police investigated the matter and found it is a case of rape but it was denied by him saying that they both were having fun at a party, even though he had admitted that he had taken drugs, he denied the part of threat or force induced. Here the sample collected by the police was not relevant so, they relied upon the blood sample and toxicology report and the result shows that he had used N-methylamphetamine which increases the feelings of energy, pleasure and distorted sensory and time perception. Also, the accused had sent certain messages after the incident which also shows that he had been involved in this. So, based on the forensic evidence along with the circumstance he was convicted.

But the issue we face here is that during the investigation most of the evidence will be unavailable and while collecting the evidence from the crime scene it often becomes unanalyzed. In certain cases, this will get contaminated which affects the reliability of this evidence as well. In the *Mohammad Atlaf v CBI*¹³, two women were raped and murdered. The locals reported into the police and on the autopsy reported it stated that there are no marks on the private parts of the victims. The police also denied to register the case and later a large outburst came out for proper investigation. After the investigation it was found that one of the pathologists had swapped her vaginal swab with one of the victims. It was also found that the police also attempted to destroy the evidence. Because of the delay that caused of 542 days the justice was denied in this case.

Still, many of the persons have opted for this evidence compared to other forms. That is

¹³ *Mohammad Atlaf Mohand & Anr v CBI & Ors*, 26 March 2018, 561-A No.66/2010.

about 90% of the respondents (Annexure 2-from survey) have largely agreed to this evidence in proving the cases related to sexual offences as it clearly states the things and helps the prosecution in solving it out, even though it is been used as corroborative evidence.

- **Witness testimony:**

Section 118 of Indian Evidence act, says about who can be a competent witness- a person who has the capacity and ability to understand the questions and give rational answer he will be a competent witness¹⁴.

In the normal case of crimes, we can see during the trial witness are been examined but, in most cases, there are issue of contradiction. The most important part here is that the cases are been called after years after the incident have happened and the witness usually tend to forget the crime scene that happened, or because of the time lapse the witness might recognize the wrong one or remember the facts in a different way or been influenced by the accused or have death or can be fabricated. Study have shown that the memory power or both sex (male and female) is different. They both remember things in different way. Also, studies have shown that in case of rape matter the people preferrable tend to recall information which are in consistent with their interest, attitude and belief. In most cases it is that they hypothesize that witnesses are more sympathetic to rape victims and usually hold a strong antirape attitude which can alter their memory based on their attitude when compared to people who have a weaker antirape attitude. But the reality in most cases is that in cases related to sexual offences like rape especially it is difficult to find a witnesses (established in *Hirjibhai v state of Gujarat*¹⁵), except the victim herself and many court have ruled out that the victim is the sole witness herself and she is a not considered as a victim during the trial process but as witness during the trial and conviction can be done based on the statement given by the victim- *Krishan Kumar Malik v State of Haryana*¹⁶ & *Rai Sandeep v State of NCT of Delhi*¹⁷.

Most of the people have denied this in the production of it to the court solely as evidence. The respondents like around 99% (Annexure 2)of people have said that a case is been decided based on the victim testimony along with medical evidence even though certain judgments are there that victim testimony is sufficient for conviction as the

¹⁴ Section 118, Indian Evidence Act, 1872.

¹⁵ *Hirjibhai v state of Gujarat*, (1983) 3SCC 217

¹⁶ *Krishan Kumar Malik v State of Haryana*, MANU/SC/0718/2011

¹⁷ *Rai Sandeep v State of NCT of Delhi*, MANU/SC/0623/2012

defendants tend to prove that it is a matter of false case.

- **Digital evidence:**

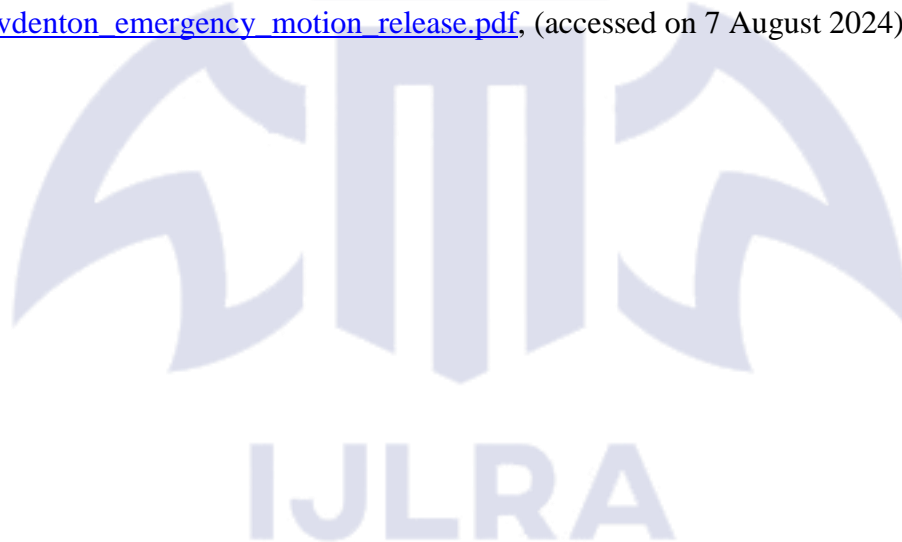
Section 65A, 65B, 88A of Indian Evidence Act, 1872, Information Technology Act, and Indian Penal code deals with the electronic evidence. This evidence is established through IT act, 2000. This evidence is stored in CDs, hard drives, CCTVs, emails, cellphones etc. This is efficient in solving crimes as it records the occurrence and helps in identifying the culprit. This helps in assisting cases like Voyeurism, rape, kidnapping, etc as it records the before and after event. So, it can be called as a silent witness. When eyewitness turn hostile, this comes in. The challenges faced by this is that often the prosecution fails in proving the origin of the footages that is it has to be proved beyond reasonable doubt. This has been admitted by the more than 50% (Annexure 2) of the respondents during the survey conducted.

Conclusion & Suggestion

The primary & the best evidence in cases of rape cases is that of medical evidence along with the victim testimony compared to that of other evidences. As in medical evidence there is a detailed procedure and accuracy is more compared to other forms. In case of witness statement, it can be fabricated or they can become a hostile witness or the witness can die etc can happen. So, there need not be any change in the standard proof in cases of rape cases for the conviction in more cases. 90% of the people from the survey agreed to the same. Also, they said that the lacking of convictions is not because of the evidence but because of the gap that happens between the investigation part with the advocates, as investigation is done by the police and lawyers doesn't play a role in that part, lack of storage or preservation of evidence is yet another issue and most importantly One part of the problem is certainly attitudes. A lot of government officials, especially police, allow negative and damaging stereotypes of rape survivors being promiscuous to interfere with their duties," says Aruna Kashyap, women's rights researcher for Human Rights Watch. And many such other. 99% of the respondents (Annexure 2) said that there should be a reform in the law. In case of evidence, the police have to take the evidence without delay and it should be handled in a better way so, that the validity of the evidence will not be questioned. The respondents also suggested that proper implementation of law as well as report the incident as early as possible. And don't allow to tamper medical or forensic evidence.

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Annexure 1

Questionnaire

- Name
- Profession
- Age
- Experience
- Gender
- Educational Qualification
- What all evidences are usually used in proving rape cases?
- what according to you is conclusive evidence?
- what all r the difficulties that an advocate face to prove the conclusive evidence both from prosecution as well as defendant side?
- Rate the reliability of each evidence.
- Does medical evidence play an important role in conviction of the accused?
- Have you ever attended a case where there is a conflict between medical evidence & witness testimony? If yes Please share your experience.
- If the scientific evidence as well as the testimony is conflicting then how will court prove the case?
- Even though scientific and technical development are increasing, still it lacks when in comes to prove his or her innocence. so, in your opinion, should law be reformed to make it mandatory for the Courts to accept medical evidence as primary & important evidence?
- What Improvements do you suggest for better handling and prosecuting offences against women?

Annexure 2

Survey Report

Name	Profession	What all evidences are usually used in proving rape cases?	Which is the Conclusive evidence in court (Rape case)	Does medical evidence play an important role in conviction of the accused?	If the scientific evidence as well as the testimony is conflicting then how will court prove the case?	should law be reformed to make it mandatory for the Courts to accept medical evidence as primary & important evidence?
Meenu Das	Advocate	Forensic evidence, expert opinion, victim testimony, digital evidence (rarely it is there)	Testimony with the assistance of medical and forensic evidence	Maybe	If no evidence adduced properly it leads to the presumption of innocence of the accused	Yes
Navaneeth	Advocate	Forensic evidence, expert opinion, victim testimony, digital	Testimony with the assistance of forensic evidence	Yes	Then will rely on other evidence- if no evidence then accused will	Yes

		evidence (rarely it is there)			be set free.	
Saiju	Public prosecutor	Forensic evidence, expert opinion, victim testimony, digital evidence (rarely it is there)	Testimony with the assistance of medical and forensic evidence	Yes	Will rely on Victim testimony- if doubt is there -then accused will be set free	Yes
Sridarmani	Advocate	Forensic evidence, expert opinion, victim testimony, digital evidence (rarely it is there)	Testimony with the assistance of medical evidence	Yes	Then will rely on other evidence- if no evidence then accused will be set free.	Yes
Thomas Philip	Advocate	Forensic evidence, expert opinion, victim testimony, digital evidence (rarely it is there)	Testimony with the assistance of forensic evidence and medical evidence	Yes	Will rely on Victim testimony- if doubt is there -then accused will be set free	Yes

Thomas	Advocate	Forensic evidence, expert opinion, victim testimony, digital evidence (rarely it is there)	Testimony with the assistance of medical evidence	Yes	If no evidence adduced properly it leads to the presumption of innocence of the accused	Yes
Sujith	Medical college Doctor	Forensic evidence, expert opinion.	Medical and forensic evidence	Yes	-	Yes
Mohanan	Forensic-police department	Forensic evidence, expert opinion, victim testimony, digital evidence (rarely it is there)	Forensic evidence	Yes	-	Yes
Sachu Kiran	Advocate	Forensic evidence, expert opinion, victim testimony, digital evidence (rarely it	Testimony with the assistance of medical evidence	Yes	Then will rely on other evidence- if no evidence then accused will be set free	No

		is there)				
Anilal	Advocate	Forensic evidence, expert opinion, victim testimony, digital evidence (rarely it is there)	Testimony with the assistance of medical evidence	Yes	If no evidence adduced properly it leads to the presumption of innocence of the accused	Yes

Reliability of each evidence (Rate from 1-5 (1-less reliable -5-Most reliable))

Name	Expert Opinion	Forensic evidence	Victim testimony	Digital evidence
Meenu Das	2	4	3	4
Navaneeth	3	5	4	3
Saiju	3	5	4	3
Sridarmani	3	4	3	4
Thomas Philip	3	4	3	3
Thomas	3	5	3	3
Sujith	4	5	3	3
Mohanan	3	5	3	5
Sachu Kiran	3	4	4	3
Anilal	3	5	4	3